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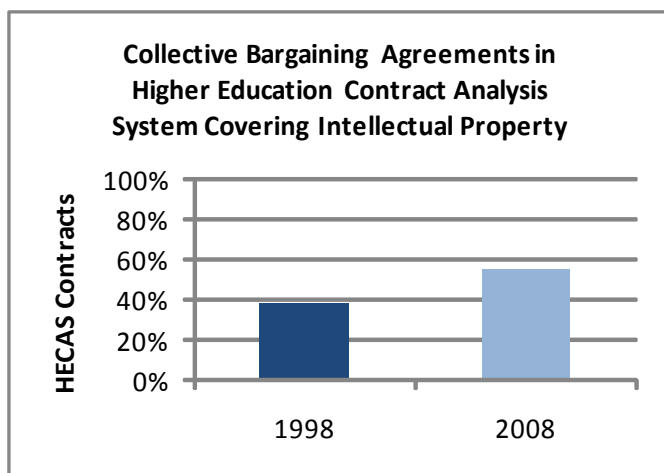
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Ten Years After *Managed Professionals*: Who Owns Intellectual Property Now?¹

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Between 1998 and 2008, the number of collective bargaining agreements at colleges and universities that covered ownership of intellectual property—patents and copyrights—increased dramatically. In *Managed Professionals: Unionized Faculty and Restructuring Academic Labor*, Gary Rhoades (1998) wrote that only about 33% of the collective bargaining agreements in the Higher Education Contract Analysis System (HECAS) maintained by the National Education Association had provisions that covered ownership of intellectual property (71 out of 212 contracts). In the 2008 HECAS, 55% (290 out of 525) of contracts covering faculty at two-year and four-year institutions had provisions covering intellectual-property ownership.

Chart 1



Using legal research methods (Thompson, 2003), this study describes the changes in intellectual-property ownership provisions in faculty contracts between 1998 and 2008. Legal research involves textual analysis and interpretation of constitutional, statutory, and case law in an effort to ascertain the state of the law, both positively and normatively, with regard to a particular issue (Thompson, 2003).

Rhoades' (1998) major finding was that a substantial majority of intellectual-property provisions within collective bargaining agreements granted faculty ownership over, and profits

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from, the intellectual property they created (pp. 237-238). This trend could be explained by the relatively low commercial value of intellectual property generally produced by faculty at unionized institutions, or at least by a more complex relationship than previously recognized between the economic value of a faculty members' work and their autonomy (Rhoades, 1998, pp. 252, 255). Over the next 10 years, institutions asserted greater ownership over faculty work, particularly work that used "significant" university resources, not necessarily work that was commercially valuable.

This study also explains why faculty contracts increasingly include intellectual-property provisions. Factors include advances in technology, new bargaining objectives developed by faculty unions, and greater institutional efforts to replace decreased state funding.

Analysis of Intellectual-Property Ownership Provisions

Within his larger study of faculty contracts, Rhoades (1998) sought to find the extent to which institutions asserted claims on faculty-created intellectual property (p. 211). In analyzing the intellectual-property provisions of collective bargaining agreements in the HECAS, he asked, among other questions: 1) what property is mentioned; 2) who owns the property; and 3) what conditions of production affect ownership (p. 218). This study applies those questions to the contracts in the 2008 HECAS database and views the answers through a legal-research lens.

What Property is Mentioned?

The contracts examined by Rhoades (1998) covered ownership of patents; copyrights; tapes or electronically produced material for distance-education courses; and "materials," sometimes specified as instructional, teaching, or course material (p. 239). Inventions and processes—related to the legal definition of patents—were sometimes listed also.

Ten years later, copyright was the major type of intellectual property mentioned in contracts. Rights regarding "copyright" or "copyrights" were mentioned in 231 contracts (44%). "Patent" or "patents" were mentioned in 175 contracts (33%). "Intellectual property," with no reference to copyrights or patents, was mentioned in 53 contracts (10%).

