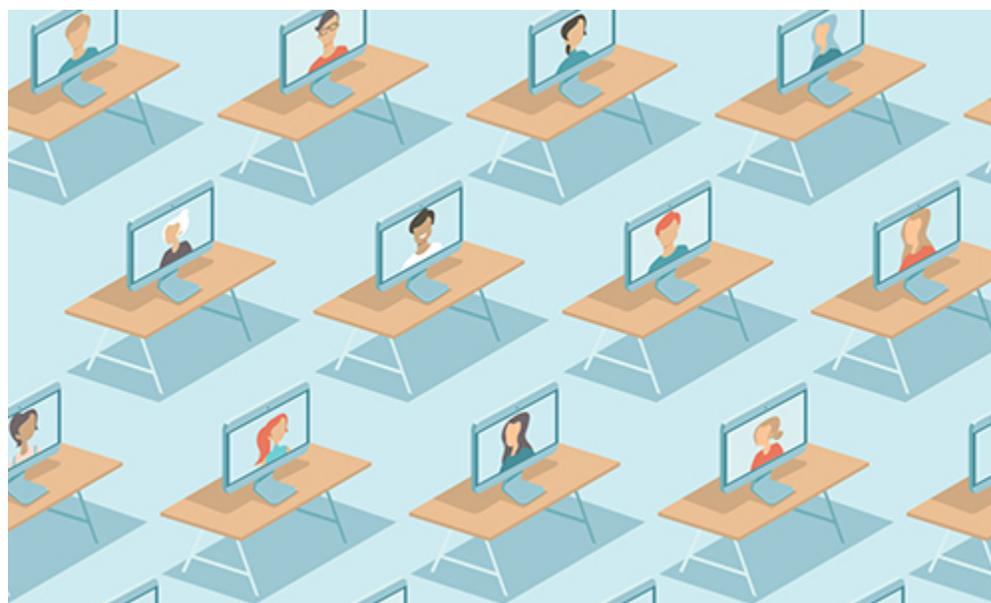# Academic Freedom in Online Education

By Jonathan Poritz and Jonathan Rees

21-27 minutes

The AAUP has been defending academic freedom for more than a century now, and anyone who has paid close attention to the organization's history will not be surprised that the AAUP was quick to recognize the principles at stake in the rise of online education. The AAUP issued its *Statement on Distance Education* (later retitled the *Statement on Online and Distance Education*) in 1999. It reads, in part, "A faculty member engaged in distance education is entitled to academic freedom as a teacher, researcher, and citizen in full accordance with the provisions of the

1940 *Statement of Principles on Academic Freedom and Tenure*." As important as that principle remains, more recent changes in online education technology require that it be applied in a variety of new ways.

In the broadest sense, there are two kinds of online settings that deserve consideration. The first is education that takes place entirely online. The second includes face-to-face classes that are sometimes online (widely known as the hybrid model) and fully face-to-face classes that depend on online tools like a learning management system (LMS). Fortunately, the AAUP's basic principles can guide both faculty members and administrators as they divide decision-making authority over a host of important issues that apply in both of these contexts. Unfortunately, these principles aren't nearly as accepted in online spaces as they are in face-to-face settings, which threatens the academic freedom of both online instructors and faculty members who use online tools with in-person courses. Since online teaching has been performed mostly by adjunct instructors (at least until the start of the COVID-19 pandemic), the problems confronting those faculty colleagues are particularly acute.

Bringing AAUP Principles Online

The AAUP's 1999 *Statement on the Freedom to Teach* is a good starting point for bringing core AAUP principles into online settings. "The freedom to teach," it explains, "includes the right of the faculty to select the materials, determine the approach to the subject, make the assignments, and assess student academic performance in teaching activities for which faculty members are individually responsible, without having their decisions subject to

the veto of a department chair, dean, or other administrative officer." In some cases, exact parallels exist between online classes and classes in physical spaces. For example, both kinds of classes assign course materials, and in most circumstances the freedom to select those materials should rest with teachers in both spaces.

But what about the nature of the classroom itself? During the COVID-19 pandemic, many classes have switched to the Zoom platform, but neither faculty members nor universities themselves have the same level of control over Zoom as they do over physical classroom spaces on campus. "Zoom Deleted Events Discussing Zoom 'Censorship'" reads the headline of a recent *Buzzfeed* article that illustrates the risks of relying on external platforms. The grounds for canceling the event in question were that the topic violated Zoom's terms of use—terms that are, of course, set unilaterally by Zoom. The same general phenomenon of outside corporate interests determining the nature of academic activity extends to other technologies commonly employed on campuses everywhere.

