

Academic freedom: a lawyer's perspective

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Pre-publication copy – some minor errors may remain.

Academic freedom – a lawyer's perspective

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Introduction

Academic freedom is central to higher education - being essential to meaningful and effective research and teaching, and identified by academics themselves as one of the things most important for their identity and self-esteem (See, for example, Altbach 2001). Academic freedom in the United Kingdom¹ is facing challenges from changing managerial attitudes. A recent observation neatly sums up the position:

‘The best thing in university life is the academic freedom that we are busy losing and the worst are the new bars on the iron cage of bureaucracy that are taking it from us’ (Elmes 2014).

Universities are increasingly expected to focus upon knowledge which can be shown to have value. Resulting constraints on teaching and research by market driven demands have the potential to compromise academic freedom (Bradley 2003, 495 and 2009, 163). Or, as Andreescu (2009) puts it, the rise of the entrepreneurial university and ‘the more or less subtle changes of academic ethos it engendered have gradually eroded the symbolic prestige of academic freedom’.

This article considers certain aspects of academic freedom from a lawyer's perspective.

The nature of academic freedom

Academic freedom is variously described by academic commentators in terms of: ‘freedom to pursue teaching and research without fear of intervention or punishment’ (Enders et al 2013, 23) or, the ‘personal liberty to pursue the investigation, research, teaching, and publication of any subject as a matter of professional interest without vocational jeopardy or threat of other sanction (Andreescu 2009, 562 citing Alstynne 1975, 71). The United Nations Educational, Scientific and Cultural Organization (UNESCO) defines academic freedom to include ‘the right to teach without any interference, subject to accepted professional principles including professional responsibility and intellectual rigour with regard to standards and methods of teaching’ (UNESCO 1997, 28). A limited amount of judicial comment can also be found, for example an Australian court described academic freedom as the ‘unimpeded freedom to teach, to study, and to research without any external control either of the teaching staff or the curriculum.’² As is discussed later, external interference is not the only current threat to academic freedom in the UK.

The legal underpinnings of academic freedom in the UK

¹ Throughout this article when writing in general terms reference will be made to the UK. However, certain aspects of the discussion are relevant to England only and this will be made clear where appropriate.

² Kaye J. in *Clark v University of Melbourne* [1978] VR 457

In one form or another academic freedom in Europe can be traced back to the medieval period, as a hard won protection of the rights to freedom of thought and expression (See, for example, Karran 2009 and Fuller 2000, Ch 4).

Despite this long history, academic freedom in the UK has few legal underpinnings. The main source in English law is the Education Reform Act 1988, section 202(2)(a) of which states:

‘[A]cademic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions.’

Protection is therefore limited to the context of each academic’s relationship with his or her employing institution (Palfreyman 2006, 2007). Also, this statutory provision applies only to the ‘pre-1992’ royal charter institutions, not those institutions which were polytechnics in 1988 and became the ‘new’ statutory universities from 1992 onwards (Palfreyman, 2006, 2007). Little more can be said about the detailed interpretation or application of section 202 as it has been subject to very little judicial scrutiny. Judicial consideration where it does arise tends to be brief. For example, in *R. (on the application of Bangert) v South Bank University*³ the claimant challenged the defendant university’s decision to exclude him from his studies as a post-graduate student and dismiss him from his role as a part-time lecturer following his attempt to whistleblow against a senior member of staff he accused of grade fixing. Judge J. held that section 202 had no application to the decision of the claimant to publish certain material on a website of which he was the administrator. In *Volkswagen Aktiengesellschaft v Garcia*⁴ Birss J. acknowledged ‘the enormous significance of freedom of expression and academic freedom’, but went on to find in favour of the claimants’ arguments that the publication in an academic paper of an algorithm which could facilitate car theft should be restricted.

It is of note, in the context of the perceived value (or lack of) placed by the UK state on academic freedom, that the removal of academic tenure, as one of the core protection mechanisms for academic freedom, was slipped into the ‘Miscellaneous and General’ section of a Bill, which became the Education Reform Act 1988, and which was mainly concerned with matters other than higher education. The change was based on the stated need for higher education to be provided ‘efficiently and economically’ section 202(2)(b), originally with no consideration at all given to the continued protection of academic freedom. That any protection found its way into the 1988 Act was only because of what has been described as an ‘ambush’ to the Bill at the House of Lords stage - the clause which became section 202(2)(a) eventually finding its way into the Act in the face of government opposition (Shattock 2001, 47 citing Crequer 1989, 11).