"Course materials" were covered in 159 contracts. While "tapes" were still covered, they were usually listed with other, more advanced technology for recording and sharing coursework.

Ownership of online courses emerged as a significant negotiations issue soon after Rhoades' (1998) study was published (Guernsey & Young, 1998). By 2008, "online," "on-line," "Web-based," or "distance education" was mentioned in 268 contracts (51%). Of these contracts, 43% discussed copyright of those courses. Other provisions regarding online courses covered teaching qualifications, additional compensation, and enrollment limits.

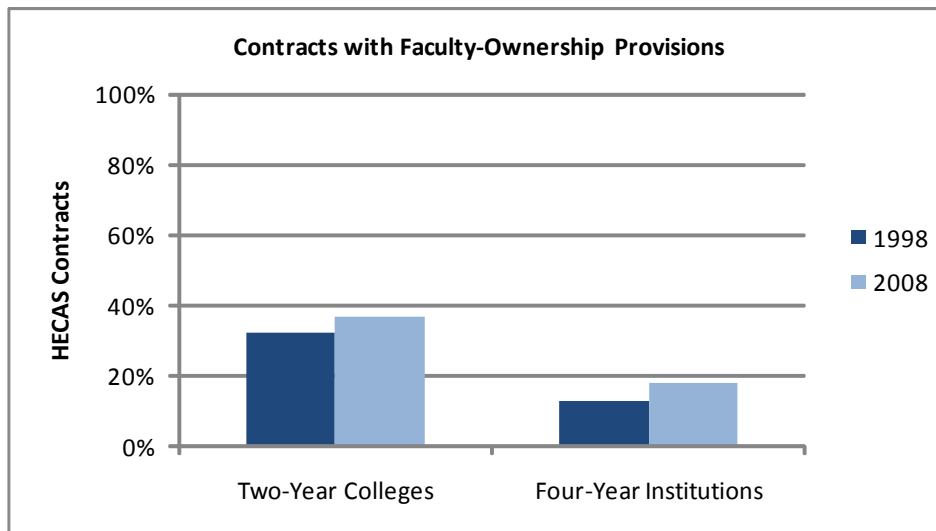
Who Owns the Property?

Rhoades (1998) found that 60 contracts explicitly defined ownership (p. 240). He determined that ownership depended on the conditions in which it was produced (1998, p. 241). He found 1) outright faculty ownership, particularly when faculty created work on their own time with “independent efforts” (1998, p. 242); 2) outright institutional ownership, often as “works made for hire”; and 3) “joint ownership” (p. 218).

Overall, Rhoades (1998) was surprised that within the 60 contracts that specifically defined ownership of intellectual property, 55 of them granted outright faculty ownership (p. 240). Two-year colleges had a higher incidence of such provisions than four-year institutions, which was the opposite of what Rhoades (1998) expected: 32% of two-year institutions provided faculty ownership, while only 13% of four-year institutions provided faculty ownership (p. 241). One possible explanation is that faculty in community and technical colleges generally do not produce intellectual property of significant commercial value (Rhoades, 1998, p. 252).

By 2008, the incidence of provisions providing faculty ownership of intellectual-property had grown in both the two-year and four-year sectors. Among two-year institutions, 37% covered faculty ownership of copyrights, patents, or intellectual property in general, while 18% of four-year institutions provided faculty ownership over such property.

Chart 2



The three ownership categories defined by Rhoades sufficiently encompassed ownership arrangements in 2008. In the first category, faculty still generally owned the intellectual property in work in which they used “independent efforts” (12 contracts), “individual effort” (33 contracts), or their “own time” (68 contracts). Individual effort is often connected to creating traditional academic work.

Institutions outright owned work in cases of “works made for hire,” which are works that an institution assigns, or works that use significant institutional resources. Works made for hire are covered in more detail in the next section. Rhoades’ (1998) third category, “joint ownership,” still appears in 20 contracts.

