

Report of the FAS Senate Governance Committee¹ Yale Copyright in the Digital Age²

**Adopted by the Yale FAS Faculty Senate
September 17, 2020**

Over the last year, virtually all Yale faculty have undertaken remote teaching. This has usually involved “Zoom” sessions, and often involved recording sessions for later viewing. Because these recordings take the form of a digital creation, they qualify for copyright protection. This report summarizes the background, past policy, current proposals, and suggestions for going forward.

1. Background

The basic framework for copyright of Yale faculty is determined by the US Copyright Act of 1976. Copyright law protects a work from the time it is created in a fixed form. From the moment the work is created, the copyright becomes the property of the author who created it. However, if a work is made for hire, an employer is considered the author even if an employee actually created the work. This would include “a work prepared by an employee within the scope of his or her employment.” US law therefore conveys most written or digital works of faculty to the University.³

However, it has been traditional for universities such as Yale to convey the ownership of scholarly material to their faculty. This transfer clearly includes

¹ The members of the Governance Committee are Alessandro Gomez, Hélène Landemore-Jelaca (Co-chair), Matthew Jacobson (ex officio), William Nordhaus (Co-chair), and Steven Wilkinson.

² The Yale FAS Faculty Senate, through its Governance Committee and Executive Council, has been involved with the question of ownership of course material and copyright since March 2020, when Yale moved to remote teaching. We are grateful to many people for their advice. We particularly thank Lisa Alter (Visiting Professor of Law at Yale Law School and principal at Alter, Kendrick & Baron), Amy Kapczynski (Professor of Law at Yale Law School), Ian Ayres (William K. Townsend Professor of Law and Professor of Management at Yale), and Dr. Jon Soderstrom (Managing Director of the Office of Cooperative Research at Yale University).

³ Yale policy lists the following as applicable for copyright: “Copyrightable works of authorship include, among other categories, books, articles and other written works; musical and dramatic works; pictures, films, videos, sculptures and other works of art; computer software; and electronic chip designs.”

articles for scholarly journals as well as monographs. It generally does not include patentable material. Further, material for which the university invested substantial resources, such as an online course for Coursera, would be covered by special policies.

2. Past policy

Yale's current copyright policy is the result of deliberations of several faculty committees as well as consultations with academic leadership at other leading research universities. The policy is stated as follows:⁴

The law provides, therefore, that works created by faculty members in the course of their teaching and research ...are the property of the University. It is traditional at Yale and other universities, however, for **books, articles and other scholarly writings** by a faculty member to be deemed the property of the writer... In recognition of that longstanding practice, the University disclaims ownership of works by faculty ... except in the following cases....

The relevant exception is when “the University makes substantial commitments of resources to, or expenditures of resources for, a project.”

The standard policy is silent on the issue of digital works and digital recordings, such as ones created by faculty for remote teaching.

3. Current proposals by the administration

The Governance Committee inquired of University officials about the status of digital materials, including those created for teaching. We were informed that the University had prepared a clarification of policy, entitled “Statement on Copyright Ownership of Online Teaching Materials Created During the Covid-19 Pandemic,” and posted it on the Poorvu Center website.⁵ It stated that the “the Office of the Provost provides this statement of clarification regarding the application of the Yale University Copyright Policy to teaching in online classroom environments.”

⁴ <https://ocr.yale.edu/faculty/policies/yale-university-copyright-policy>, emphasis added.

⁵ <https://academiccontinuity.yale.edu/statement-copyright-ownership>.

