

“An Intellectual Production”:  
Influence of Law and Policy on Faculty Ownership of Copyright  
in Massachusetts and New Jersey

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## Abstract

This paper explores how the laws and policies underpinning the relationship between unionized faculty and colleges and universities help shape copyright ownership of online courses. Faculty unions at the University of Massachusetts and at New Jersey's state colleges and universities recently sought to secure, through collective bargaining, copyright ownership of online courses. Using the framework developed by the Alliance for International Higher Education Policy Studies (AIHEPS) (Richardson, 2004), this paper explains how the Copyright Act, labor laws, state higher education policies, state budgeting, and campus curriculum decisions interacted to help produce similar results in Massachusetts and New Jersey.

Property is an intellectual production. The game requires coolness, right reasoning, promptness, and patience in the players.

--Ralph Waldo Emerson, 1860, p. 99

### Introduction

The question of who owns the copyright to online courses developed at colleges and universities is difficult to answer. The courses are part invention, and universities usually own the intellectual property rights to faculty-created inventions (Chew, 1992). Online courses are also part textbook, and most institutions “expressly disclaim university ownership of copyrights in traditional scholarly works, such as books and articles” (Lape, 1992, p. 262).

Between 1992 and 2002, an increasing number of leading research universities adopted copyright policies (Lape, 1992; Packard, 2002). Under these policies, most institutions—using language based on the Copyright Act—assert copyright ownership over expressly assigned works made for hire (Packard, 2002, p. 301) and works that make “significant or substantial use of university resources” (Lape, 1992, p. 257; Packard, 2002, pp. 295-297). Such resources usually do not include libraries, offices, classrooms, laboratories, and support staff (Lape, 1992, p. 257; Packard, 2002, pp. 295-297).

On unionized campuses, collective bargaining agreements could help clarify the copyright ownership issue, but copyright ownership provisions, and broader intellectual property provisions—encompassing patents and copyrights—have only recently started to appear in collective bargaining contracts. “Although a number of unionized institutions have bargained intellectual property clauses that provide for faculty ownership, most have not” (Slaughter & Rhoades, 2004, p. 173).

Gary Rhoades (1998), in his study of faculty collective bargaining agreements, found “the answer to who owns the [intellectual] property depends on the condition in which it was produced” (p. 241). Rhoades (1998) identified three issues that determine intellectual property ownership: (1) whether the faculty member independently produced the work; (2) whether the faculty member used institutional resources and/or personnel time to produce the work; and (3) whether

the institution commissioned the work (pp. 241-242). Some contracts provide royalties to faculty who develop technology-based courses, “even if other personnel deliver the courses” (Rhoades & Maitland, 2004, p. 76).

Recently negotiated collective bargaining agreements in Massachusetts and New Jersey each included, for the first time, a provision covering copyright ownership. The provisions, while different from each other, broadly follow the criteria identified by Rhoades (1998). In their collective bargaining agreement covering 2004-2007, the faculty at the University of Massachusetts secured copyright ownership over “course content and materials” they developed for “distance learning” courses (§ 35.9). In New Jersey, the 2003-2007 collective bargaining agreement between the state colleges and universities and their faculty provided the faculty with copyright ownership of traditional academic works, as well as “distance learning materials” and “courseware” that are not created with “more than incidental use of College/University facilities or financial support” (Art. XXXIII).

Although Rhoades (1998) explains the criteria used by universities and unionized faculty to determine copyright ownership, the criteria themselves flow from the relationship between faculty unions and public colleges and universities. The purpose of this paper is to understand the forces that shape the relationship between unionized faculty and public institutions of higher education, and how those forces interact over the issue of copyright ownership of online courses.

Several forces underpinning the relationship between faculty unions and public institutions of higher education worked together to influence the copyright-ownership provision negotiated in the faculty contracts at UMass and the New Jersey state colleges. These forces included development of the Copyright Act, state labor laws, state higher education structures, levels of state funding for higher education, and campus-based decisions to incorporate online courses into the curriculum. Not all of these influences had an equal effect in both states, but together they help describe the legal and policy contexts in which faculty unions and colleges and universities operate when considering copyright ownership.

#### Methodology

To understand the relationship between unionized faculty and public institutions of higher education, and how the forces underpinning that relationship influence copyright ownership, it is helpful to apply the conceptual framework developed by the Alliance for International Higher Education Policy Studies (AIHEPS) (Richardson, 2004). The AIHEPS model explains the interaction among federal, state, and local actions regarding higher education. The key concept is the “rules of the game,” or the “rules in use” (Richardson, 2004, p. 2). Rules of the game include “formal and informal norms and values” that determine how actors make decisions in situations such as planning, program review, and resource allocation within a discrete action arena, such as federal (*e.g.*, a national government), state (*e.g.*, a state system of higher education), and institutional (*e.g.*, an institutional governing board) (Richardson, 2004, p. 9; see also Ostrom, 1999).

Under the AIHEPS model, the rules of the game fall into three categories: (1) constitutional rules, which include constitutional provisions and statutes; (2) collective choice rules, which include system design, planning, and fiscal policy made through the “interface” between government and higher education; and (3) operational rules, which implement decisions as influenced by constitutional or collective choice decisions (Richardson, 2004, p. 9). These three sets of nested rules—constitutional, collective choice, and operational—can be observed in three different arenas: federal, state, and institutional (Richardson, 2004, p. 11).