Rhoades’ (1998) strict categorization of ownership belies the bundle of rights composing copyright, which allows faculty and institutions to hold different sticks within the bundle. The bundle includes rights to 1) reproduce the work; 2) prepare derivative works; and 3) distribute copies to the public (17 U.S.C. § 106). These rights provide different kinds of control over faculty work beyond outright ownership based on commercial value. Contracts that focus on “the parties’ interests in a work, rather than just on who owns a work, will better serve everyone’s needs” (Harper, 2000, p. 9).

Provisions covering online courses demonstrate how the bundle of rights comprising copyright can be split. For example, at Cabrillo Community College (2004), faculty members own the copyright of online materials based on their traditional materials, but the college retains a non-exclusive license to use the materials and has the right to share the materials with other instructors (§ 24.2.1.d.).

What Conditions of Production Affect Ownership?

Based on 58 contracts, Rhoades (1998) identified three categories of conditions of production: 1) property independently produced by faculty on their own time; 2) property produced by faculty with use of institutional resources and/or personnel time; and 3) work commissioned by the institution. Rhoades (1998) called the last category “work for hire” (p. 242).

These three conditions remained the most prevalent in faculty contracts in 2008. Property produced independently by faculty is closely tied to traditional academic materials. Regarding works using institutional resources and commissioned works, however, contracts now often use more sharply defined terms that more explicitly follow the framework of the federal Copyright Act, thereby blurring the distinctions among Rhoades’ (1998) conditions of production.

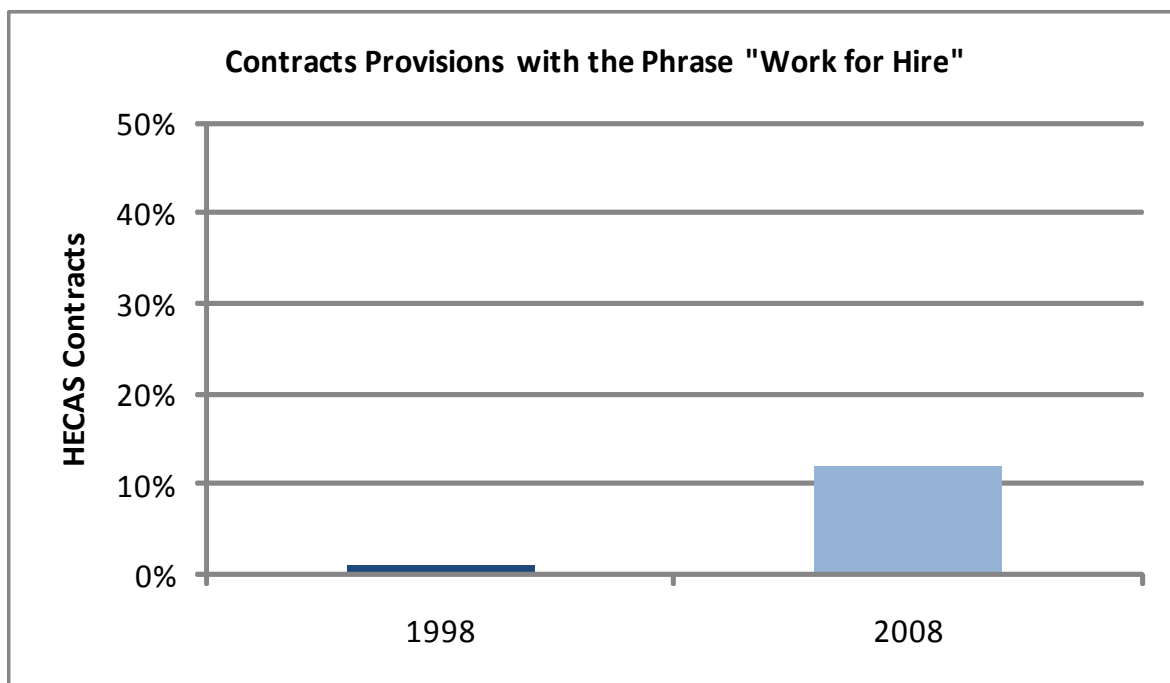
The Copyright Act generally considers the creator of a work to be its author, and therefore its copyright owner. The law allows an exception to this rule under the concept of “works made for hire,” where the author—and therefore the copyright owner—is often an employer or the person for whom the work was prepared (17 U.S.C. §§ 101, 201(b)). The Copyright Act establishes two situations when a work is a “work made for hire”: 1) a work prepared by an employee within the scope of his or her employment; or 2) a work specially ordered or commissioned for use as a contribution to a “collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an