The basic clarification is the following:

The purpose of this statement is to clarify that “scholarly writings” under the Yale University Copyright Policy include instructional content and materials originally authored by individual instructors that are shared in the course of their online teaching. The University will continue to cede copyright ownership in such instructional content and materials, even in cases where digital versions are created using Yale-supported technology. The policy clarifications in this statement have been decided by the Office of the Provost and will remain in effect through December 31, 2020.⁶

Additionally, the Statement provides several clarifications to the Clarification. These include that instructors retain full copyright ownership of instructional content and materials originally created and captured in these recordings; that digital versions created using Yale-supported technology will not trigger the “substantial” resources exception; that faculty retain full copyright ownership in videos for instruction; and that the University will seek explicit permission before sharing instructional content and materials created by instructors with others. There are more complicated issues on selling or licensing content that are beyond the scope of this review.

4. Appraisal of the Clarification

The Governance Committee approves of the basic philosophy of the Clarification that copyrights on scholarly material owned by faculty include instructional content. However, there are four issues that arise and need to be corrected.

a. Poor process

The Committee is concerned in the extreme in the way the policy was developed and announced. Unlike changes to patent and copyright policy in the past, it was not done openly in consultation with the faculty and the relevant university committees. Such regulations change the ownership of the intellectual property of its faculty, and that intellectual property is undoubtedly the most

⁶ <https://academiccontinuity.yale.edu/statement-copyright-ownership>.

valuable property of faculty, for reputational value even more than financial value.

The Governance Committee recommends that a faculty-chaired committee be empowered to review current copyright policy and make recommendations that are appropriate for the digital age and not only for the period of the pandemic.

b. Time limitation

The policy applies only to the Fall of 2020. This is a poor decision and needs to be changed. It actually muddies the water because it suggests that the policy is a deviation from the standard policy that applies only for the period of the pandemic rather than clarifying policy as the University moves into the digital age. It also is ambiguous about whether the faculty ownership will be temporary, applying only to this period, but may be claimed by the University after the Fall of 2020.

In conjunction with the first recommendation, we recommend that the policy be a clarification that applies for the future, including after the pandemic. This would be clearly articulated if the University charges a committee to review copyright policy and make new recommendations.

c. Limited scope of copyright

The Clarification has a narrow scope of the conveyance. It pertains to “include instructional content and materials originally authored by individual instructors that are shared in the course of their online teaching.” Without parsing the language, the revised policy should cover all digital materials created by faculty for research or teaching. See the proposal in part 5.

We recommend that copyright policy should be clarified to cover all written and digital materials created by faculty for teaching and research.

d. Permission to use faculty copyrights

An important issue is the use or license of the material that faculty own. The Clarification states, “The University will seek your explicit permission before sharing instructional content and materials created by you with others.” This is not acceptable under standard law and practice of copyright ownership. If

another person or organization would like to use copyrighted materials, they must obtain permission, not just seek it.

We recommend that the University must obtain permission of the owner before sharing instructional content and materials created by faculty.

5. Suggestions for going forward

Going forward, the Governance Committee has two summary recommendations.

a. Review Committee

The Governance Committee recommends that the University review and revise its copyright policy along the lines of the Clarification, with the important point that this policy should, as is traditional, be the result of deliberations of a faculty-chaired committee rather than closed-doors decisions of administrators and that it correct the defects identified above.

b. Suggested revised language

The Committee has consulted copyright experts at Yale Law School and outside to get advice on how best to revise Yale's copyright policy in the digital age. It should do so in a way that reflects the vast changes in the digital landscape of instruction and research. We believe that there is a simple modification of the language of current policy that will capture the change. We therefore propose that a new committee on copyright-policy revision consider the following language. The language is identical to current policy except for the words in italics and red:

It is traditional at Yale and other universities, however, for books, articles and other scholarly writings *and digital materials created* by a faculty member *for research or teaching* to be deemed the property of the *faculty member as author*^{writer}, who is considered to be entitled to determine how the works are to be disseminated and to keep any income they produce. This tradition reflects the University's commitment to encourage members of the Yale community to *teach*, write, and publish what they wish. In recognition of that longstanding practice, the University disclaims ownership of works by faculty, staff, postdoctoral fellows and postdoctoral associates and students, except in the following cases...