

Intellectual Property Guidelines and “FAQ’s” for LCC Faculty and Academic Professionals

Overview

Terms

Note: Throughout this document term “professor” is used to denote a teacher, professor, or other academic professional that is part of the MAHE bargaining unit.

What is Intellectual Property?

The term Intellectual Property (sometimes referred to as IP) is a broad, umbrella term for different types of legal property rights assigned to the products of human creative work. Different laws govern each of these categories of intellectual property. These laws define what is protected, what rights are created, and what are the obligations of creators and users. For example, novel and useful inventions are protected by patent laws. But patent protection is only extended after the government’s patent office approves and publishes what is often a lengthy and expensive application. In contrast, creative, intellectual, or artistic expressions of ideas are protected by copyright. Copyrights, unlike patents, are established automatically at the time the work is first created by the author.

Who “owns” the Intellectual Property I create?

This is a complex question. The answer varies depending upon:

- **Your Relationship to LCC:** Are you faculty? Are you an outside contractor? Are you staff? A student?
- **Type of IP:** There are different considerations for the different categories of IP such as patent, copyright, trademark, or other. Which type is this work?
- **Scope of Employment:** How does the subject and nature of each creative work relate to your specific job, position, and job description?
- **Specific Directions and Supervision Assigning the Work:** Were you specifically assigned to create this specific work and were you given resources, a deadline, and supervised in the creation of the specific work?
- **Substantial Use of Resources:** Does the creation of this work require substantial use of college-owned resources or does it only require incidental use of normally provided resources?
- **Derivative Work:** Is this particular piece of IP a derivative of another or is it completely original? If it is derivative, who owns the rights to the source and what licenses or uses apply?

Each of these six considerations are discussed in later sections of this document.

In addition, faculty are not like ordinary employees in most other jobs. Determining ownership of copyrightable work created by professors and employed academic professionals is very complicated. There are conflicting interests, legal doctrines, and purposes. Courts have generally held for the rights of faculty but there are exceptions. Schools have different policies. LCC and MAHE have agreed to these procedures and guidelines to help faculty and the college determine not only who owns the copyright to materials created by faculty, but also what rights the respective parties have to use these materials. This

document provides guidelines and answers specifically for faculty and academic professionals governed by the MAHE contract at LCC to help them determine who owns what and what their usage rights may be.

What are the types of Intellectual Property?

The primary categories of intellectual property (IP) are

- patents on inventions
- copyrights on creative expressions of ideas (not the ideas or information itself)
- trademarks on unique identifiers used in commerce.

The term IP also encompasses other rights such as trade secrets, publicity rights, moral rights, and rights against unfair competition.

Of these different categories of IP, the most significant, most complex, and most likely to involve LCC faculty and academic professionals is copyright. Guidelines for patent, trademark, and other IP property are fairly simple.

Relationship to LCC

The nature of a person's relationship to LCC is also important. Students, for example, own copyright of the work they create at the time they create it. The exception to this is student employees, who would be considered employees, not students, for work they create in the scope of their employment. Student IP is covered by a separate LCC procedures statement. As of Oct 22, 2018, the LCC Student IP Procedures are available as a pdf at this URL: <https://lcc.edu/about/documents/labor-relations-bargaining-agreements/intellectual-property-procedures-for-students.pdf#search=Intellectual%20property>.

Third-party or outside contractors working with or for LCC may be governed by the terms of their contracts or their own employers.

Administrators, non-teaching staff, and non-academic employees at LCC are governed by the same LCC Intellectual Policy and procedures as are faculty and academic professionals. However, some non-teaching, non-academic professionals may have other non-MAHE union contract provisions that apply. Faculty and academic professionals covered by the MAHE contract are also governed by contractual language and principles regarding IP. As of Oct 22, 2018, the LCC employee IP Procedures, as agreed by MAHE, are available as a pdf at this URL: <https://lcc.edu/about/documents/labor-relations-bargaining-agreements/mahe-moa-intellectual-property-policy-procedures-for-faculty-and-college-employees.pdf#search=Intellectual%20property>.

The nature of the job of faculty and the college's own mission to publicly support and further education and knowledge in the community make for a lot of "fuzzy" situations. This is discussed further under the copyright section below.

Patents, Trademarks, and Other Types of IP (not Copyright)

What's the guideline for Patents?

It is unlikely that LCC faculty or academic professionals will encounter situations wherein ownership of patent rights between the college and the faculty member need to be determined. Unlike faculty at

“research universities” such as MSU, LCC faculty do not have research responsibilities. Therefore, inventions in the course of ordinary faculty employment are extremely unlikely.