Similarly, the learning management system was invented in the 1990s as a way for colleges and universities to move their classes online faster. Somehow, LMS operators managed to convince institutions across the world that all courses, online or otherwise, should operate through their products. In an increasing number of colleges and universities around the country, use of the LMS—or some components of the LMS (for example, just the gradebook and syllabus)—in all classes has become mandatory, or at least so strongly encouraged that it is effectively required.

The primary problem with the LMS is that it sets a framework for

the way faculty members interact with their students. The structure of the LMS greatly affects the nature of the assignments faculty members are able to give, the way they assess student learning, and especially the materials they can select to teach. Some of these issues depend on the decisions made and policies set during the installation of the LMS on campus. Others depend on decisions made by the LMS company itself on behalf of all its client campuses. A department chair or dean shouldn't influence decisions about curriculum and classroom management, and campus information technology staff or programmers working for outside companies shouldn't have that kind of control either.

Unfortunately, this problem is so subtle that it can be difficult to recognize. For example, an entirely numerical online gradebook cannot account for the extra consideration that a faculty member might give when determining final grades for students who make progress over the course of the semester. The order of the menu and links on the home page of a faculty member's course is a statement of priorities, and the ability of system administrators to add announcements to that page is an infringement on that individual's prerogatives as a teacher. The LMS can be a convenient tool to get faculty members who are not tech-savvy to switch to online instruction quickly. However, it is not particularly difficult for instructors with minimal technology skills to set up websites and class spaces that they alone control. The academic freedom of all faculty members should allow them to maintain that option, irrespective of any administrative calls for consistency across platforms.

Intellectual Property and Teaching Materials

While the ability to upload your own teaching materials to an LMS mitigates some design concerns, it raises new ones about intellectual property rights. Who has time to read the user agreements for their learning management systems? We all probably should. Colorado State University–Pueblo, where we teach, uses Blackboard, whose terms of use state, "By submitting, posting or displaying Content on or through the Products, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, host, store, copy, reproduce, process, adapt, modify, publish, transmit, create derivative works from, communicate, display, and/or distribute such Content in any and all media or distribution methods (now known or later developed) as part of providing any of the Products."

The dense legalese of these terms hides an important point about the rights faculty members have over their pedagogical (and scholarly) productions. Remember that creators automatically have a copyright in all of their "original works of authorship fixed in any tangible medium of expression," even without registration or other formalities, as soon as they create and fix those works. This includes both written works of scholarship or pedagogy in physical or in fixed electronic form (such as saved on your computer's hard drive) and recorded lectures, whether delivered synchronously or asynchronously. Copyrights give rights holders control over the reproduction, distribution, public performance, sale, and creation of adaptations of the protected works. These rights give faculty members the ability to protect the integrity of their work and also to prevent administrations from using recordings of lectures to cut faculty entirely out of the educational process.

At least, copyrights would give faculty members that legal bulwark

to their academic freedom if they were the rights holders for their creations. Unfortunately, under a doctrine in copyright law called "works for hire," the copyrights to works created as an expected part of employees' normal work belong to employers. However, US colleges and universities have traditionally ceded to faculty the copyrights to scholarly and pedagogical creations. But note that this "academic exception" to the works-for-hire doctrine, because it is not the default in copyright law, must be spelled out explicitly in a contract. The Connecticut State University system has proposed eliminating this protection from the next contract with its unionized faculty. If you don't know whether you are comfortably protected by this exception, stop reading this article and go check your contract or faculty handbook immediately!

Faculty members who are aware of the subtleties of issues surrounding intellectual property often want to exercise even more control than would simply be provided by the extremes of all-rights-reserved copyrights and abjuring all control over their works—say, by dedicating those works to the public domain. Since around the turn of the millennium, creators of all kinds have had the ability to choose from among six Creative Commons (CC) licenses, which give rights holders fine-grained control over how the public may use their creations. For example, by adopting the CC license known as CC BY-NC, a rightsholder can allow all uses and creation of derivative works so long as those uses are not for commercial purposes and proper attribution is given to the original author. This license is very popular among faculty members, probably because they might be willing to give their works to the public without seeking personal profit from those works but might find it inappropriate that someone else should be able to profit

from them.

Here we come back to those LMS terms of service. Armed with the academic exception to the works-for-hire doctrine in copyright law (you did check that you have that protection in your handbook or your contract, didn't you?), faculty members can exercise academic freedom and preserve the integrity of their work by using Creative Commons licenses—but not if the terms of service on the LMS they are required or strongly pressured to use give away to the LMS operator the rights to decide what to do with materials posted there!

