

From: "Wegner, Toni" <twegner@hbs.edu>

To: "Edelman, Benjamin" <bedelman@hbs.edu>

Subject: RE: ownership of cases written by HBS faculty

Date: Fri, 09 Oct 2009 13:18:17 +0000

Importance: Normal

Hi Ben,

I'm really sorry that I never circled back to you on this. We've been actively looking into this since your email and are waiting for responses from the Office of the General Counsel. Our Dean's Office is involved, so it may be someone other than me following up with you.

I apologize for the length of time it has taken us to explore these issues.

Best,

Toni

Toni Wegner | Managing Director, Research Administration and Intellectual Capital | 617-496-9952

-----Original Message-----

From: Edelman, Benjamin

Sent: Thursday, October 08, 2009 10:42 AM

To: Wegner, Toni

Subject: RE: ownership of cases written by HBS faculty

Toni,

Have you made any progress on this question?

I'm currently evaluating methods to distribute material I've recently drafted -- a document that would be useful in the classroom, but also of significant public interest. If submitting the material to HBSP truly means giving up my rights in the material and, e.g., my right to post the document to my web site, then I don't want to submit to HBSP. On the other hand I still think it's possible that I retain important rights even after submission to HBSP, for the reasons we discussed earlier in this thread. If I can keep those rights while also getting the benefit of HBSP distribution, that's a great outcome from my perspective.

If you like, I'm happy to discuss the details of the project -- the substance, why free distribution of this material is crucial to achieve the impact I envision, and why this single document makes sense as both a case and a freestanding text. (Of course even separate documents (a HBSP case and a non-case variant) wouldn't necessarily solve the problem, for substantial text would inevitably be shared between the versions -- raising copyright questions if in fact HBSP publication entails a copyright transfer.) I do think there are good reasons for the approach I favor -- though it may not be necessary to get into these questions if we can confirm, as I still believe to be the case, that faculty authors retain copyright in the cases they submit to HBSP.

Thanks,

Ben

-----Original Message-----

From: Wegner, Toni
Sent: Friday, March 13, 2009 9:20 AM
To: Edelman, Benjamin
Subject: RE: ownership of cases written by HBS faculty

Hi Ben,

I wanted to let you know that I raised this to Srikant at our meeting this week, and he thinks this is a very interesting intellectual issue. He has asked me to explore this further, but we've got a lot of work to do on the budgets, so we won't likely get started for a month or so. I'll let you know what I learn!

Thanks,
Toni

-----Original Message-----

From: Edelman, Benjamin
Sent: Wednesday, March 11, 2009 9:02 AM
To: Wegner, Toni
Subject: RE: ownership of cases written by HBS faculty

Even if HBS/DRFD policy claims that Harvard receives copyright in a case, that doesn't necessarily make it so.

For one, copyright law establishes some formalities for transfers of copyright. There are good reasons why most copyright transfers occur pursuant to signed written agreements, not mere sentences in policy documents. I'm not sure a sentence in a policy is an adequate instrument to transfer copyright. (Compare the copyright agreement a non-HBS coauthor must sign in the course of submitting a case to HBSP.) I believe there has been litigation on this question over the years.

For another, I am unclear whether HBS or DRFD policy can overrule the HU policy at <http://www.techtransfer.harvard.edu/resources/policies/IP/>. I doubt it. Crucially, that policy requires a specific approach: 1) Faculty authors retain copyright unless a specific exception applies (section II.A.). 2) In circumstances where the university makes a "more than incidental" contribution, rights are to be "fairly and equitably apportioned" and the University is to "reach agreement" with faculty authors (section II.B.2.).

Applied to HBS cases:

1) I believe that there are some cases where the University contribution is not more than incidental. Consider a library case, teaching note, module note, or course note where no RA time is used, no travel is required, etc. (Other sections of the IP policy indicate that ordinary use of office equipment, PC, library access, etc. do not constitute a substantial University contribution.) In those cases, I read the HU IP policy to require that faculty retain all rights, because I see no relevant exception to the general rule that faculty retain rights in their work.

2) In circumstances where the University makes a contribution, e.g. travel costs or RA time, there is a threshold question of whether that contribution is "more than incidental." (Some might argue that use of a faculty member's ordinary research budget is necessarily incidental, since a faculty member has complete discretion to spend that budget on non-case research. Clearly there's a good counterargument too: Money is money, and HBS puts big money behind case-writing.) If the University's support is not more than incidental, then the preceding paragraph applies. If the support is more than incidental, then we face at least two further questions:

A) Whether the current policies are "fair and equitable." Policies I'd want to look at with extra scrutiny, given their close relationship to rights in the resulting works: Prohibiting faculty from posting or distributing their cases as they see fit. All aspects of royalty terms. Rights to excerpt, rewrite, or otherwise reuse case text in other materials such as

books, articles, web site postings, etc. To determine whether policies are "fair and equitable," I'd compare HBS/DRFD policies with the terms offered by other publishers.