Findings by Slaughter and Rhoades (2004) and Rhoades (1998) indicate that the AIHEPS framework would be a sharp lens through which to view the relationship between faculty unions and public institutions of higher education, and how the relationship influences ownership of intellectual property. National, state, and campus rules are interacting influences in both intellectual property and collective bargaining. While patents and copyrights “are the province of the federal government,” states “have authority for shaping institutional policy for public universities and colleges,” and “that authority is sometimes delegated to state systems of higher education, sometimes to the institutions themselves” (Slaughter & Rhoades, 2004, p. 81). Moreover, “State and institutional policy sometimes preceded and always interpret and implement

federal policies and statutes” (Slaughter & Rhoades, 2004, p. 81). With regard to labor laws, state legislatures have “a tremendous impact” on the legality and scope of collective bargaining in higher education (Rhoades, 1998, p. 18).

### Constitutional Rules

Constitutional rules in use “reflect such relatively stable policy parameters as basic attributes of higher education and the constitutional and statutory provisions that shape the enterprise” (Richardson, 2004, p. 9). Two major constitutional rules were at play when the copyright-ownership provisions were negotiated in Massachusetts and New Jersey. The first is federal copyright law, and the second is state labor laws.

### *Copyright Law*

In the United States, the concepts of protecting the property interests of authors and inventors, and providing useful information to the public, are embedded in the Constitution. The Constitution grants Congress the power “to promote the Progress of Science and useful Arts, by securing, for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” (U.S. Const. art. I, § 8, cl. 8).

### *What Can Be Copyrighted*

The Copyright Act of 1976 defines eight categories of works of authorship. They are literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works (17 U.S.C. § 102 (2007)).

The Copyright Act protects a work from the time it is created. The Act provides copyright protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device” (17 U.S.C. § 102(a) (2007)). Stated more simply, “[A] work is protected at the very instant that, for example, a word is written on a page or encoded onto a computer disk” (VerSteege, 1990, p. 386). An author is not required to register a

copyright, or even affix a copyright notice to the work to secure copyright protections (17 U.S.C. § 408(a) (2007)).

### *Ownership*

Copyright ownership “vests initially in the author or authors of the work” (17 U.S.C. § 201(a) (2007)). Copyright ownership lasts for the life of the author plus 70 years (17 U.S.C. § 302(a) (2007)), or in the case of a work made for hire (described below), 95 years from the first publication of the work or 120 years from its creation, whichever comes first (17 U.S.C. § 302(c) (2007)).

Copyright owners enjoy exclusive rights to their works under the Copyright Act. This bundle of rights includes: (1) reproducing the work in copies or phonorecords; (2) preparing derivative works; (3) distributing copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, performing the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, displaying the copyrighted work publicly; and (6) in the case of sound recordings, performing the copyrighted work publicly by means of a digital audio transmission (17 U.S.C. § 106 (2007)).

Another stick in the bundle of rights constituting copyright ownership is the right of transfer (17 U.S.C. § 201(d) (2007)). A “transfer of copyright ownership” is an assignment, exclusive license, and any other conveyance other than a nonexclusive license (17 U.S.C. § 101 (2007)). All transfers, other than those by operation of law, must be through “an instrument of conveyance, or a note or memorandum of the transfer” in writing and signed by the transferor (17 U.S.C. § 204(a) (2007)).

*Works made for hire.* The law allows an exception to the general rule that the creator of the work is considered the author. Under the concept of “works made for hire,” the author—and therefore the owner of the copyright—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 under which 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 agree in a written instrument signed by them that the work shall be considered a work made for hire” (17 U.S.C. § 101).

A healthy debate exists among legal scholars whether the copyrightable work of faculty members that is not specially ordered or commissioned is work made for hire (Klein, 2004, pp. 159-166). These legal arguments all stem from *Community for Creative Non-Violence v. Reid*, a U.S. Supreme Court case that considered whether a sculptor working for no fee for a nonprofit organization to create a statue to depict the plight of the homeless was an employee creating a work within the scope of his employment (490 U.S. 730 (1989)). The Court devised a 13-point test to define an employee under the Copyright Act’s definition of work made for hire (490 U.S. at 751-52; 17 U.S.C. § 101(1)). Analyzing this test, scholars who argue that faculty-authored works are not works made for hire include Dreyfuss (1987); Kilby (1994); Gorman (2000), and Kwall (2001). Scholars who find that faculty-authored works are works made for hire include Simon (1982-83); Wadley and Brown (1999); Laughlin (2000); and McSherry (2001).

*Academic exception.* An even healthier debate focuses on the “academic exception” from the Copyright Act (Klein, 2004, pp. 167-171). The academic exception—a time-honored tradition that allows teachers and college faculty to retain copyright ownership of their work—grew out of case law interpreting the Copyright Act of 1909 (*Sherrill v. Grieves*, 57 Wash. L. Rep. 286, 20 C.O. Bull. 675 (1929); *Williams v. Weisser*, 273 Cal. App. 2d 726, 78 Cal. Rptr. 542 (1969)). It is unclear whether the exception survived the amendments to the Copyright Act in 1976. The influential Seventh Circuit Court of Appeals is split on this issue. Supporting the exception, the judge in one case wrote that “reasons for a presumption against finding academic writings to be work made for hire are as forceful today as they ever were” (*Hays v. Sony Corp. of Am.*, 847 F.2d

412, 416 (7th Cir. 1988)). The year before this decision, a judge in the same circuit wrote that the Copyright Act's work-made-for-hire provisions "were general enough to make every academic article a 'work for hire' and therefore vest exclusive control in universities rather than in scholars" (*Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1094-95 (7th Cir. 1987)).

Legal commentators who believe the academic exception still exists include VerSteege (1990), Lape (1992), and Laughlin (2000). Legal scholars who conclude that the academic exception is no longer good law include Simon (1982-83), DuBoff (1985), Dreyfuss (1987), and Wadley and Brown (1999).

