

# More OER for Free!

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## Land acknowledgement

Before we begin, I must acknowledge that I am physically located at this moment within the unceded territory of the Ute Peoples. The earliest documented people in this area also include the Apache, Arapaho, Comanche, and Cheyenne. An extended list of tribes with a legacy of occupation in this area can be found here: [Colorado Tribal Acknowledgement List](#).

## Legal acknowledgement

Another thing: **I Am Not A Lawyer**<sup>1</sup>, and even if I were a lawyer, **I would not be *your* lawyer.**

Therefore, nothing in this presentation should be construed as legal advice. You have been warned!

Another warning (and apology): the little I know about the law is quite centered on the United States. In fact, much of this talk is motivated by issues in the US copyright system ... but, *mutatis mutandis*, some of this may be relevant in many other jurisdictions.

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<sup>1</sup>In fact, legal expertise seems to have skipped a generation in my family: my mother is a [retired] judge and one of my sons is a law school graduate. But, while I have passed the CopyrightX course from Harvard Law School and done various trainings such as the CC Certificate course and the University of Amsterdam International Copyright Summer Course, I have no legal degree or experience.

## The AAUP

I joined the [American Association of University Professors](#) [AAUP] because of its declarations such as

*Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.*

from the [1940 Statement of Principles on Academic Freedom and Tenure](#)<sup>2</sup> and many other actions and positions, including the publication of [Academic Freedom in Online Education](#) by Jonathans Poritz and Rees, in [Academe: Magazine of the AAUP](#) (2021)<sup>3</sup> whose conclusion contains the admonitions

*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.*

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<sup>2</sup> which was built on the [1915 Declaration of Principles on Academic Freedom and Academic Tenure](#)

<sup>3</sup> Note: I convinced them to let us license it [CC BY-NC-SA 4.0!](#)

## The issues

There are several issues which need explanation:

1. the “works-for-hire copyright doctrine” [W4H]
2. the “the academic exception to the W4H doctrine”
3. what that has to do with tenure-line vs contingent faculty
4. how CC licenses can help

The US Copyright Act is [17 U.S.C.](#) Within that, [17 U.S. Code §101 - Definitions](#) says:

A “work made for hire” is–

- (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, if the parties*

which matters because [17 U.S. Code §201 - Ownership of copyright](#) states

- (b) **WORKS MADE FOR HIRE.**– *In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.*

The default, then, is that the copyrights to works prepared by an employee in the course of their employment belong to their employer!

## The [traditional] academic exception to the W4H doctrine

I would guess that most OER are AACed<sup>4</sup> by academic employees in the course of their employment! So it seems that would mean the copyrights to most OER should be owned by the academic institutions where their authors/adapters worked....

Maybe not? The clause “..unless the parties have expressly agreed otherwise...” in [17 U.S. Code §201 - Ownership of copyright](#) allows for employment contracts (or some other legal agreement) to leave copyrights to works prepared by an employee in the course of their employment with the employee themselves.

This is very commonly done in academia, where it might be called the *traditional academic exception to the W4H doctrine*.

But note:

**Since the default in the law is that the employer gets the copyrights, the *academic exception* must be written down somewhere explicitly or it has no force.**

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<sup>4</sup>I'm trying to convince OER folks to use the new verb “to AAC,” meaning “to adopt, adapt, or create,” and pronounced “ace.”

# So what do academic employment contracts say?

## Globally?

You tell me! (Really, please tell me! I know W4H rules are very different)

## Across the US?

A recent publication

In *Keeping with Academic Tradition: Copyright ownership in higher education and potential implications for Open Education* in *The Journal of Copyright in Education and Librarianship* (volume 5, number 1, 2021-2022) by the fabulous Lindsey Gumb and William Cross<sup>5</sup>

finds<sup>6</sup> that

*...while the ownership of scholarly works overwhelmingly belongs to the person who created the work, variables such as unusual support and potential uses affect copyright ownership.*

## In Colorado, USA<sup>7</sup>

In my personal experience, individual creators owning their curricular materials is absolutely *not* the overwhelming majority of cases.

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<sup>5</sup> and licensed CC BY 4.0, yay!

<sup>6</sup> from a survey of 109 public and private two- and four-year postsecondary institutions of higher education in the U.S.