B) Whether a DRFD policy, posted on the DRFD site but not subject to individual negotiation, can be said to constitute "reach[ing] agreement" on rights in the resulting materials.

Analysis in this section 2 also raises thought-provoking hypotheticals. For example, suppose a faculty member elects to pay for case expenses out-of-pocket (e.g. declining reimbursement for case travel). In that case, the University's support would seem to be minimal. Does the faculty member then retain rights in the case? The HU IP policy would seem to say yes. HBS policies would seem to say no. This is more than speculative. For those cases where expenses are limited, perhaps just a few hundred dollars, some faculty might be happy to pay those costs out-of-pocket in order to be permitted to distribute the resulting cases as they saw fit.

Finally, the II.B.5 "by agreement" exception prompts another set of questions. Does a policy posted on the DRFD web site, though nowhere mentioned in the New Course Material submission form or otherwise specifically brought to faculty members' attention, comprise an adequate "agreement" to transfer copyright? If so, HBS may receive copyright pursuant to II.B.5. If not, the DRFD policy you referenced may not be effective according to its terms.

I look forward to Srikant's thinking on this, and, in due course, perhaps to feedback from university attorneys. I realize these questions may be opening a can of worms -- but on balance I think a careful analysis of this matter is important and arguably overdue. I greatly appreciate your willingness to consider such complicated and thorny questions.

Ben

-----Original Message-----

From: Wegner, Toni
Sent: Tuesday, March 10, 2009 11:26 PM
To: Edelman, Benjamin
Subject: RE: ownership of cases written by HBS faculty

Hi Ben,

Rough day--I accidentally sent you the wrong link--very sorry. I meant to send you the case policies at <http://intranet.hbs.edu/dept/drfd/caseservices/CP.html>.

I appreciate your thoughts below and will discuss this with Srikant. Let me know if you have additional thoughts after reviewing the case policies.

Thanks,
Toni

-----Original Message-----

From: Edelman, Benjamin
Sent: Tuesday, March 10, 2009 9:10 PM
To: Wegner, Toni
Subject: RE: ownership of cases written by HBS faculty

Thanks for the details.

I flipped through http://www.fas.harvard.edu/~research/hum_sub/, but I didn't immediately see anything on point. I also used Edit-Find to look for the word "case" (since you said this falls within "case policies"), but I found no matches. Can you clarify what you had in mind?

My tentative view is that HBS may have made an error -- may have mistakenly (albeit of course in good faith) believed case copyright passed from casewriters to HBS, HBSP, and/or HU, when in fact, for at least some cases, copyright actually remained with casewriters all along; and for others, rights in the material may actually be split between Harvard and casewriters in a way not yet well understood. I do not yet know whether I am correct in these tentative views. A full analysis of this question would require carefully evaluating the Harvard Policy on Intellectual Property and considering relevant statutes and caselaw.

Given the number of cases at issue and the value of these cases, this is a serious matter deserving careful analysis by a legal professional. I think the appropriate course of action is to bring the question to the attention of whatever attorneys (probably in the Harvard Office of the General Counsel) advise HBS/HBSP on questions of publishing and copyright. I would be happy to assist in framing the question and in conveying what I've learned from my research so far, but ultimately HBS should have its official attorneys think about these questions.

Ben

-----Original Message-----

From: Wegner, Toni
Sent: Tuesday, March 10, 2009 3:52 PM
To: Edelman, Benjamin
Subject: RE: ownership of cases written by HBS faculty

Hi Ben,

Sorry not to follow up with you about this, but it's a hard question! I talked about this with several people and it seems that faculty don't sign anything when they start or for specific cases. The only explanation I can find is that it's part of our case policies (http://www.fas.harvard.edu/~research/hum_sub/). I'm very interested to know what your recommendations would be for where we should go from here.

Thanks
Toni
6-9952

-----Original Message-----

From: Edelman, Benjamin
Sent: Monday, March 09, 2009 7:54 PM
To: Wegner, Toni
Subject: ownership of cases written by HBS faculty

Toni,

Last year, I asked you about ownership and copyright of cases written by HBS faculty. The prevailing wisdom seems to be that HBS, HBSP, and/or HU holds copyright in all cases. But I know I didn't sign a copyright transfer agreement (as I would if I, say, published a book with HBSP). I believe writing cases is not a condition of employment. (It's not in faculty offer letters. And faculty would be within their rights to write no cases, to write cases for distribution through some other publisher, or even to self-publish.) And I'm mindful of the Harvard Policy on Intellectual Property (<http://www.techtransfer.harvard.edu/resources/policies/IP/>). So I've long found the prevailing wisdom puzzling.

Did you ever make any headway on the question of copyrights in these cases, and how the school comes to hold such copyright (if it does)? This is important given the value of cases, both to the school and to authors. It's surely increasingly important as IT advances facilitate

new publishing models. And it's of personal interest to me -- both to confirm that the school's policies are lawful and appropriate, and to understand my rights in my own work.

Many thanks,

Ben