Given the current state of flux over the academic exception, including the split in the Seventh Circuit between *Hays* and *Weinstein* and the debate among legal scholars, "what is clear is that without an explicit statutory foundation[,] the exception can no longer simply be assumed" (McSherry, 2001, p. 107). "The best way to resolve the ambiguity," according to Georgia Harper (2000), a national copyright expert and a university counsel at the University of Texas, is a university policy on copyright (p. 8).

### *Labor Law*

#### *National Labor Relations Act*

The National Labor Relations Act of 1935 (NLRA, or the Wagner Act, 29 U.S.C. 151 *et seq.*) is the federal law that governs collective bargaining between employers and employees. Enacted to address widespread strikes and the Great Depression in the 1930s (National Labor Relations Board, 1995), the law grants employees the right to form labor organizations and to deal collectively through these organizations with their employers. The Labor-Management Relations Act of 1947 (the Taft-Hartley Act, 29 U.S.C. § 141) amended the NLRA by, among other provisions, creating the NLRB general counsel position, making unions as well as employers subject to the NLRB's unfair labor-practice powers, and imposing on unions the same requirement to bargain in good faith that the Wagner Act placed on employers (National Labor Relations Board, 1995).

The National Labor Relations Act defines “employer” and “employee” in narrow terms. The definition of “employer” excludes “any state or political subdivision thereof” (29 U.S.C. § 152(2)), and thus does not apply to public colleges and universities. Not all private institutions are covered under the law, either. Under the current rules of the National Labor Relations Board, the NLRA applies only to institutions with gross annual unrestricted revenues of at least \$1 million (29 C.F.R. § 103.1).

With regard to employees, the NLRA specifically excludes certain types of workers, including independent contractors and supervisors (29 U.S.C. § 152(3)). The U.S. Supreme Court further sharpened the definition of employee in two important cases. First, in *National Labor Relations Board v. Bell Aerospace Co.*, the Court excluded from the NLRA “managerial employees” who “formulate and effectuate management policies by expressing and making operative the decisions of their employer” (416 U.S. 267, 288, 272 (1974)).

Building on the *Bell Aerospace* decision six years later, the Court held that faculty at private colleges and universities are “managerial” personnel—and therefore ineligible to form unions under the NLRA—in *National Labor Relations Board v. Yeshiva University* (444 U.S. 672 (1980)). The Court based its ruling on faculty members’ authority over course offerings, teaching methods, grading policies, admission standards, and graduation decisions (444 U.S. at 686).

#### *State Labor Laws*

At public institutions of higher education, state laws can allow faculty and staff to unionize and collectively bargain. Generally, in states that have adopted such laws, public employees have the right to organize and to select a representative to negotiate on their behalf with their employer. Once a representative is elected by a majority of the employees in a specific bargaining unit, the employer must bargain with the representative, and individual employees may not negotiate with the employer over issues that are mandatory subjects of bargaining (Kaplin & Lee, 2006, p. 278).

“Mandatory” subjects of bargaining under state law usually follow the language of the NLRA, which defines “mandatory” subjects to be “wages, hours, and other terms and conditions

of employment” (29 U.S.C. § 158(d)). Ambiguous language like “terms and conditions of employment” often appears in state labor laws, subjecting it to administrative and judicial interpretation. “Thus, the distinction between mandatory and permissive subjects is difficult to draw, particularly in postsecondary education, where employees have traditionally participated in shaping their jobs to a much greater degree than have employees in industry” (Kaplin & Lee, 2006, p. 294).

Massachusetts adopted the so-called “Baby Wagner Act” (Commonwealth of Massachusetts Labor Relations Commission, 2002, p. ii) in 1937 to provide bargaining rights to private-sector employees within the Commonwealth. State employees received the right to bargain with respect to working conditions, but not wages, in 1964 (MASS. GEN. L. ch.149, §178F). In 1973, most state and municipal employees in Massachusetts received full collective-bargaining rights (MASS. GEN. L. ch. 150E).

New Jersey originally adopted its Employer-Employee Relations Act in 1941 to help mediate labor relations in the private sector (Mastriani, 1998). New Jersey extended its law to the public sector in 1968 (N.J. STAT. ANN. § 34:13A-1 *et seq.*, P.L. 1968, c. 303). At that time, “only the states of New York and Wisconsin had enacted similar comprehensive legislation” (Mastriani, 1998, p. 1). New Jersey’s law authorizes representatives selected by the majority of the employees in a bargaining unit to be the exclusive representatives for collective negotiation of “terms and conditions of employment” (N.J. STAT. ANN. § 34:13A-5.3).

“The relationship between the state and higher education faculty is [an] important aspect of the policy dimension” (Richardson, Bracco, Callan, & Finney, 1999, p. 171). In Massachusetts and New Jersey, the state higher education structure significantly influences the relationship between the state government and the faculty at public institutions. Each state’s system determines the collective-bargaining process. As the “interface” between government and higher education, state systems—and the way they are funded—fall under “collective choice rules” in the Richardson (2004, p. 9) model.

#### Collective Choice Rules

Groups inside and outside state government help determine the distribution of authority between state government and institutions of higher education (Clark, 1979). In the “interface between government and higher education,” collective choice rules include decisions about “system design, planning, information collection and dissemination and fiscal policy as these persist or are altered in response to changing socioeconomic conditions and changes in governing coalitions” (Richardson, 2004, p. 9). Massachusetts and New Jersey have several collective choice rules in place, including the organization of their public higher education systems, public-sector collective bargaining, state appropriations for higher education, and their political systems.