It has been suggested that section 202 may have become ‘for the most part hidden by management and forgotten by staff’, allowing a climate of fear about speaking too controversially to arise in some universities (Hayes 2009 citing Russell 1993). Subsequent legal developments have also potentially further weakened the position as it might benefit individual academics. The Higher Education Act 2004, in creating the Office for Fair

³ [2002] EWHC 2765 (Admin)

⁴ [2013] EWHC 1832 (Ch); [2013] All ER (D) 68 (Aug), Ch D

Access, requires that the Director of Fair Access protects academic freedom. However, the focus of this freedom is at organization level – seeking to ensure that higher education institutions are able to determine the content, manner of teaching and assessment of their courses (section 32(2)).

This legal position has led to the UK being described as the ‘sick man of Europe’ with regard to academic freedom—lacking equivalence to the constitutional and legal protections found in a number of other jurisdictions (Farrington and Palfreyman 2012, para 13.08). Calls for government to act to provide ‘a proper statutory framework to academic freedom’ remain unheeded (Birtwistle 2004; Palfreyman 2006, 2007; Beloff 2010, 141).

Changing academic and institutional attitudes

In addition to weakened legal protections, changes in academic attitudes can also be identified. Writing in 1988, O’Hear (1988) considered that academic endeavour cannot properly be undertaken by people, amongst other things, under pressure to come up with quick research results, to publish and to recruit students. Academics will struggle to convince students of the importance of alternatives in thinking if the academics themselves are:

‘obviously motivated by the values of educational consumerism - quantities of publication, ability to ‘attract’ students, to get outside money, and the rest. All of these considerations would be quite in order if the university were a market-orientated institution, but to see it as such is to miss its actual *raison d’etre* ... [W]e have to insist once again that universities can really serve the society that supports them ...through their commitment to a genuine notion of academic freedom-by standing for a different view of the relationship between economics and society.’ (O’Hear, 1988)

For many academics working in English universities in the twenty-first century, the idea of being protected against ‘pressure to publish, to ‘attract’ students..’ etc is already a lost ideal. The uses to which society puts universities can risk undermining their core purpose – that is, to house a community of scholars enjoying academic freedom – if powerful social institutions, for example, government or commercial funders, seek to reorient the concept of a university towards their own ends (Gillon and Henderson 2012). Universities have increasingly come under pressure to please these and other interest groups and so risk becoming ‘corporatized’. An effect of the Research Excellence Framework (REF) is an increased ‘threat to one of the fundamental tenets of academic freedom: the freedom to decide what to research’ (Watson 2011). Demands for increased accountability via impact moves the position from government attempts to control the research *arena* (arguably the aim of RAE2008) to greater control of research *outputs* (Watson 2011). In such an environment, it has been suggested that ‘many administrators in their heart of hearts have little respect for academic freedom’, seeing it as something which, if not resisted, academics will take ‘indulgent advantage’ (Barrow 2009, 189).

Historically, academic freedom was often seen to be underpinned by autonomy of universities from state control. Barendt observes that ‘[f]ree universities are much more likely to allow and indeed encourage their staff to exercise academic freedom, because they appreciate its essential role in discharging their responsibility to teach students to think for themselves and to advance knowledge’ (Barendt 2010, 67). This perspective may represent an ideal which is increasingly lost in the UK, especially England, as universities are pushed down market-driven pathways. Academics may find themselves fighting not *with* their

university against external encroachment, but *against* their university as a direct threat to aspects of their academic freedom.

Pressures on academics to respond proactively to student requests for change, even if the changes are not considered by the academics in question to be in the long-term academic best interests of students, have the potential to undermine academic freedom as traditionally applied to teaching. Academics may themselves exacerbate the threat to their academic freedom by self-censoring, because of a desire not to displease students or prospective funders. Certain academic opinions may thereby go unexpressed and therefore untested (Reisz 2013). A 2006 survey found that around 40 per cent of academics expressed concern at increasing threats to their freedom to express controversial or unpopular opinions. Almost 25 per cent reported self-censorship out of concern for institutional or peer disapproval (Shepherd 2006).

