



Questions & Answers

Intellectual Property, Software and Distance Learning: SUNY Policy and UUP Recommendations

Dear Colleague,

UUP members, for the most part, have cautiously embraced the new technologies being introduced into the University. Most of us see the potential they bring to our professions yet are wary of the threats that they can present to the quality education we strive to offer at SUNY.

As technology has become more pervasive on state university campuses, and in our classrooms, more and more of our members have also raised some important questions regarding the ownership of intellectual property and of newly created computer software. Issues surrounding the increased use of distance learning also continue to surface as online learning becomes more accepted.



You and your colleagues are asking if the intellectual products produced with the new technologies — your curricula, lecture notes, assessment tools, etc. — might somehow be treated differently from those created in the traditional ways. This publication is intended to answer those questions and more.

But, as you read this information, you should do so with the confidence that UUP has already set the standard on intellectual property issues that other universities throughout the nation are using as a model. Through diligence and foresight, your union has established policies and practices that ensure your rights and protect your profession. As you will see in this Q-and-A, UUP members are well positioned in today's high-tech academy.

Of course, that isn't to say we shouldn't always be vigilant as changes occur in the workplace. This publication will help you to do that. If you have additional questions or concerns, please consult UUP; important phone numbers and Web sites are listed on the back. And, I am always available to help — e-mail me at bscheuer@uupmail.org.

In solidarity,

UUP President William E. Scheuerman

Intellectual Property

What is SUNY's Policy on intellectual property and where is it located?

The UUP contract provides the reference for SUNY's Policy on Intellectual Property.

APPENDIX A-23

Dr. William E. Scheuerman, President
United University Professions
159 Wolf Road
Albany, New York 12205

Dear Dr. Scheuerman:

This will confirm our mutual understanding that Article XI, Title J of the Policies of the Board of Trustees apply, irrespective of the medium of storage, to all literary works as defined by copyright law, including, but not limited to, literary, instructional, dramatic, musical and artistic works, except for software, which is covered by a separate policy.

Sincerely,
s/John Ryan, Chancellor, State University of New York
s/William E. Scheuerman, President, United University Professions

With the software exception in mind, the SUNY Policy on Intellectual Property reads, in Subsection 2:

Copyright Policy: Generally the members of the staff of the University shall retain all rights to copyright and publish written works produced by them. However, in cases where persons are employed or directed within the scope of their employment to produce specific works subject to copyright the University shall have the right to publish such work without copyright or to copyright it in its own name. The copyright will also be subject to any contractual arrangements by the University for work in the course of which the writing was done. Staff members will be expected not to allow the privilege to write and retain the right to their work to interfere with their University duties. In those cases where an author desires the help of University facilities, arrangements should be made through the administrative staff of the author's institution in advance with respect to the assistance which may be appropriately given and the equity of the University in the finished work.

It appears that the policy applies to books and articles, but what about the newer technologies, like video, CD-ROM and the like?

"Written works" means any copyrightable work. All intellectual creations are treated the same, regardless of how they are stored ... on a printed page, on videotape or on any other storage medium. In the simplest terms:

You own what you produce unless you have knowingly given up your rights to the product.

Can my lecture notes be covered by copyright law?

Yes. Quoting directly from the “questions frequently asked” portion of the Web site of the United States Copyright Office (www.loc.gov/copyright):

What does copyright protect?

Copyright, a form of intellectual property law, protects original works of authorship including literary, dramatic, musical, and artistic works such as poetry, novels, songs, computer software and architecture.

When is my work protected?

Your work is under copyright protection the moment it is created and fixed in a tangible form so that it is perceptible either directly or with the aid of a machine or device.

Do I have to register with your office to be protected?

No. In general, registration is voluntary. Copyright exists from the moment the work is created. You will have to register, however, if you wish to bring a lawsuit for infringement of U.S. work.

OK, but there are still a lot more words in the Policies paragraph. Go through it carefully. Just what does “where persons are employed or directed within the scope of their employment” mean?