Further, the U.S. Patent and Trademark Office (PTO) issues patents after a paid application, public disclosure of the invention, and an evaluation by the USPTO patent examiners. Not all applications are approved. No patent rights exist until the application is made and evaluated. Patent applications are complex and often costly to prepare, requiring the assistance of specialized “patent attorneys”.

If a faculty member should invent and subsequently patent some invention outside of their regular job responsibilities, they are responsible for patenting it and will own it. An example of this might be the English Faculty member who invents a novel way to secure packages to a bicycle, or even a science faculty member invents a new design for a lab instrument.

If, in the rare and unlikely event that a faculty member invents something in the course of assigned work at the college and using substantial resources and support from the college, then the faculty member and the college may wish to patent it. A written agreement regarding sharing of rights, costs, and obligations between the college and the faculty member is advised for each such patentable invention.

What’s the guideline for Trademarks?

Trademarks are words, symbols, colors, sounds, or smells that someone is using in conjunction with a product or service. For example, the LCC Star logo is a trademark. Trademarks are registered with the US Patent and Trademark Office. Any registered LCC trademark is the property of the college. Usage of LCC trademarks is governed by LCC procedures and policies. Faculty should be contact the LCC Marketing office for more information.

Any trademark created, used, and registered by a faculty member that represents some other organization and does not refer to LCC is the property of the faculty member or the other organization.

What about other Intellectual Property rights such as rights of publicity or trade secrets?

Trade secrets, if they apply to LCC , are by definition the property of the college. However, as a public institution and being subject to FOIA laws, it is difficult to think of an example of what could be an LCC trade secret.

Rights to publicity include the right to control how your name, likeness, and persona are used by others. Rights to publicity have historically not been a concern at LCC or other colleges. The college has the right, indeed it is obligated by the Higher Learning Commission, to make public the names and degree qualifications of its faculty. The rights to publicity may become an issue if and when the college should decide to implement lecture capture and re-use of particular faculty lectures outside their own classes. As of this writing (October 2018), there is no agreement regarding rights of publicity between the college and MAHE. It is strongly suggested to have a written agreement in advance for any such situations.

Copyright and Faculty – General Guidelines

What kinds of academic works are copyrightable?

The majority of IP created by a professor or academic professional is copyright material. It includes books, articles, study guides, syllabi, workbooks, tests, manuals, bibliographies, directions for

assignments, instructional packages, video or audio recordings, images, photos, slides, multi-media materials, 3D materials, exhibits, and databases.

What is not copyrightable?

The law limits what is copyrightable. In broad terms, ideas, methods, or systems themselves cannot be copyrighted. Particular descriptions, expressions, explanations, or illustrations of ideas, methods, or systems can be copyrighted, but not the ideas themselves. Names, titles, and short phrases cannot be copyrighted. Similarly, typefaces, fonts, lettering, blank forms, or familiar symbols/designs cannot be copyrighted. For more information on what is not copyrightable, see the [US Copyright Office Circular 33](#) (pdf document).

In addition, there are classes of works called “derivative works” or “collections”. These are creative works made from or derived from some other previously created and copyright-protected works. Teaching often involves significant creation of derivative works, for example when a professor revises or remixes material such as texts that are the copyright of others. If the original or source work is openly licensed by a CC license or similar, the license governs. Derivative works will be discussed in a later section in this document. Finally, works that are already in the public domain cannot be copyrighted.

Do I have to register my copyright?

No. Major changes to US copyright law were enacted with the Copyright Act of 1976. Since 1976, registration of creative works is no longer required for a work to be protected by copyright. Likewise since 1989 it is no longer necessary to attach the © copyright symbol or notice for a work to be protected. However, it is good practice to attach such a notice including any open licenses such as Creative Commons licenses you are assigning to the work.

How do I determine the rights and ownership of my creative work?

Determining ownership of copyrightable work created by professors and employed academic professionals is complicated. There are conflicting interests, legal doctrines, and purposes. As a result of trying to resolve these conflicts and find a balance of interests, LCC and MAHE have agreed to these guidelines to help faculty and the college determine not only who owns the copyright to materials created by faculty, but also what rights the respective parties have to use these materials. This document provides guidelines and answers specifically for faculty and academic professionals governed by the MAHE contract at LCC to help them determine who owns what and what their usage rights may be. These guidelines are intended to help faculty and their administrative supervisors to determine the ownership and usage rights to copyrighted works created by faculty and academic professionals at LCC.

Doesn't the college automatically own everything I write at/for work?