Academic freedom has been described as activity-focused, benefitting most academic staff, but not necessarily other university employees and office holders (Barendt 2010, 35–8). Discussion about management in universities and how this may help or hinder academic freedom is therefore further complicated by the fact that whilst some university managers are career administrators, others are drawn from, and some may return to, the mainstream academic community. Where roles are mixed, academic managers may find their freedom to challenge proposed changes which impact upon wider academic freedom curtailed.

Academic freedom and the ownership of intellectual property

A key example of the threat commercialization can pose to academic freedom is illustrated by changing approaches to the intellectual property ownership of the outputs from academic endeavours. For the purpose of the following discussion, consideration will be given mainly to copyright. In English and Welsh law copyright can protect, inter alia, works such as academic articles, books and other writing, and recordings of a work, orally and/or visually. Copyright does not protect ideas alone, the work has to be fixed in writing or some other medium. Copyright is an automatic protection and so doesn't have to be applied for. In contrast, patents protect new inventions, including how the invention works, what it does, how it does it, what it is made of and how it is made. A patent has to be applied for.⁵

Protection of intellectual property can be connected to European developments in understanding academic freedom. Fichte is identified as articulating the original philosophical defense of authorial copyright as presenting the legal recognition of protecting the unique contribution, beyond 'sheer physical labour', an author makes to work (Fuller 2009, 172). Fichte is similarly credited with identifying the need to protect lectures against unauthorized transcribing and printing (Fichte 1793, cited by Kawohl et al 2009), a concern which may return to prominence in a modern guise of lecture recording.

Organisations such as the National Academies Policy Advisory Group have argued that universities asserting ownership of academic work are inappropriately depriving the creator of control over their intellectual output (National Academies Policy Advisory Group 1995). The Universities and Colleges Union (UCU) in its statement on academic freedom recommends that its members 'retain control over their work to the greatest extent reasonable and practicable' including 'retaining copyright in material produced during the course of their

⁵ For further detail see the website of the Intellectual Property Office, <http://www.ipo.gov.uk/>

duties'.⁶ Retention of intellectual property ownership allows individual academics to more fully control how, when, or if at all the fruits of their academic endeavours are used, whether at the institution for which they worked when intellectual property was created or when in subsequent employment. Academics may, in the interests of their own career, also wish to control the dissemination of findings to facilitate future work (for further discussion in the scientific context, see Wei-Lin Wang 2012, 839). Section 22 of the Freedom of Information Act 2000 provides a qualified exemption protecting information from disclosure where it is intended for future publication. In *Queen Mary University of London v Information Commissioner*⁷ an Information Rights Tribunal held that it would not be appropriate for information arising from a medical research trial to be disclosed prior to the date of intended publication. In terms of the qualified nature of the exemption - the public interest in exempting disclosure had to be weighed against the public interest in disclosure. The protection provided in England and Wales is less extensive than that in Scotland – the latter expressly protects research where disclosure prior to the intended date of publication would substantially prejudice the research programme or the interests of those participating in the programme.⁸

In the English and Welsh context, what little historical case law there is recognised that, in the absence of agreement to the contrary, those engaged to lecture and teach retained the intellectual property, including any material committed to writing to facilitate otherwise oral teaching.⁹ The influential nature of the judicial observations in *Stephenson Jordan & Harrison v MacDonald & Evans*¹⁰ may explain why historically many universities tended to either 'shy away' from claiming copyright in a range of academic works (Pila 2010). The relatively recent Australian decision of *University of Western Australia v Gray*¹¹ reaffirmed this approach - the court concluded that an implied contractual term granting ownership of intellectual property to the university would negatively impact on the freedom of academics to research, to exchange ideas and to move freely between jobs.

This historical academic-favoured approach corresponds with observations that intellectual property concerns within UK universities are a relatively recent phenomena (Howell 2011). A 1992 Cabinet Office report, recommending that universities exploit the commercial opportunities generated by their research activities, is one example of evidence that universities were at that time not self-motivated in this direction (United Kingdom Cabinet Office 1992).