This is exactly what we meant when we said, “knowingly given up” any of your rights. Some employees are hired or directed, specifically, to produce a specified work. In that case, SUNY can exercise the right to copyright the work in SUNY’s name, or to use it without copyright. The vast majority of SUNY employees are not hired or directed to produce something, so this refers to very special cases. You would know it if it included you.

Is this what the copyright law means by a “work made for hire?”

Yes. The United States Copyright Office describes “a work made for hire” as:
Although the general rule is that the person who creates the work is the author, there is an exception to that principle; the exception is a work made for hire, which is a work prepared by an employee within the scope of his or her employment; or a work specially ordered or commissioned in certain specified circumstances. When a work qualifies as a work made for hire, the employer or commissioning party is considered to be the author.

Wait a minute! Does this mean that anything I do while I’m working for SUNY is SUNY’s, not mine?

No! SUNY policy makes an important distinction between the traditional concept of “work for hire” and SUNY’s meaning. This is made clear by reading SUNY’s Policy on Software [We’ll say a lot more about SUNY’s Software Policy later]. Here is what that Policy says about “work for hire:”

Scope of Employment shall mean tasks assigned in a job description, letter of appointment, or other specific written document.

Work for Hire shall mean work done by faculty, employees or students under campus consultation, extra service or technical assistance arrangements either through contract, consultancy or purchase order, but not within the Scope of Employment.

What is meant by “subject to any contractual arrangements?”

It refers to any specific agreements that the employee and SUNY make when an employee is hired or directed to produce a work. Again, you would be aware of these; they wouldn't sneak up on you. This most probably refers to sharing income, if any, which should have gotten your attention at the time.

And the last long sentence in the Policies about the “help of University facilities?”

Like before, this refers to specific equipment, facilities, personnel and the like that may be used to help produce the work. Again, you would be aware of it if you had such an arrangement with SUNY.

Could this mean the SUNY computer on my desk?

Most emphatically not! The computer on your desk is just like the desk itself, your phone, the library, or the light and heat in the building. Don't worry about that.

Even so, could I have been caught up in such an arrangement and given my rights away without knowing it?

That's highly unlikely because the key is that arrangements must be made before the work is done, not afterward.

What should I do to ensure that I am not caught unknowingly in such an arrangement?

Gather all the documents that make up your hiring papers or your job description and consult UUP. A complete list of the people to call, their phone numbers and e-mail addresses, as well as UUP's Web site address, appears on Page 8.

Occasionally, students ask to tape one of my classes. I have even had students ask me to sign a paper permitting them to tape my class. Have any advice here?

For heaven's sake, don't sign anything, whether you have read it carefully or not. If you give something away, you have given something away. Everyone is familiar with *caveat emptor*, but *caveat venditor* is important, too.

That's a pretty hard-nosed approach. I don't really oppose students taping my classes, particularly if it assists a student with a recognized disability. Is there something I can do to give myself the most protection?

Personal use falls under the "fair use" concept. It is OK to allow students to tape classes. The best advice might be to actually copyright the material.

I have heard that there are commercial lecture note companies out there in cyberspace that appeal to college and university students to sell their lecture notes and post them on the Internet. Any suggestions here?

What a rotten business that must be! But, let's face it — if it's doable, someone will try it. This is one of the areas that has arisen. There isn't a lot of law here, as of yet. If you know that this is being done at your campus, contact UUP.

As noted earlier, you will need to actually register your work with the United States Copyright Office to bring a lawsuit if you believe someone has actually misused, or infringed upon, your copyright. If you believe your copyright has been infringed upon, consult an attorney who specializes in copyright law.

I'm new to the idea of copyrighting my work. Where can I get basic information on copyrighting and copyright laws?

The best place to start is with the United States Copyright Office at its Web site, www.loc.gov/copyright . The Web site also suggests other sites that may help. The United States Copyright Office is part of the Library of Congress and is located at 101 Independence Ave., S.E., Washington, D.C. 20559-6000. To call, (202) 707-3000.