Isn't everything I create for work owned by the college under the “Work for Hire” doctrine?

No. In general, the law establishes that the creator of the IP is the owner of the rights. In copyright law, for example, the author automatically owns the copyright simply by creating the document or other work. This is the default practice. However, the law has long made an exception for situations where a person is employed, hired, or contracted to specifically create something. If the terms of the contractual or employment situation are that the worker is specifically hired to create some particular work(s), then courts will grant the copyright to the employer. This is referred to as the “Work for Hire” doctrine.

The key to work-for-hire doctrine is defining the “scope of employment” – in other words, what is the employee supposed to write as part of the job? In academic and faculty work, the work-for-hire doctrine

is ambiguous. There are a lot of “gray areas” regarding exactly what kinds of writing the faculty member is hired and required to create. Further, an important part of work-for-hire doctrine is that the employer must clearly specify, assign, and supervise exactly what is to be written. This need for specificity in assignment conflicts with academic freedom, a core value of academia and the College. Academic freedom is also contractually established. Further, it is often in the interest of the college or academic institution to encourage the creation and broad dissemination of knowledge instead of tightly controlling copyrights.

We’re hired to teach. What’s an example of a gray zone on faculty work?

Some cases are easy to determine. A professor of physics who writes a children’s story in her spare time is clearly an example of a faculty member writing something outside the scope of their employment.

But consider another case. Consider a faculty member, perhaps a professor of sociology or economics, who is hired specifically to teach a particular class. This covers nearly all LCC faculty. LCC faculty are hired to teach, not to publish or research. But suppose this faculty member writes and publishes a public blog in sociology or economics. In this blog they happened to explain key concepts or comment on the news for the general public. Is this writing considered part of their scope of employment? It is after all, about either sociology or economics. Under the LCC policy, guidelines, and contractual language, this situation would still be the copyright of the faculty member because the college did not specifically assign that particular work to be written, and it did not require substantial use of college resources.

Now let’s suppose that the college’s marketing office asked the faculty member to write an article by a specific date, and the work was listed as part of the faculty member’s (full-time) 32 day non-instructional work. Now the article would be considered within the scope of employment and ownership would belong to the college unless a written agreement otherwise existed.

Summary of Determining Copyright Ownership and Rights

In very broad terms, the default practice for materials created by faculty is that the faculty member owns the copyright. However, under certain conditions the college may own the copyright. In addition, there are materials and situations where the faculty member may own the copyright, but a limited license to use/reuse/copy the materials exists for the college.

Seven Questions

The ownership and rights for faculty-created copyrighted material can be determined by answering a short series of questions.

1. *Is the work created by **an LCC faculty member or academic professional**?*

If the answer is yes, then the remaining questions are relevant and this document applies. If the work is created by a student, an outside party such as a publisher, or by a non-academic employee of LCC, then other rules and interpretations may apply.

2. *Is there a **written agreement** between the faculty member (creator) and ~~the~~ either the college or other organization regarding IP rights for this particular work?*

If an agreement exists, then the agreement determines who owns what and what rights or licenses exist. This agreement may exist between the faculty member and the college or it may exist between the faculty member and a publisher. For example, an article authored by a faculty member and

submitted for publication to an academic journal will likely be subject to the terms and conditions agreement of that publisher.

3. *Was this particular work **specifically assigned** by the faculty member's supervisor or specifically required by the college to be used in a particular course?*

If the work in question was specifically assigned by a supervisor to a faculty member to be written or created, or, if the work in question is required by the college for a particular course, then the work in question is likely the IP of the college. Examples like this that result in college-owned copyrights might include:

- Writing or creating an official course syllabus for all sections of a particular course (note: an individual section syllabus may include portions that are the copyright of the particular professor teaching that section. A section syllabus is a derivative work, which is described later).
- A dean or supervisor assigns a faculty (or group of faculty) to write a description of their program for use in an LCC website or brochure. They provide a deadline and the work is included in the faculty's non-instructional time (full-timers) or additional pay is provided (adjuncts).
- A Program Review document and supporting analyses are prepared by a faculty member(s) as part of the regular assigned Program Review process. Such documents are the copyright of the college.
- A faculty member who is also an Academic Senator writes a motion for the Academic Senate to consider. That document is college copyright.

To be "specifically assigned," the supervisor must define and describe the particular work(s) in question. Vague or general assignments such as "make teaching materials for the X course" are not specific and therefore are not considered work-for-hire. What kinds of materials? How should the materials be created? What is the deadline? What is an acceptable outcome? These questions need to be answered in advance for it to be a specific assignment. Further, active supervision and monitoring of progress is required.