#### *Higher Education Structure*

Each state's higher education system “operates in a policy environment that is the result of efforts over time to balance the often conflicting interests of academic professionals and . . . the market” (Richardson, Bracco, Callan, & Finney, 1999, p. 12). The market comprises economic forces, such as “competitive pressures, user satisfaction, cost and price, and student demand”; and noneconomic forces, such as “demographic characteristics and projections . . . political pressures, public confidence, and the availability of new technologies” (Richardson, Bracco, Callan, & Finney, 1999, p. 12). Over the past 15 years, Massachusetts and New Jersey have each restructured their higher education system to rebalance the interests of academic professionals and the market.

#### *Massachusetts*

In Massachusetts, the Board of Higher Education (BHE) oversees public colleges and universities. The Massachusetts system of public higher education consists of three tiers: the five-campus University of Massachusetts (UMass), nine state colleges, and 15 community colleges (Bastedo, 2005b). Each state college and community college has its own board of trustees. UMass has a centralized board for its five campuses at Amherst, Worcester, Boston, and two institutions merged into the system in 1991: Lowell (formerly the University of Lowell), and Dartmouth (formerly Southeastern Massachusetts University).

The current Board of Higher Education, established in 1995, had three predecessors: the first Board of Higher Education (1965-1980), the Board of Regents of Higher Education (1980-1991), and the Higher Education Coordinating Council, which replaced the Board of Regents in 1991 (Bastedo, 2005a, 2005b).

The original Board of Higher Education was created in 1965 to “plan and develop efficient coordination” among institutions, and to recommend budgets, approve new programs, collect data, and administer scholarships (Fitzgibbons, 2003). The board coordinated the public and private institutions, “but rarely engaged in self-regulation or control” (Crosson, 1996, p. 78).

The Reorganization Act of 1980 created the Board of Regents for Higher Education, which exercised significant centralized powers over all public institutions. The Board of Regents approved all campus budgets, distributed funding from a single line-item appropriation for the entire system, and had authority to approve and discontinue academic programs (Bastedo, 2005a). Institutions continued to lobby the legislature for greater funding for individual campuses, however, causing the Board of Regents to fail in its dual purpose to (1) control costs and program duplication among the institutions; and (2) serve as a barrier between the state government and the institutions (Crosson, 1996). A political fight between Governor Michael Dukakis and the legislature over filling the chancellor position in 1986 significantly diminished the influence of the Board of Regents (Crosson, 1996).

In 1991, Governor William Weld restructured higher education through two new entities. He created a cabinet-level secretary of education, who had responsibilities over elementary through postsecondary education, and was “chief adviser to the governor on all education matters” (Crosson, 1996, p. 92). Weld also eliminated the Board of Regents and decentralized governance authority through the Higher Education Coordinating Council (HECC) (1991 Mass. Acts 142).

The HECC had governing authority over the state colleges and county colleges, and coordinating authority over UMass. The five boards of trustees composing UMass were

combined into one system-level governing board. A chancellor served as the chief executive officer at each campus.

Four years later, in 1995, Governor Weld reconstituted the HECC into the new Board of Higher Education (BHE) (Tocco & Gill, 2002). The BHE has the statutory authority to approve and eliminate academic programs, establish institutional missions and goals, approve admissions standards, set tuition and approve fees, and set presidential salaries (MASS. GEN. L. ch. 15A, § 9 (2007)). The BHE selects the chancellor—the state’s chief executive for public higher education—and campus boards of trustees select campus presidents with BHE approval (Bastedo, 2005a, p. 556).

UMass has more autonomy than the other public sectors of higher education (as explained below under “Collective Bargaining”). “As a result, it is said that the BHE has ‘governing level authority’ over the state and community colleges and ‘coordinating level authority’ over the University of Massachusetts” (Bastedo, 2005a, p. 556).

#### *New Jersey*

New Jersey has two statewide coordinating agencies rather than one governing board, but also has three tiers of public higher education, as in Massachusetts. The three tiers consist of three public research institutions (Rutgers University, the New Jersey Institute of Technology, and the University of Medicine and Dentistry), nine state colleges and universities, and 19 county colleges.

In 1968, the State established the Department of Higher Education and the Board of Higher Education headed by a powerful chancellor, who served as a member of the governor’s cabinet. The Department of Higher Education had both coordinating and governing responsibilities. “Thus, in addition to coordinating statewide planning and program approval, for example, the chancellor also strongly influenced the selection of presidents at the state colleges, controlled tuition rates, and played a formal role in naming local college trustees” (Greer, 1998, p. 87).

Largely at the urging of the state colleges, Governor Tom Kean signed legislation in 1986 that granted state college trustees significantly greater authority, including the right to appoint a chief executive without approval of the chancellor (Greer, 1998). Personnel decisions related to managerial and professional staffs were separated from civil service, and institutions gained more financial and operational freedom. The Kean administration also decoupled state funding for four-year public institutions from enrollments.

In 1994, Governor Christine Todd Whitman removed even more regulation by eliminating the Department of Higher Education and its Board (Higher Education Restructuring Act, 1994). In their place, she created two new entities. The New Jersey Commission on Higher Education (CHE) provides general coordination, planning, and policy development (N.J. STAT. ANN. §§ 18A:3B-13 to 18A:3B-34). The Presidents' Council—comprising the presidents of all public and private institutions, and representatives of proprietary institutions—collaborates with the CHE on issues such as licensure and policy development (N.J. STAT. ANN. §§ 18A:3B-7 to 18A:3B-12). Governor Whitman also strengthened institutional governing boards, adding responsibilities to set tuition and fees after a public hearing, recommend trustee members to the governor, and retain legal counsel (N.J. STAT. ANN. § 18A:3B-6).