SUNY's Software Policy

SUNY's Software Policy is more detailed and clearer than its Policy on Intellectual Property. Please note that this policy applies *only* to software and software support materials.

Not many of us are engaged in the creation of software or software support products. Why have you included it in this Q-and-A?

Actually, that isn't true. All UUP members in "information services" are affected by this policy. And, a careful reading of the policy will help you understand the Policy on Intellectual Property. We encourage you to read this policy even if you are not going to create software.

SUNY Computer Software Policy

Introduction:

The use of computers within the University may result in the creation of computer software. Computer software can be either copyrighted or patented, depending on the particular circumstances, and can often be licensed for commercial use. This policy covers the various aspects of ownership, administration and promotion of such computer software.

The proprietary interests of several parties can be involved when computer software is generated within the University: the creator(s), the University or the Research Foundation, or an outside sponsoring agency. The University wishes to clarify and protect the rights and interests of all of these parties.

This policy addresses only computer software and software support materials and not other literary and instructional works nor dramatic, musical and artistic works created by faculty, employees, or students of the State University of New York.

Disclosure:

Computer software and software support materials shall be disclosed promptly to the Research Foundation (Technology Transfer Office), which functions by formal agreement as the agent of State University of New York for the administration of such materials. All concerned shall cooperate to insure copyright protection is secured when needed.

Definitions:

Scope of Employment shall mean tasks assigned in a job description, letter of appointment, or other specific written document.

Work for Hire shall mean work done by faculty, employees or students under campus consultation, extra service or technical assistance arrangements through contract, consultancy or purchase order, but not within the Scope of Employment.

Software shall mean computer programs in machine readable or interpreted form, including printed listings or printout forms produced from machine-readable input, required operating documentation, input information, or formal specifications necessary for operating of the program.

Software Support Materials shall mean all additional materials pertaining to software including narrative and instructional documentation, user and operational guides, and program training guides.

Creator shall mean one who originates the computer software code or who makes a significant contribution to structure or organization of the software.

Royalties shall mean the gross amount of all payments received from the commercialization of software and software support materials.

Ownership:

Title to computer software support materials developed by faculty, employees, and students of the State University of New York or employees of the Research Foundation shall belong solely to the State University of New York or the Research Foundation unless all of the following conditions exist; then it belongs to the creator:

- I. The work was not created within the scope of the employment of the creator;
- II. The work created was not the result of a work-for-hire situation;
- III. The work created was not a product or byproduct of sponsor funded or contracted activity;
- IV. The work was not developed through the use of facilities, funds or personnel of the University or the Research Foundation or under the control of the University or the Research Foundation.

Royalties:

Where software is created within the scope of employment or is the result of a work-for-hire situation the Research Foundation shall retain all royalties generated by the commercialization, for distribution in accordance with the policies of the University and the Research Foundation. If the work was developed through the use of University or Research Foundation facilities, funds, or personnel or resulted from sponsor funded or contracted activities, the creator shall receive forty percent of all gross royalties received for products or services which embody the creator's work, unless the payment exceeds the limits fixed by applicable regulations of the relevant sponsoring agency, which will control in such cases. The remaining royalties will be distributed in accordance with the policies of the University and the Research Foundation. These remaining royalties, after deduction of an administrative fee, are deposited in a royalty account under the control of the campus president where the software was created. The originating academic units, laboratories, or centers, as determined by the campus president, may receive a percentage of the royalties thus returned to the campus.

Exception or Waiver:

In all cases, creators of software are entitled to request a waiver or exception to the provisions of this computer software policy. This waiver or exception will be reviewed by the appropriate Patent Policy Board of the State University of New York, which will make a recommendation on the request to the Chancellor.

Well, it is pretty clear. What should I do if I still have questions?

Don't hesitate to call UUP. Applicable numbers can be found at the end of this Q-and-A.

UUP Recommendations for Distance Learning

Just what do you mean by distance learning?