<sup>7</sup> Where I live at the moment, and have worked with the open ed community for a long time



## Academic employment contracts in Colorado, USA

Working with the Colorado AAUP, I have reviewed IP policies at many public institutions of higher education in Colorado. According to my unscientific collection of anecdotes:

- Tenure-line faculty almost always keep all of their copyrights. Other IP is less clear and mostly varies depending upon how research-oriented is the institution.
- Even tenure-line faculty may not have complete copyright control when some special (internal) project is created.
- Non tenure-line faculty rarely keep any of their IP rights.
- All IP policies are highly reactive to external forces, particularly grants and fads the blow through leadership (like online ed).
- The policies are **a horrific mess**: self-contradictory, poorly written, subject to change without notice or reason or logic, and interpreted by campus attorneys who know very little about IP law (except at R1s, where there is some knowledge of patent law in isolated corners).
- Policies are written and/or have been interpreted so that there is **a lot** of curricular material whose copyright is owned by the institutions under W4H.

## Consequences

There is **a lot** of curricular material which could be OER, and was produced by employees of public institutions of higher education [in Colorado, at least – and, I believe, in many other US states].

I know of no case in Colorado where a public institution of higher education is selling curricular materials to which it holds copyright in order to make additional revenue. I do know of cases where such an institution has refused to apply for state OER grants because of the public licensing requirement that would come along, presumably in order to keep open the sales of curricular materials as a possible future profit center.

I also know of “road-warrior” adjuncts who teach the same, or very similar, courses at several institutions, who do not own the copyrights to the curricular materials they develop in each employment situation. In theory, they are violating copyright laws by using the works they themselves authored, when using those materials at their second (or third or...) job!

# Proposal 1

## A Modest<sup>8</sup> Proposal

In all cases where copyrights over pedagogical materials are owned by the employing public educational institution at any level (primary, secondary, or tertiary) because of W4H, those materials should be released with an OER-compatible Creative Commons license, with a specification that attribution statements should also mention the natural person who actually authored the materials.

This could be done by institutional policy, by public education regulators, or by state law.

It has the flavor of the dictum of the Open Access movement which goes: publicly funded research should appear in publicly accessible journals. Which principle has some teeth in US law, or at least regulation.

It is also related, in the patent law situation, to the [Bayh-Dole Act](#)

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<sup>8</sup> meant non-ironically, here

## Objections

This is “coercive,” and we don’t like to coerce people to be open.

Actually, I have no problem with coercing people to work for the common good; or, rather, not assuming that everyone is always motivated primarily by the desire for personal profit maximization.

The Bayh-Dole Act has coercive elements, as do the NIH regulations of open access publishing.

Also, US Government employee’s works, produced in a situation where W4H would apply, are born into the public domain – that sounds coercive for those employees, e.g., civilian academics at the service academies! But they have no trouble hiring people anyway!<sup>9</sup>

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<sup>9</sup>YIL that the situation with this was changed in 2019 to be much more complicated! see [17 U.S. Code § 105 - Subject matter of copyright: United States Government works](#)

### A Less Modest Proposal

In all cases where copyrights over pedagogical materials are owned by the employing educational institution – public or private!<sup>10</sup> – at any level (primary, secondary, or tertiary) because of W4H, those materials should be released with a OER-compatible Creative Commons license, with specification that attribution statements should also mention the natural person who actually authored the materials.

This generalized Proposal 1 to all institutions, public and private. Therefore, it would not be possible (or much harder) – for the private ones – to implement with regulation. Accrediting organizations, maybe? Changing cultural norms so that every institution did it? Hooking it to non-profit status?

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<sup>10</sup>but presumably only the non-profit ones

### A Very Modest<sup>11</sup> Proposal

Pedagogical materials produced in educational institutions – public or private! – at any level (primary, secondary, or tertiary should all be released with a OER-compatible Creative Commons license.

Here we are skipping the requirement of the W4H status. Very ambitious, but look at the AAUP statement at the beginning of this presentation and tell me this proposal doesn't make sense.

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<sup>11</sup>very ironic, here

## Always cite yourself...

*The ideas in this presentation were also shared in a post for the [OER & Beyond](#) blog, for which I am the 2022 Contributing Editor.*

# Discussion!!

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<sup>12</sup>subject to [CC-BY-SA 4.0](https://creativecommons.org/licenses/by-sa/4.0/)