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Corynne McSherry

Law Student Warns That Professors' Quest for Rights to Lectures Could Backfire

By [JEFFREY R. YOUNG](#)

Professors who are fighting to claim copyright for their lectures and other course materials online could be unintentionally chipping away at the notion of academic freedom, says Corynne McSherry, a third-year student at Stanford Law School.

Ms. McSherry takes a thoughtful look at recent struggles over control of intellectual property on college campuses in a new book, *Who Owns Academic Work: Battling for Control of Intellectual Property* (Harvard University Press, 2001).

By claiming intellectual-property rights to online materials, Ms. McSherry says, professors may be helping to promote a notion that courses are commodities and that professors are just like workers in other sectors. If professors are just like other workers, she adds, how can they also assert academic freedom?

Q. You seem to see a shift in how professors talk about their rights as owners of their academic work. What has changed?

A. In universities across the country, scientists are being encouraged to look for possible patentable inventions in their day-to-day work ... and it's become part of the day-to-day thinking of people in the applied and even in the basic sciences that there may be an invention out there, and it may be worth exploiting, and it may be worth paying attention to and looking for.

At the same time ... there's a great nervousness about this because some professors feel that when they patent an invention, they've cut it off in a certain way from the community of science, and they don't necessarily feel comfortable about doing that.

Q. You say that academics risk losing a language for talking about knowledge as anything other than property. What do you mean by that?

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A. Universities are organized around communities and organized around an idea of gift exchange [in which professors make information available freely]. ...

Intellectual-property law is organized around something very different. It's not about the exchange of gifts; it's about the exchange of commodities and about protecting the exchange of commodities. So when you use intellectual-property language, you're bringing all of that in, and it becomes difficult to keep talking about academic work as a matter of gift exchange when you're legally and consciously treating academic work as a commodity.

There's also sort of a practical version of this, which is that ownership of academic work under copyright law has been based in large part on the idea of an academic exception. By this, I mean that most employees don't own copyright of the works that they do in the course of their employment. Arguably, academics are employees of a university and produce most of their work in the course of their employment. So in theory anyway, a university could own copyright of their works, and some universities are actually moving to assert that.

Normally, though, professors fall under what is called the "academic exception" or the "teacher exception." And the idea has been that professors are a special kind of employee, and in order to preserve academic freedom, you can't allow universities to control the circulation of their work. And that means that you have to let professors retain copyright of their work.

But that's based on the idea that professors are special -- that they're not like other kinds of knowledge workers. And it seems to me that when professors go to court and start more and more asserting these rights, in a way they start looking more and more like other kinds of authors and other kinds of employees, and perhaps less like sort of members of a unique profession. And so they're undermining the ground of the academic exception in the process of asserting it.

Q. So is academic freedom at risk?

A. I wouldn't say that academic freedom is at risk. I think the definition of academic freedom may change in ways that people don't realize. What's happening, I think, is that ... in some places people are conflating academic freedom and the civil-rights idea with freedom of property and the property-rights idea. And I think people need to be very aware of this conflation.

Q. What are the alternatives?

A. Well, I wish I had a quick answers for this. I've actually put a lot of thought into it, and I don't have one. It seems to me, though, that intellectual property

is not the answer. I'm not suggesting that people shouldn't claim any intellectual property in their work, but rather they shouldn't rely on it as sort of a comforting way of responding to the problem, because I think it papers over the problem.

I think, though, that any kind of response has to sort of start at a broader level and deal with what intellectual-property discourse is helping to conceal, and that means dealing more directly with the structural changes of the university. ...

Let's understand this issue of how teaching is being assigned to part-timers. Let's deal with the economic realities ... in which universities feel they can't afford to hire full-time tenure-track professors. Well, what's going on with that? That's an important structural shift, and that needs to be taken on directly, perhaps by the faculty unions.

The other thing that people should be doing is that I think faculty should be working with administrators rather than as opposed to administrators, and vice versa, to think about how to manage academic work so that the public domain is sustained as much as possible, rather than the faculty and administrators sort of squaring off on this battle over who's going to own the rights to a faculty article.

Let's take seriously the university's mission of making scholarly research available, of sustaining a community of science and a community of scholarship, and figure out how we can foster that as much as possible. That would be a good starting point.



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