### *Collective Bargaining*

#### *Massachusetts*

Under the Massachusetts system of higher education, the University of Massachusetts is independent from the BHE with regard to collective bargaining. The BHE is the statutory employer of “employees of the system of public institutions of higher education,” except that the board of trustees of UMass is “the employer of employees of the University of Massachusetts” (MASS. GEN. L. ch. 150E, § 1). Within 30 days of executing a collective bargaining agreement, the BHE and the UMass trustees, as employers, must submit to the governor “a request for an appropriation necessary to fund such incremental cost items contained therein as are required to be funded in the then current fiscal year” (MASS. GEN. L. ch. 150E, § 7(c)).

The Massachusetts Society of Professors (MSP), affiliated with the National Education Association, has represented UMass faculty and librarians since 1976 (MSP, 2007). MSP has about 1,400 members (Page, 2006).

#### *New Jersey*

Despite the increased autonomy provided to the boards of trustees at the state colleges and universities in 1986 and again in 1994, the boards do not conduct collective bargaining directly with their unionized faculty and staff. Under the autonomy law of 1986, the governor remains the “public employer” as defined by the New Jersey Employer-Employee Relations Act and, through the governor’s Office of Employee Relations, acts as the chief spokesperson on behalf of the state colleges with respect to all matters under negotiation (N.J. STAT. ANN. § 18A:64-21.1). Upon recommendation by the state colleges and universities, one representative of the institutions is designated by the governor as a member of the negotiating team (Higher Education Restructuring Act, N.J. STAT. ANN. § 18A:64-21.1).

The legislature debated the issue of collective bargaining during Governor Whitman’s restructuring efforts, but “legislators deferred the decision over decentralizing labor negotiations” (Greer, 1998, p. 96). Therefore the State—through the Office of Employee Relations—continues to negotiate contracts with faculty and staff bargaining units at the state colleges and universities.

The Council of New Jersey State College Locals (CNJSCL), affiliated with the American Federation of Teachers, has represented the New Jersey state colleges’ faculty, librarians, and staff in New Jersey since 1973 (Alexander, 1979). The CNJSCL represents over 7,600 faculty, adjunct faculty, librarians and professional staff at the state colleges and universities in two separate bargaining units: one for full-time faculty, librarians, and staff; and one for adjuncts (Council of New Jersey State College Locals, n.d.).

#### *Higher Education Financing*

A key component of any collective-bargaining agreement is salaries, which in turn depend on state appropriations. State appropriations to public colleges and universities “are based largely on workload measures or across-the-board, incremental adjustments to prior year

budgets” (Richardson, Bracco, Callan, & Finney, 1999, p. 190). States have primarily targeted their financial support for higher education “on institutional capacity-building and on maintaining institutional assets” (Richardson, Bracco, Callan, & Finney, 1999, p. 190).

The value of public support for higher education has shrunk at public institutions in the past decade. The Commission on National Investment in Higher Education (1997) found that public support from federal, state, and local sources per student “has just kept pace with inflation, but real costs per student have grown by about 40 percent” (p. 12), resulting in a “catastrophic shortfall in funding” for higher education across the country (p. 4).

The downward trend continued in the years leading up to the adoption of the copyright-ownership provisions in Massachusetts and New Jersey. The portion of institutional revenues coming from government appropriations declined to 36% in 2000, down from 50% in 1980 and 43% in 1990 (College Board, 2004, p. 4). Between 2000-01 and 2002-03, state appropriations per full-time-equivalent student (FTE) declined by 9% in constant dollars (College Board, 2004). By 2004-05, inflation-adjusted totals of state and local appropriations per student were the lowest since 1993-94 (College Board, 2006, p. 24).

### *Massachusetts*

Massachusetts’ public higher education system “has always been relatively impoverished compared to other states . . . ranking near the bottom of measures of state financial commitment to higher education” (Bastedo, 2005b, p. 45). Between FY1988 and FY1994, higher education funding, as a proportion of the state budget, fell from 6.5% to 4.4% (Bastedo, 2005b, p. 58). “Taken as a whole, the six-year period between 1988 and 1994 represented the largest disinvestment in the history of U.S. public higher education” (Bastedo, 2005b, p. 58).

The disinvestment affected both students and faculty. By 1992, higher education in Massachusetts “had become among the most expensive for students in the public sector” (Crosson, 1996, p. 76). Faculty and staff at public colleges and universities received no cost-of-living adjustments or merit raises from 1988 to 1993 (Crosson, 1996, p. 85)

Financing in Massachusetts declined further in the early 2000s. In the 2001-2002 fiscal year, the legislature cut 7% (about \$70 million) from the state's higher-education budget to help plug a projected \$1.1-billion deficit (Hebel, Morgan, Schmidt, & Selingo, 2002). Acting Governor Jane Swift vetoed \$35 million in spending for higher education from the FY2003 budget (Morgan, 2002).

The largest portion of the \$35-million cut in FY2003 was \$29.6-million in promised salary increases for public-college faculty members and administrators (Morgan, 2002). In the summer of 2001, Swift's administration agreed to a contract that included annual salary increases of 5% for three consecutive years for employees of the University of Massachusetts system and the state's other public and community colleges (Morgan, 2002). In 2002, the legislature passed a budget that covered the funding for the first year of the salary increases, but then shifted the responsibility of paying the raises to the institutions themselves in the last two years of the contract. The governor canceled the deal because, as her education adviser said, "there was a real risk that it would have thrown the campuses into a financial crisis" (Morgan, 2002, p. A26).