4. *Has creation of the work required **substantial use of college resources**?*

If creation of the work requires substantial use of college resources beyond the normal provision of resources, then the college may have acquired the copyright. The term "College Resources" means LCC funds or funds administered through LCC space, equipment, personnel, tangible or intangible research materials; information and/or materials, including things such as LCC facilities, computing and graphic services, equipment, or staff support; and supplemental pay. "Substantial Use" of those College Resources means unreimbursed use which requires additional expenses that are not part of standard expenses for supporting staff (non-faculty). *Resources beyond the normal provision made to employees is a threshold factor in this determination.*

For example, being paid your ordinary salary while writing a work is not "beyond normal provision". It is not substantial use of college resources. Nor is using a school-issued laptop or desktop computer or the college connections to the Internet. Using your office or desk space in the college or using the college library does not constitute "beyond normal provision" and does not result in the college obtaining ownership. However, let us suppose that in the creation of a video explaining a key concept for a class, a faculty member requires the use of facilities and/or personnel in Media Services to help them film or

edit the video. This will likely constitute substantial use of college resources. The college would then have an option to claim ownership or may let the copyright remain with the faculty. It is always best to obtain an agreement with supervisors in advance to clarify these situations.

Finally, the issue here is the degree of college resource usage in the creation of the materials. Resource usage after the creation in order to publish or distribute materials does not constitute substantial resource usage. For example, if a document does not otherwise require substantial use of college resources, then placing the document on the D2L course management system which is paid for by LCC or publishing the book with the LCC Open Learning Lab Pressbooks or WordPress systems does not constitute substantial use in creation.

5. *Is the subject or nature of the copyright material relevant to or part of the scope of the courses that professor is qualified to teach?*

If the materials created are outside the subject or scope of the courses taught by that faculty member, then the copyright belongs unambiguously and without restriction to the faculty member. The college has no rights to use of those materials. For example, a physics professor writes a fictional children's story, or an economics professor writes an article, booklet, or makes a video explaining some advanced, graduate level concepts in economics. The physics professor doesn't teach children's literature. An economics professor at LCC does not teach graduate-level courses. Therefore, such works would unambiguously be the copyright of the faculty member.

However, let us suppose a faculty member creates original teaching materials to be used in courses for which that faculty member was hired and is qualified to teach. In other words, let's use an example of a history professor who creates some materials to be used in teaching a history course taught at LCC. It does not matter whether that particular professor is assigned to that course at that time, as long as it is a course the professor is considered qualified to teach. Further, let us assume this particular work was not specifically assigned by a supervisor (see question 3 above) and it does not require substantial college resources (see question 4 above). In this case, where all of the following conditions are met:

- a) the work is teaching material usable in LCC courses for which the professor is qualified,
- b) the specifics of the particular work were not assigned by a supervisor, and
- c) there is no substantial use of college resources,

then, the professor retains ownership of the copyright *but* the college is granted a limited license to copy, reuse, remix, and redistribute the materials for educational (teaching) purposes within LCC. The college is not allowed to commercialize or monetize the work, or to redistribute it outside of LCC. The professor retains those rights as part of the copyright.

6. *Is the work entirely an original creative work such that it is copyrightable? Or, is the work non-copyrightable material or a derivative work or a collection of other copyrighted works?*

If the work is not copyrightable because it is one of the types of materials excluded from copyright by law, then there is no copyright, and neither the faculty member nor the college "own" the work. If the work is not entirely original, but is a derivative creation, adaptation, collection, or compilation of other copyrighted works then only the original changes/additions may be copyrighted and they may be subject to limitations from the original copyright owners. In academic work, derivative works are very common and both faculty and college administrators/staff are advised to not make overly broad assertions of copyright or ownership. For example, many tests, especially if created by curating

questions from a test bank or shared from another professor are actually derivative collections and may not have any original copyrightable content. Similarly, much of what is often referred to as an “online course” in a learning management system like D2L is actually only a derivative work or a collection of other works. For example, if the contents of a course shell contain primarily documents that were created elsewhere and have their own copyright, then the D2L “course” is more like an anthology of copyrighted works and should be considered a derivative work.

7. *Has the faculty member, as copyright owner, assigned an appropriate open license to the work such as a Creative Commons or GPL license?*

If the copyright owner assigns an open license, such as Creative Commons, GPL, or Apache licenses, then that open license is sufficient to meet all the requirements described in question 4 above. The open license replaces any other license the college may be entitled to under this policy. It is the faculty member’s choice whether to openly license their works, but it is strongly recommended to do so. Openly licensing academic works promotes and facilitates the work of all faculty to the benefit of students.