instructional text, as a test, as answer material for a test, or as an atlas,” provided the parties expressly sign a written agreement that the work shall be considered a work made for hire (17 U.S.C. § 101).

Rhoades (1998) identified 43 contracts (20% of the HECAS) that addressed property produced “by faculty specifically for the institution” (p. 242). The phrase “work for hire,” however, appeared in only two contracts, or 1% of the HECAS. In examining other provisions of institutionally commissioned work, Rhoades (1998) concluded, “it is not just a matter of using college resources. The work must be assigned” for the institution to own it (p. 243).

In 2008, provisions covering copyright of “assigned” or “commissioned” works appeared in 107 contracts (20% of the faculty contracts in the HECAS), and the institutions almost always own these works. Using specific language from the Copyright Act, 63 contracts (12%) contain the phrase “works made for hire,” “work made for hire,” “works for hire,” or “work for hire.” For example, Franklin Pierce College’s (2002) contract states, “Works-made-for-hire are works specifically contracted for by the College. When work qualifies as a works-made-for-hire, the College is the sole owner of the property” (Art. 27.5.1.1).

Chart 3



Rhoades (1998) identified 53 contracts with a “less clearly defined middle ground” between faculty’s independent production and production for the institution (p. 243). These were situations where faculty used institutional resources or time to produce their work. Rhoades (1998) found that contracts commonly used the phrase “significant” institutional resources in provisions that led to negotiated ownership between faculty and their institution (p. 244).

In 2008, the use of institutional resources was not merely a middle ground but a central battleground determining ownership of intellectual property. Under the Copyright Act, works made for hire include works created by employees within the scope of their employment in addition to commissioned works. The rub for faculty is the extent to which their contracts consider them to be “employees” and their work to be prepared “within the scope” of their employment. With neither term defined in the Copyright Act, the courts have provided clarification.

To determine whether a hired party is an “employee,” courts consider 13 factors, such as “the hiring party’s right to control the manner and means by which the product is accomplished,” “the source of the instrumentalities and tools,” “whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party” (*Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 [1989]). To determine whether an employee acted within the scope of his or her employment when creating a copyrightable work, courts use a three-part test: 1) whether the work is of the type that the employee is employed to perform; 2) whether the work occurs substantially within authorized work hours and space; and 3) whether the work’s purpose, at least in part, is to serve the employer (*Newark v. Beasley*, 883 F. Supp. 3, 7 [D.N.J. 1995]); *Roeslin v. Dist. of Columbia*, 921 F. Supp. 793, 797-98 [D.D.C. 1995]).

Taking cues from these cases, collective bargaining agreements focus on the use of institutional resources. Of the 525 two-year and four-year faculty contracts in the HECAS database, 107 (20%) link use of resources to copyright ownership. “Significant use” or “substantial use” appears in 23 (4%) of the faculty contracts in the HECAS database. Related phrases are “incidental use” of institutional resources, mentioned in 6 contracts; and “extraordinary University assistance” (*Cleveland State University*, 2006). Controlling university resources appears to be more important than owning intellectual property based on its commercial value.

Rhoades (1998) found “the term *significant* is undefined” (p. 244). That is often no longer the case. For example, at the University of San Francisco (2002), “significant University assistance and resources” include “the use of employees or non-routine use of students as support staff to develop the work, substantial use of specialized or unique facilities and equipment, released time, special leaves, stipends, or other special subventions provided by the University” (Art. 27.2.4).