The nullification of the wage increases may have been the first step toward the agreement on the copyright provision in the UMass contract. After the acting governor's veto, thousands of faculty and staff at public colleges and universities in Massachusetts briefly walked off their jobs to stage protest rallies (Carnevale, 2002). Although negotiations over distance-education policies were a separate matter from salary increases, the president of the Massachusetts Society of Professors said at the time that "the disagreement over the salary increase may help the distance-education policies get pushed through quickly" (Carnevale, 2002, p. A50).

#### *New Jersey*

State funding for higher education in New Jersey declined steadily through the 1990s. In the late 1980s, New Jersey stopped using enrollment as a factor in determining funding for its public four-year institutions (Martinez & Richardson, 2003), causing budget increases, if any, to become incremental. Between the late 1980s and early 1990s, "[d]eclining state investment in

higher education was coupled with increasing pressure on the campuses to exercise greater autonomy to manage their limited resources effectively. To help offset state budget reductions, campuses called for increased tuition and fees” (Greer, 1998, p. 91).

Governor Jim McGreevey cut the higher education budget 5% in his first year in office (FY2003), cut another 5.6% in FY2004, and provided a slight increase the next year (FY2005) (Mann & Forsberg, 2006). The Fiscal Year 2006 appropriation for higher education in New Jersey was approximately 5.4% of the total state budget, down from the peak of 9.8% in 1983 (Mann & Forsberg, 2006).

Unlike Massachusetts, New Jersey’s budget woes never jeopardized negotiated salary increases for faculty and staff. The 2003-2007 contract provided cost-of-living adjustments of 11.5% over four years (State of New Jersey & Council of New Jersey State College Locals, 2003-2007, Art. XXI). Although the State has often failed to fully fund the salary increases it negotiated with faculty and staff bargaining units, the institutions made up the difference out of their State appropriations and from tuition and fee increases (Greer, 1998).

#### *State Politics*

Underlying all of the above-named collective-choice rules is politics. “Each state’s political culture—a combination of history and social factors—is distinct, and it shapes all state policies, including its system of higher education” (Gittell & Kleiman, 2000, p. 1059). The governor and legislative leaders, in particular, “play a significant role, often dominating design and implementation and sometimes frustrating policy reforms” (Gittell & Kleiman, 2000, p. 1088). Labor unions are active players in state politics, and are likely to “make monetary contributions to candidates, endorse candidates, and work on campaigns” (Nownes, & Freeman, 1998, p. 101).

#### *Massachusetts*

Massachusetts is recognized as a liberal state, typically having “large Democratic majorities in both the house of representatives and the senate” (Crosson, 1996, p. 77). Jane Swift was a Republican lieutenant governor who got the top job when Governor Paul Cellucci resigned to become U.S. ambassador to Canada in 2001. Swift originally supported

higher education's unions, approving the 2001 contract that would have increased salaries 5% each year for three straight years (Morgan, 2002). She decided in the spring of 2002 not to run for re-election that November (Morgan, 2002), which perhaps made it politically easier to cancel the pay increases in 2002 when tax revenues fell short of projections (Morgan, 2002).

The MSP pressured Swift's successor, Republican Mitt Romney, to fund the contract. During the summer of 2003, the MSP joined a coalition called Higher Education Unions United (HEUU), which conducted "Romney Watch," an effort to trail the governor at his public appearances to make sure "someone from higher education is visible at every public event" (Join Higher Ed Unions United, 2003, p. 3). HEUU also conducted a "State House Watch" on each day the Massachusetts legislature was in session, organizing at least 10 people on the steps of the State House with signs and lobbying material "to remind our legislators, day in and day out, that the unfunded contract situation is not going away" (Join Higher Ed Unions United, 2003, p. 3).

#### *New Jersey*

In 1991, a public backlash against Democratic Governor Jim Florio's 1990 tax increases voted in veto-proof Republican majorities in the New Jersey Senate and Assembly (Sabato, 2005). Over the past 15 years, however, the Republican advantage has slipped steadily to the point where political analysts now consider New Jersey a "deeply Blue Northeastern state" (Sabato, 2005).

Democratic Governor Jim McGreevey, whose administration approved the copyright-ownership provision in New Jersey, was a steadfast friend of labor unions. McGreevey (2006) wrote that "organized labor was my most reliable funding base" during his first gubernatorial campaign in 1997 (p. 170), which he lost to the incumbent, Governor Whitman.

During McGreevey's successful second run for governor, in 2001, the CNJSCL actively supported him. The union endorsed McGreevey, staffed his phone banks, and volunteered for him on Election Day (Yovnello, 2001). The national AFT supported McGreevey as well, sending a national representative who at one point worked directly out of McGreevey's campaign headquarters "to coordinate Council's efforts with those of its AFT affiliates, the New Jersey State

Federation of Teachers and Health Professionals and Allied Employees” (Yovnelo, 2001, p. 3). Moreover, “National AFT made several financial contributions to the McGreevey campaign and the Democratic Party” (Yovnelo, 2001, p. 3).

Once in office, McGreevey enjoyed strong support from organized labor, even when he considered laying off State workers (Kocieniewski, 2002). The CNJSCL continued to show its support, even after McGreevey resigned from office. The president of the CNJSCL, Nick Yovnelo (2004), wrote in the union’s newsletter, “I believe that under the McGreevey administration, we made significant strides and had a good shot at attaining more legislation to benefit our members and their families” (p. 1).

After his departure, the union gave McGreevey credit for the copyright-ownership provision. In a list of union accomplishments under the McGreevey administration, Yovnelo (2004) wrote, “Our negotiations yielded substantial non-economic gains in the area of intellectual property rights . . . . The bottom line is that the governor was slowly making progress on meeting his campaign pledges to us and to the labor movement” (p. 6).