The Six Common Rights Situations for LCC Faculty

After analyzing and answering the above “Seven Questions,” the status of a particular creative work is likely to be one of the following four situations.

1. **A prior, written agreement exists defining ownership and rights.** Written agreements defining a particular creative work and who owns what and who get what usage rights will override other considerations. An advance, specific written agreement governs the rights.
2. **The faculty member owns all rights; LCC has no usage rights.** This would include those materials not specifically assigned by a supervisor or not related to LCC courses the faculty member is qualified to teach. Also this pertains to materials that did not require substantial college resources to create.
3. **The faculty member owns copyright, but LCC is entitled to a limited license for use for educational purposes.** This includes teaching materials the professor creates that are relevant to the courses the professor is qualified to teach. The materials did not require substantial college resources beyond normal provision and were not specifically assigned by a supervisor.
4. **The Faculty member owns copyright, but has assigned an open license (Creative Commons or similar).** This includes teaching materials the professor creates that are relevant to the courses the professor is qualified to teach. The materials did not require substantial college resources beyond normal provision and were not specifically assigned by a supervisor. In this case, unlike case #3 above, no separate license is necessary for LCC because the open license provides the same permissions.
5. **LCC owns the copyright.** These resources were either specifically assigned as part of the professor’s duties by a supervisor or are teaching materials that required substantial use of college resources to create.
6. **The Work is derivative or a collection.** These situations are complex and depend on the ownership, rights, permissions, and licenses of the included works. Ownership and scope of rights will vary.

Other Restrictions on Usage Rights of Copyrighted Material

There may be other legal restrictions on the use, reproduction, or distribution of faculty created material even if the faculty member owns the copyright. For example, if FERPA or HIPPA laws are relevant, they may restrict some usages.

Open Licenses and OER

I create Open Educational Resources (OER). Why think about copyright?

First, only the owner of the copyright is legally able to assign an open license such as Creative Commons to a work. In plain language, this means that if the college owns the copyright (situation #5 above), then you, the professor, cannot legally assign a Creative Commons license to the work. You may only assign CC licenses to materials you own.

Second, as noted in the previous sections on copyright, derivative works and collections are complex regarding rights. The copyright owners of the underlying original works may not allow the derivative work you have planned. If, however, open licenses such as Creative Commons licenses have been assigned to the works you are compiling, collecting, remixing, or revising, then you are in the clear so long as you comply with the terms of those licenses. Creative Commons licenses make it easy and clear for you to know what you have to do to legally comply.

Faculty Questions on Copyright

I have a sabbatical. I have to write something as part of my sabbatical. Who owns it?

The professor owns the copyright. If the materials created involve teaching materials for courses the professor is qualified to teach, then LCC will acquire a limited license to use the materials. If the professor assigns a Creative Commons or other open license to the work, then LCC's interest is met through the open license.

Sabbatical leaves are an ordinary contractual benefit for many LCC faculty. The pay received while on sabbatical is ordinary, normal income. It is not beyond the normal provision, therefore it does not constitute substantial use of college resource. Further, while a sabbatical involves an agreement to research and create something, the idea and proposal for what to research or create lies with the professor. The professor proposes both the work and the timing. Therefore it is not a supervisor-assigned specific assignment. An exception would be if the particular work involved some other substantial use of college resources such as editing assistance from Media Services.

I have an OER Incentive Award. Who owns it?

The professor owns the copyright but must assign a CC license according to the rules of the grant program. In 2017, the LCC Board and administration instituted an OER Award program wherein faculty members may propose to adopt, revise, remix, or create various OER teaching materials. In return they would receive some limited financial support in the form of fixed honoraria when the task is completed and the teaching materials used in class.

This situation appears at first to be both a specific assignment of qualified teaching materials and a substantial use of college resources (i.e. beyond normal provision). However, a closer examination

shows two facts that mean the professor owns the copyright. First, the terms of the grant agreement, as written by the college, require that on-the-job time not be used for this work. Reporting of hours is required but it is made clear that the compensation is not based upon the hours worked. Therefore, this work is outside the scope of employment since the college states it must not be done during the time used for employment.

Second, and more significantly, professor ownership of the creative work involved in an OER award is implicit in the requirements of the award. The terms of the award by the college require the recipient professor(s) to assign an open license (Creative Commons license). Since legally only the owner of a work can assign an open license, the college has implicitly stated that the professor(s) is the owner of the copyright.