Pressure from publishers masquerading as technology companies only increases this threat. As Joe Moxley noted in this publication back in 2013, "Publishers . . . hoard enormous war chests from sales of educational materials, and we should question whether they have taken control of teaching and learning processes that would be more appropriately owned and overseen by academics." Moxley's analysis points to the outsourcing of academic functions like online course development and assessment to undercut faculty prerogatives. Those threats still exist. However, when entire textbooks are moved online, faculty prerogatives are threatened even more.

Not surprisingly, the original 1999 AAUP *Statement on Distance Education* called for the protection of the rights of faculty members who served as content creators in online settings. Today, the ability of faculty members to choose the educational content that best meets their pedagogical goals is under threat. One serious threat comes from commercial publishers' so-called "inclusive-access models," under which students pay a relatively modest fee to gain access to all of the titles from a particular publisher. The

terminology that publishers use to describe these arrangements is pure gaslighting, as these would be better described as "mandatory payment schemes," under which students are often charged a course fee that goes directly to the publisher and have little idea that, in fact, they can opt out of the arrangement.

While saving students money is great, what are professors supposed to do if they are pressured to assign a particular book because it is part of such an arrangement? Or what if they prefer not to assign a digital textbook at all? Or would like to use one from a different publisher? Questions like, "Who makes the final decision about assigning the textbook in this course?" invariably appear in publisher surveys accompanying examination copies of physical textbooks. Such questions demonstrate that some faculty members don't have the freedom to choose their own textbooks. The freedom of faculty members to choose their textbook format is even more easily denied.

In fact, the creation of mandatory payment schemes, as well as a slight dip in the prices of textbooks over the last few years—after decades in which their prices have increased at around three times the rate of inflation—is largely a response to the rise of open educational resources. Creative Commons defines these resources as "teaching, learning, and research materials that are either (a) in the public domain or (b) licensed in a manner that provides everyone with free and perpetual permission to engage in the 5R activities": retaining, reusing, revising, remixing, and redistributing the resources. Essentially, open educational resources are pedagogical materials, including textbooks, that have been released by their authors—often faculty members who want to share their works with the academic community for the

betterment of teaching and to reduce the crushing financial burden of higher education today—under one of the more permissive Creative Commons licenses.

In a very real sense, only open educational resources afford faculty full pedagogical academic freedom: a commercial textbook under an all-rights-reserved copyright may not be customized and localized for an instructor's purposes in a particular class. Open educational resources, by contrast, are free to be adapted and customized, because of the permissive license under which they are distributed. Before the pandemic, widespread adoption of these resources, usually for in-person classes, had already saved students in the United States a combined total of around $1 billion, according to the Scholarly Publishing and Academic Resources Coalition. Nevertheless, open educational resources are usually born digital and certainly are easiest to share with zero marginal cost online. Classes that already used these resources were able to make the online pivot in response to COVID-19 more seamlessly.

Privacy Threats

In recent years, the AAUP has increasingly found itself endeavoring to protect the rights of faculty members who are harassed for comments made on social media. Records of faculty interactions with students may pose even bigger threats to academic freedom. Imagine a faculty member who has raised the ire of administrators. If that faculty member teaches only online, hostile parties can conduct a prolonged fishing expedition by monitoring the class in a way that would be impossible in a face-to-face setting.

Consider the case of University of Mississippi sociology professor James M. Thomas, who in September 2020 participated in a two-day scholar strike for racial justice. In response, the Mississippi state auditor began an investigation of Thomas and called for his dismissal. As part of that investigation, the auditor subpoenaed "copies of all documents uploaded to Professor James Michael Thomas's University of Mississippi Blackboard account in the 2020 fall semester. This is not limited to but should specifically include all class syllabi, class lesson plans, and all course materials." Also subpoenaed were "copies of any communication sent or received by Professor James Michael Thomas through his University of Mississippi Blackboard account" and all of Thomas's university emails from the semester leading up to his participation in the protest. As of this writing, the dispute has not been resolved.

Again, AAUP principles pertain here, but they have yet to be specifically applied to the tools that have come to define the modern online classroom. The AAUP has already noted in its report *Academic Freedom and Electronic Communications* that "surreptitious recording of classroom speech and activity may exert a chilling effect on the academic freedom of both professors and students." The AAUP report cited as an example the taping of a Michigan professor's lectures by a student, but the overdependence on the LMS means that all content and discussion in any class are open to anyone with access to the system. This is most decidedly not the case with courses taught in physical classrooms. Moreover, if the intruding party is one's own administration, then this kind of activity could influence the normal tenure or appointment-renewal processes. The potential threat to academic freedom in this sense is much more serious, because it

is hidden from view and might be more widespread than anyone imagines.