#### Operational Rules

Operational rules implement decisions influenced by constitutional or collective choice decisions (Richardson, 2004). In the case of copyright ownership at UMass and the New Jersey state colleges and universities, an important operational rule was academic programming, which put online courses in place. This curriculum decision was influenced by developments in technology and state budget policy.

#### *“Academic Capitalism” and the “Digitization Revolution”*

The budget cuts in Massachusetts and New Jersey, described above, put pressure on institutions and their faculty to find alternative sources of funding. In a national context, colleges and universities—in the face of “changes in national policy and declines in state share of support” (Slaughter & Leslie, 1997, p. 74)—turned increasingly toward “academic capitalism,” defined as “institutional and professorial market or marketlike efforts to secure external moneys” (Slaughter & Leslie, 1997, p. 8).

Market activities include “for-profit activity on the part of institutions, activity such as patenting and subsequent royalty and licensing agreements” (Slaughter & Leslie, 1997, p. 11). Marketlike activities, distinguished by “competition for funds from external resource providers,” refer to “institutional and faculty competition for moneys, whether these are from external grants, and contracts, endowment funds, university-industry partnerships, institutional investment in professors’ spinoff companies, or student tuition and fees” (Slaughter & Leslie, 1997, p. 11).

Digital technology created market and marketlike opportunities with a global reach. Tom Friedman (2005), in *The World is Flat*, described how digital technology helped to globalize the economy:

Once the PC-Windows revolution demonstrated to everyone the value of being able to digitize information and manipulate it on computers and word processors, and once the browser brought the Internet alive and made Web pages sing and dance and display, everyone wanted everything digitized as much as possible so they could send it to someone else down the Internet pipes. Thus began the digitization revolution (p. 64).

### *Online Courses*

Online courses are just the type of innovation made possible by the digitization revolution. Online courses are one type of “distance education,” defined as “education or training courses delivered to remote (off-campus) sites via audio, video (live or prerecorded), or computer technologies, including both synchronous (i.e., simultaneous) and asynchronous (i.e., not simultaneous) instruction” (Waits & Lewis, 2003, p. 1).

Around the time the Massachusetts and New Jersey contracts were being negotiated, the majority of colleges and universities in the U.S.—especially public institutions—were offering online courses. In the 2000-01 academic year, 56% of the two- and four-year degree-granting institutions in the U.S. (2,320 institutions) offered distance-education courses (Waits & Lewis, 2003), up from 44% three years earlier (Kiernan, 2003). In 2000-01, public institutions outpaced private colleges and universities in online offerings: 90% of public two-year and 89% of public four-year institutions offered distance education courses, compared with 16% of private two-year and 40% of private four-year institutions (Waits & Lewis, 2003). By the fall of 2005, 63% of

degree-granting institutions in the U.S. reported offering at least one online course or program (Allen & Seaman, 2006).

The increase in popularity in online education is due in large part to student preferences and behaviors. Working adult students, a major target of online offerings (Foster & Carnevale, 2007), compose a greater proportion of the current student population than traditional-age students and appreciate the flexibility and convenience of online courses (Levine & Sun, 2002). Traditional-age students, on the other hand, are attracted to online courses by the technology itself. “Members of today’s digital generation of students . . . approach learning as a ‘plug-and-play’ experience; they are . . . inclined to plunge in and learn through participation and experimentation” (Duderstadt & Womack, 2003, p. 63).

Making a profit is a primary motivation to develop online courses, in part to help take the place of shrinking public funds (Foster & Carnevale, 2007). Faculty members and their universities often compete over ownership of online courses because each side believes the courses will be profitable on the open market. Commenting on Harvard Law School’s attempt to stop one of its professors from offering videotaped lectures for a course offered by Concord University School of Law, an entirely online institution, Harvard Law professor Alan M. Dershowitz said, “What distinguishes the Internet from everything else is the number of zeroes. The money is so overwhelming that it can skew people’s judgment” (Marcus, 1999, p. A10).

Despite conventional wisdom, online courses—like most copyrighted works—are not guaranteed moneymakers. According to Professor Lawrence Lessig of Stanford University, only about 2% of all works protected by copyright produce continuing revenue for their owners (Harmon, 2002). When MIT considered selling its courses online, a study by consulting firm Booz Allen Hamilton concluded that no market existed for them (Olsen, 2002). Moreover, the study revealed that most MIT faculty members would have difficulty “reconceptualizing” their courses for a broader audience beyond their classroom (Olsen, 2002). As a result of the consultant’s report, MIT decided to post the primary materials from its courses for free, through its OpenCourseWare project (Olsen, 2002).

For-profit ventures by traditional universities learned the hard way what Booz Allen had advised MIT. In January 2003, Columbia announced that it would close Fathom, its for-profit distance-learning venture that aimed to sell Web-based courses and seminars to the public. With 12 partners—including the London School of Economics and Political Science, the University of Chicago, and the Woods Hole Oceanographic Institution—Columbia invested \$14.9 million in Fathom in 2001 and reaped only \$700,000 from fees from other institutions and from sales revenue (Carlson, 2003). New York University closed down NYUOnline in November 2001, three years after becoming the first large nonprofit university to create a for-profit venture to market courses over the Internet (University Is Ending NYUOnline, 2001). The bust of the Internet industry ended NYU's plans to tap the Internet investment market to finance development and marketing of its for-profit online courses (University Is Ending NYUOnline, 2001).