Good question, because the phrase has come to mean so many different things. As used here, distance learning describes courses in which nearly all the interaction between teacher and student takes place electronically. This will include audio, video, e-mail, teleconferencing, chat rooms and, increasingly, the Internet.

Is UUP for it or against it?

In a Fall 2000 survey, academic and professional faculty members of UUP expressed overwhelming support for the educational opportunities offered by new distance learning technologies. This enthusiasm was tempered by concerns about the quality of the education available through distance learning technologies, and by concerns about SUNY's commitment to providing the financial, technical and professional support necessary to ensure effective distance learning programs.

Well, that sounds like a press release, carefully positioning UUP on both sides of the issue. Just what does UUP really believe?

In fact, that was a press release. Sophistry aside, it reflects exactly what we believe. Look, there just aren't any easy answers to the question. The technology is there, but it costs money. Money is needed not only for the equipment itself, but also to pay for the faculty and technical personnel needed to properly develop, test, give and then revise distance education courses. At SUNY, each campus must make a decision on its distance learning programs, then decide how much of its budget will pay for the programs. Everybody is learning that distance learning technologies aren't the "silver bullet" to reduce educational costs, and aren't that easy to pull off successfully.

In the past few years, UUP has done a lot of research in this area with colleagues from all over the country. Much of this work appears in two publications of the Higher Education Program and Policy Council of the American Federation of Teachers: *Teaming Up With Technology: How Unions Can Harness the Technology Revolution on Campus* and *Distance Education: Guidelines for Good Practice* (www.aft.org/higher_ed/technology). You can download both from UUP's Web site (www.uupinfo.org).

Can you just summarize what they say?

Sure. The first report focuses on the need to answer four questions:

- (1) Does the technology make sense educationally? Will it really advance student learning and scholarship?
- (2) Does the technology make sense financially? Is there a realistic cost/benefit analysis?
- (3) Will students and faculty all have access to new technology and know how to use it?
- (4) Are faculty and staff rights protected?

And the second report, the *Guidelines for Good Practice*?

This report sets 14 standards, many of which apply to all educational practices, that are especially pertinent to distance learning situations:

- (1) Faculty must retain academic control.
- (2) Faculty must be prepared to meet the special requirements of teaching at a distance.
- (3) Course design should be shaped to the potentials of the medium.
- (4) Students must fully understand course requirements and be prepared to succeed.
- (5) Close personal interaction must be maintained.
- (6) Class size should be set through normal channels.
- (7) Courses should cover all the material.
- (8) Experimentation with a broad variety of subjects should be encouraged.
- (9) Equivalent research opportunities must be provided.
- (10) Student assessment should be comparable.
- (11) Equivalent advisement opportunities must be offered.
- (12) Faculty should retain creative control over use and re-use of materials.
- (13) Full undergraduate degree programs should include same-time-same-place coursework.
- (14) Evaluation of distance coursework should be undertaken at all levels.

I am really interested in my rights and responsibilities. If I agree to create and teach a distance learning course, does SUNY own my work?

As described on Page 2 under SUNY Copyright Policy, “members of the staff of the University shall retain all rights to copyright and publish written works produced by them.” Also, re-read the caveats and the rules that apply to them.

Yes, but is distance learning judged by a different set of rules?

No. These are the rules that govern any distance learning project. Do not begin any distance learning project until you understand the terms and conditions under which you will work. Do not agree to any deviations from the rules described here. Consult UUP as soon as possible.

Are you sure that SUNY can't take the distance learning course I have created, say “bye-bye” to me, and use it after I'm gone?

Each campus is going about distance learning in its own way. Is this possible? Are there problems? Sure there are. But one of UUP's problems is that individual members do not come to UUP with their concerns. We cannot say it loud enough:

**If you see deviations from the rules we have described here,
consult UUP immediately.**

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Web Sites of Interest

UUP: www.uupinfo.org

New York State United Teachers: www.nysut.org

American Federation of Teachers: www.aft.org/higher_ed

U.S. Copyright Office: www.loc.gov/copyright

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