

BACKGROUND

Last year the AA committee discussed the sale of class notes by various commercial companies. Dr. Charles Osburn chaired of a group that was examining copyright issues. A list of questions was sent to him and he forwarded these to the Office of Counsel of the UA System. Below is a memo from Sandy Gordon to Dr. Osburn (May 31, 2000).

RE: Publishing, Selling and Distributing Class Notes

I am writing to respond to the March 15, 2000 e-mail that you received from Dr. Donald DeSmet, Co-Chair of the Faculty Senate Academic Affairs Committee. In his message Dr. DeSmet asked for guidance on five questions about the sale and distribution of class notes from courses taught at UA.

Before addressing the questions, I believe a very brief discussion of the intellectual property rights in faculty lectures is warranted. Once those rights are identified, then the answers to the questions may appear more evident.

Under current federal copyright law copyright protection in a work exists from the moment that the work is fixed in a tangible medium of expression from which it can be perceived, reproduced, or communicated.¹ While a faculty member's written lecture, if original authorship, becomes protected by copyright when written down, the faculty member's oral delivery of the lecture may or may not receive the same protection. For oral lectures to receive copyright protection, a faculty member either must read a previously scripted lecture or tape record or otherwise fix an extemporaneous lecture. If the faculty member deviates from the prepared written lecture and fails simultaneously to fix the lecture, there is no copyright protection.

Even if a lecture is protected by copyright, the notes taken by a student are not necessarily infringing. First, the ideas, facts, and concepts embodied in the lecture are not copyrightable. Second, unless the student takes verbatim notes, the student's version of the lecture might constitute either a derivative work² or a separate work of authorship. In the former the faculty member has likely impliedly licensed the student to create the derivative work faculty expect students to take notes. In the latter situation if the student's notes are sufficiently original and not based substantially on the faculty member's expression of the facts or concepts, the student may have created an original work that is protected by the student's copyright.

What is a faculty member to do to preserve his or her rights or interests in the lecture? If the lecture is protected by copyright, then the faculty member, at his or her expense, may resort to an infringement action in federal court to halt the copying and sale of the lecture notes. Of course, the costs of prosecuting a federal lawsuit are not insignificant in financial terms or in the commitment of faculty time to the action. Since the federal copyright law has pre-empted state law, the local courts are unavailable to pursue infringement actions.

A faculty member might also expressly license the use of the lecture by communicating oral and written instructions on the uses or restrictions applicable to the lecture. The faculty member should communicate those instructions prior to the start of the course.

Another remedy is for the institution to adopt as part of its internal code of conduct rules that describe what action or conduct is prohibited with regard to lectures and notes taken by students. The institution may then use its disciplinary procedures to deal with violations of those regulations.

In view of the foregoing, I will attempt to address the five questions in the order that Dr. DeSmet raised them.

1. "Are students under any obligation not to sell class notes simply because they are registered students?"

- That is, do they have any real or implied contractual obligation to the University?" In the absence of internal institutional rules or restrictions or instructions issued by the faculty member to the contrary, a student may assume that there are no contractual prohibitions against selling what the student views as his or her work product. That said, one's status as a student does not give the student any special privileges or exemption from complying with copyright laws, but if the lectures are not protected by copyright, then the student has not engaged in an infringing conduct and is free to sell his or her notes.
2. "Can an instructor include a statement in a syllabus to the effect students agree not to sell or distribute notes they take in class?" Yes. The more difficult issue is how does the faculty member enforce that restriction.
 3. "Can an instructor require students to sign a statement such as mentioned in 2 (above)?" While the faculty member might establish that requirement as a condition of course enrollment, that requirement might negatively impact enrollment in the course. If the course is required for graduation, a student might claim that his or her consent was coerced or obtained under duress and thus void. Finally, the faculty member is still faced with an enforcement issue. If the faculty member fails to address violations, the requirement becomes meaningless.
 4. "Is distributed class material (either hard copy or on the web) automatically copyrighted? Can it be copyrighted easily, by just including a copyright statement?" Class material becomes protected by copyright at the time the materials are fixed in a tangible means of expression from which they can be perceived or communicated, either directly or with the aid of a machine or device. The affixing of a copyright notice is no longer required to preserve one's copyright. By including a copyright notice, however, one does put others on notice of the copyright claim and who owns it, and the appearance of a copyright notice eliminates the innocent infringer defense that limits the amount of statutory damages that the court can award in an infringement action. That said, faculty members must remain alert to ensuring that their posting or use of materials created by others is non-infringing.
 5. "To what extent is a lecture equivalent to a performance?" The Copyright Act provides that "[t]o 'perform' a work means to recite, render, play, dance, or act it either directly or by means of any device or process...."³ The Act also says a "work" "is 'created' when it is fixed in a copy or phonorecord for the first time...."⁴ Applying the statutory definitions to a lecture, it becomes apparent that for a lecture to become protected by copyright the faculty member either must read verbatim the previously written lecture or if the faculty member lectures without notes the lecture must be simultaneously fixed such as by a tape recording.

In conclusion, the best solution may lie in a combination of measures that promote rather than frustrate the academic process. Some institutions are educating students about copyright so as to foster respect for the rights of others and adopting internal rules that the faculty member can enforce through institutional disciplinary procedures. One institution has capitalized on the issue by awarding exclusive note taking rights to a local business that in return pays fees that are shared institutionally. This approach provides a service to students, gives faculty input on quality control of the notes that are produced, and generates a revenue source. On the other end of the spectrum, some faculty simply ignore the issue and instead may rely on course changes such as requiring students to master material not covered in lectures to lessen the commercial value of class notes or making class attendance mandatory.

I trust this memorandum is responsive to the issues raised by Dr. DeSmet. As always, the Office of Counsel is available to address any questions generated by this memorandum or other issues related to the topic.

1 17 U.S.C. §102(a).

2 A derivative work is one that is based on a pre-existing work such as a faculty member's copyrighted lecture. 17 U.S.C. §101.

3 17 U.S.C. §101.

4 Id.