Colleges and universities would be wiser to look for savings, rather than profits, from online courses. The Pew Charitable Trusts provided \$8.8 million in grants to the Program in Course Redesign, which revamped instruction at 30 institutions using information technology, including instructional software and other Web-based learning resources (Twigg, 2003). The redesigned courses reduced costs by an average of about 40%, and they now collectively save \$3.6 million each year (Twigg, 2003, p. 30).

*Massachusetts.* By the spring semester of 2001, the University of Massachusetts, through a program called UMass Online, was offering a significant number of online courses. They included baccalaureate courses in introductory art management, marketing, and psychology; and master's level courses through its MBA Professional Program, its master's program in Public Health for Professionals, and its master's program in Community/School Health nursing (Hammel, 2001). The MSP was wary of the UMass Online venture and urged its members "to refrain from signing any contracts with UMass Online until the intellectual property, working conditions, and governance issues have been resolved" (Hammel, 2001).

*New Jersey.* Although New Jersey's state colleges and universities did not have an extensive online program in place, as at UMass, the institutions were maturing and expanding

their academic programs in the early 2000s. By the mid-1990s, “some colleges, such as [T]he College of New Jersey (TCNJ), Montclair [State], and Rowan, prepared to extend their missions by adding new professional or doctoral programs” (Greer, 1998, p. 92). At the undergraduate level, TCNJ was planning to implement an engineering program (Greer, 1998). The CNJSCL’s interest in online courses indicates that Internet-based offerings were probably entering the curriculum.

### Conclusion and Future Research

Several forces underpinning the relationship between faculty unions and public institutions of higher education worked together to influence the copyright-ownership provisions negotiated in the faculty contracts at UMass and the New Jersey state colleges. Three tiers of rules—classified under the Richardson (2004) model as constitutional, collective choice, and operational rules—underpin the faculty union-institution relationship and influence copyright ownership. Under constitutional rules, the federal Copyright Act defines authorship, and state labor laws determine bargaining rights. Under collective choice rules in Massachusetts and New Jersey, restructured higher education systems defined the actors at the bargaining table, and state budgeting policy for public higher education—which has steadily decreased appropriations—motivated institutions and faculty to seek external resources. Each state’s political system includes prominent roles for labor unions, allowing the faculty unions at UMass and New Jersey’s state colleges and universities to exert influence away from the bargaining table to achieve their goals at the table. Finally, operational rules at the campus level, most importantly academic programming, placed online courses into the curriculum, making ownership of those courses an important consideration.

### *Future Research*

Future research can explore the issue of copyright ownership in other unionized states, and whether the Richardson (2004) model proves useful in understanding how the faculty union-institution relationship influences copyright ownership. Organized faculty are located in 31 states and the District of Columbia, with a majority concentrated in the three states: California, New York

and New Jersey (National Center for the Study of Collective Bargaining in Higher Education and the Professions [NCSCBHEP], 2006). As of 2006, collective bargaining agents represented a total of 318,504 faculty members, organized into 575 separate bargaining units across 491 systems or institutions higher education located on 1,125 campuses (NCSCBHEP, 2006).

Within unionized states, the type of institution may be an important influence on copyright ownership. Slaughter and Rhoades (2004) found that research universities tend to assert greater institutional rights over faculty-created works, and Rhoades (1998) found that two-year colleges provide their faculty with more significant ownership of their own work. Therefore, “pursuing the differences in copyright policies by type [of institution, elite vs. less prestigious] may repay investigation” (Slaughter & Rhoades, 2004, p. 145).

Finally, future research could investigate the influence of the three largest faculty unions’ national leadership on organized faculty’s pursuit of intellectual property rights. Of all organized faculty, 89% are represented, in whole or in part, by one of the three unions that have historically represented educators: the American Association of University Professors (AAUP), the American Federation of Teachers (AFT), and the National Education Association (NEA) (NCSCBHEP, 2006). Each of these unions has counseled its members to secure greater intellectual property rights in their works.

The AAUP has adopted a *Statement on Copyright* (1999), but “it has not formally addressed the questions of patents” (AAUP, n.d.). In its copyright statement, the AAUP argued that the ownership of online courses should be no different from traditional courses. It wrote, “[I]t has been the prevailing academic practice to treat the faculty member as the copyright owner of works that are created independently and at the faculty member’s own initiative for traditional academic purposes,” such as class notes, syllabi, books, and articles. This academic practice has not depended on “the physical medium in which these ‘traditional academic works’ appear, that is, whether on paper or in audiovisual or electronic form” (1999). The AAUP concludes, “this practice should therefore ordinarily apply to the development of courseware for use in programs of distance education” (1999). The AAUP (1999) recognizes, however, that the employer

university may fairly claim ownership of faculty-created work that falls into three categories: special works created in circumstances that may properly be regarded as “made for hire,” negotiated contractual transfers, and “joint works” as described in the Copyright Act.

The AFT has provided a primer on intellectual property for its members (Strom, 2002). In it, the union 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” (Strom, 2002, p. 11).

The NEA takes the strongest position on behalf of its members. It “believes that education employees should own the copyright to materials that they create in the course of their employment,” and it advocates amending the work-made-for-hire doctrine in the Copyright Act “to expressly recognize an appropriate ‘teacher’s exception’” (NEA, 2002). Short of that goal, copyright ownership of faculty-created works should be determined by “negotiated agreements . . . [that] provide that copyright ownership vests in the education employee who creates the materials and that he or she has all of the legal rights that come with such ownership” (NEA, 2002).

The collective bargaining agreements at UMass and the state colleges and universities in New Jersey—with their new provisions for copyright ownership—are a first step in the goals articulated by, respectively, the NEA and AFT. They might be a sign of things to come in contract negotiations at other institutions.

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