Rhoades (1998) asked rhetorically, “How much use is ‘insignificant?’” (p. 244). The contract for New Jersey’s state colleges and universities (2007) provides an answer: “‘incidental use’ means normal academic use of resources commonly available to the employee such as the use of an employee’s office, computer, Internet services, library facilities and/or office equipment” (Art. XXXIII. A.1.b.).

No matter how an institution defines “significant,” faculty work produced with sizeable institutional resources generally belongs to the institution. In a minority of cases, faculty retain ownership, but they must reimburse the institution for “the cost of production” (Cabrillo Community College, 2004, Art. 24.2.1.b.).

Reasons for Increase in Intellectual-Property Ownership Provisions

Advances in Technology

Over the past decade, digitization and the expansion of the Internet (Friedman, 2005) are the major technological developments driving increased development of intellectual property at colleges and universities, particularly online courses. In 1997-1998, only 44% colleges and universities in the U.S. offered online courses (Kiernan, 2003). By 2006-2007, 66% of degree-granting institutions in the U.S. offered at least one online, hybrid/blended online, or other distance-education course (Parsad & Lewis, 2008).

Advances in the life sciences—including biology, medicine, and chemistry—are leading to more university patents. Recent surveys of the Association of University Technology Managers (2009) and other literature indicate that about 60-75% of university licensing income is based in the life sciences (Roessner, Bond, Okubo, & Planting, 2009).

Bargaining Priorities

Since Rhoades’ (1998) work, the three major faculty unions have made ownership of intellectual property a top bargaining priority. The AAUP (1999) argues that the ownership of online courses should be no different from ownership of traditional courses, which has not depended on “the physical medium” in which they appear. The AFT has published a primer on intellectual property (Strom, 2002), which argues, “Ownership of intellectual property should be the right of all academic employees and is key to controlling the quality and duplication of their work. Therefore, academic employees must be vigilant in protecting intellectual property rights” (2002, p. 11). The NEA (2002) “believes that education employees should own the copyright to materials that they create in the course of their employment” (NEA, 2002).

Decline in State Funding and Rise of Academic Capitalism

Public colleges and universities in the U.S. faced a significant decrease in public funding between 1998 and 2008. In 2008-2009, state tax appropriations per public full-time equivalent student were \$7,953, 12% lower in constant dollars than in 1998-1999 (Baum & Ma, 2009). As state support shrank, demand rose to record levels at public institutions. Between 1998 and 2008,

total enrollment in public degree-granting institutions increased 20% (Snyder, Dillow, & Hoffman, 2009).

To address the “double whammy” of state budget cuts and sharply rising enrollments (Wellman, 2002, p. 6), colleges and universities increased efforts to raise their own revenue, often called “academic capitalism” (Slaughter & Leslie, 1997; Slaughter & Rhoades, 2004). To secure external money in response to government policies that reduce funding for higher education, institutions and faculty adopt market or market-like efforts, such as patenting, establishing spin-off companies and arm’s-length corporations, and partnerships with industry (Slaughter & Leslie, 1997, p. 11). Increased assertions over ownership of intellectual-property rights reflect exactly these kinds of market-based behaviors.

Conclusion

Rhoades (1998) uncovered the complex relationship between collective bargaining and intellectual property ownership. He found a significant difference in the behavior of two-year and four-year institutions toward ownership of faculty-created work. To explain the differences, Rhoades (1998) concluded that “the more valuable the property generated by faculty labor, the more likely that institutions will move to regulate and/or harness that labor” (pp. 252-253).

Ten years later, a legal-research analysis of intellectual property provisions in collective bargaining agreements reveals that commercial value is not the driving factor behind ownership. Two-year as well as four-year institutions assert ownership interests in faculty work when faculty use significant or substantial institutional resources. Compared to 1998, contracts more precisely define significant or substantial use, often invoking the language of the Copyright Act to define and capture “works made for hire.”

Faculty contracts now blur the lines between the ownership categories created by Rhoades (1998). This suggests that college and university negotiators now better understand intellectual property law. It also reveals the usefulness of analyzing collective bargaining agreements with a legal-research approach.

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