While the ability to get online quickly and easily might be a price that some faculty members are willing to pay, the widespread use of online tools of all kinds means that safeguards for academic freedom need to be extended explicitly to guarantee the faculty's rights in new settings. Without such protections, far fewer faculty members will ever choose to teach online, or they will forego online tools that might be helpful to them. Moreover, extending the benefits of shared governance to online settings would likely benefit faculty members, students, and administrators alike—just as it has in face-to-face settings.

The adoption of a more expansive definition of "the classroom" can help protect faculty members who teach online from threats posed by many new technologies. Therefore, every campus should incorporate language into faculty handbooks acknowledging that, as the AAUP put it in the 2004 report *Academic Freedom and Electronic Communication*, "the 'classroom' must indeed encompass all sites where learning occurs—websites, home pages, bulletin boards, listservs, etc." And as the AAUP recognized in its 2013 revision of that report, that need has become only more acute. At the very least, any definition of the classroom must include not just entirely online classes, but any instance in which faculty members teaching in person use online tools as well. Ideally, this statement would also recognize that faculty members maintain their prerogatives to select course materials they wish to use in an online setting, including programs and platforms.

Updated language on academic freedom applicable to today's

technologies would also recognize a reasonable expectation of privacy in those settings and suggest protocols for notifying faculty members whose privacy has been violated in a security failure or needs to be violated in some formal investigation.. At the very least, any electronic oversight of online teaching should be disclosed to the professor. While there might be advantages to coordinating online classes in a single place at any university, faculty members deserve the right to reject any or all elements of a campus's LMS if they have sound pedagogical reasons to do so. Faculty members should also be able to opt out of any mandatory electronic textbook requirements not decided in conjunction with other faculty members, especially if their alternative is an open educational resource.

Defending Your Rights

You and your faculty colleagues can take steps now to address these academic freedom issues before they become a problem. Start by making sure that faculty members on your campus have a significant role in selecting the learning management system before a contract is signed (or before it is renewed). Since the selection of an LMS may be the single most important decision affecting all teaching and learning on campus, meaningful faculty involvement should be shared governance 101. If you are able to participate in an LMS contract decision, look at the intellectual property policies. Find out about the degree of customization possible for individual instructors. Ask everyone involved who has access to the day-to-day operations of courses. Set guidelines for when anyone, including information technology staff, can gain access to the work of instructors.

Then enshrine protections in your faculty handbook or collective bargaining agreement. Explicitly extend whatever academic freedom language exists to your colleagues who are teaching entirely online. Protect the right to privacy of all instructors who are using your learning management system. Establish guidelines that spell out under what circumstances materials from inside the LMS can be used in tenure and promotion decisions (such as if the faculty member decides to submit them). Make sure that your handbook clearly supports the academic exception to the works-for-hire copyright doctrine, not only for tenure-line faculty but for all instructional faculty if possible. If your administration refuses to grant contingent faculty the copyrights to their pedagogical materials, as is all too common, it might at least be willing to release all of those materials under a Creative Commons license, to benefit instruction at other institutions and, in the future, at your institution. Perhaps most important, preserve the freedom for faculty to teach using tools outside the LMS or to bypass the LMS entirely.

The traditional prerogatives of faculty members teaching online or using online tools haven't been tested extensively yet, but at the moment the prospects for the future look bleak on this front. During the COVID-19 pandemic, the popularity of online tools and systems for remote teaching has opened up an opportunity for more unwarranted and centralized supervision of faculty teaching than ever before. As a result, academic freedom is in danger. The extraordinary crises instigated by the pandemic have swamped higher education and made it more difficult to keep up with the threats to academic freedom from countless competing interests. The effects of this particular threat may not be apparent yet, but

taking steps now to support every faculty member teaching online could prevent even bigger threats from emerging in the future.

Jonathan Poritz ([https://poritz.net/jonathan)](https://poritz.net/jonathan) *is associate professor of mathematics and open educational resources coordinator at Colorado State University–Pueblo. Jonathan Rees is professor of history at Colorado State University–Pueblo and a member of the AAUP's national Council. They are coauthors of* Education Is Not an App: The Future of University Teaching in the Internet Age.