The remainder of this section reviews current university intellectual property policies and considers whether academics should be concerned about the impact on academic freedom. There is some earlier research in this area focusing is on patents. This will mainly be of relevance to science and technology disciplines, and its scope in the UK context is limited to Russell Group universities (Stallberg 2007). Research for the purposes of this article looks beyond the Russell Group and focuses on copyright - which is relevant to all disciplines within a university.

⁶ <http://www.ucu.org.uk/index.cfm?articleid=2386>(accessed 26 May 2014).

⁷ (2013) 133 B.M.L.R. 210

⁸ Section 27(2) of the Freedom of Information (Scotland) Act 2002. For further discussion, see Gray 2012.

⁹ *Stephenson Jordan & Harrison v MacDonald & Evans* [1952] 1 TLR 101 (CA).

¹⁰ [1952] 1 TLR 101 (CA).

¹¹ [2009] FCAFC 116 (Fed Ct (Aus) (Full Ct))

The formal legal position is that, in the absence of contractual provisions to the contrary, intellectual property rights in works and inventions produced in the course of employment are usually owned by the employer.¹² All of the university policies considered adopted this position as their starting point, but then diverged in terms of exemptions applying to certain types of academic output. Other restrictions also reflected moves by universities towards image management. For example, a clause in the University of Manchester *Intellectual Property Policy* states that the ‘University ...waives its rights of ownership of copyright in Scholarly Materials except: ...where publication of the Scholarly Materials in question might bring the University into disrepute.’ Concerns about such restrictions are illustrated by a recent discussion within the academic community about a blog entry by a practising lawyer working for a firm with university clients - the blog allegedly equated outspoken academic opinions with employment misconduct (Gill 2014; Parr 2014; Parr 2014a).

In researching for this section, 81 UK university intellectual property policies were considered. These represented approximately 70 per cent of the total number of universities in the UK.¹³ Most gave the impression of significant input from lawyers, although very few expressly acknowledged this.¹⁴ Lawyer input of itself is not criticised - creating legally sound policies necessitates careful consideration of the relevant legal provisions. However, there is an important difference between the academic community in a university collectively determining what it wishes to achieve and then lawyers being instructed to frame this in legal terms, and university managers instructing lawyers to draft a legal document, which may be significantly slanted in favour of the institution, and then seeking to push this through the university decision making or decision ratification processes.

A striking feature of a number of the policies reviewed was that financial priorities predominated – asserting the university’s rights to ownership of much or all intellectual property created or devised by their staff. This was particularly extensive in the context of potentially patentable inventions, with universities purporting to acquire control, including in many instances requiring silence on the part of the inventor until necessary safeguarding steps had been taken. Patent protection relies upon secrecy prior to the making of an application and it has been argued that this alters the focus of academic life by shutting out colleagues and graduate students not directly involved and distorts channels of communication of ideas (Macdonald 2011; Loughlan 1996, citing, inter alia, Ch'ang, 1994; Langford, 1991. For some counter arguments, see Crespi 1997). It has been argued that academics who object to being drawn into the commercialisation of their work have the power to prevent university patenting by publishing information about their inventions. However, if breach of IP policy provisions gave rise to disciplinary action this in itself would draw into question fundamental aspects of academic freedom (Macdonald 2011, citing Argyres 1998).

The position in intellectual property policies relating to copyright was more varied – perhaps reflecting the fact that, to date at least, the potential financial value of intellectual property in academic outputs of this nature may have been assumed to be far lower than for patentable inventions (Macdonald, 2011). Examples of policy provisions most supportive of academic freedom included the University of Cambridge:

¹² Copyright, Designs and Patents Act 1988 ss.11(1) and 11(2); Patents Act 1977 ss.7 and 39-41.

¹³ A few university policies were not available due to significant redrafting in progress, the others were not accessible online and could not otherwise be obtained in the time-frame for this research.

¹⁴ The University of Manchester policy documents were unusual in expressly crediting a named law firm in creating the policy

‘[I]ntellectual property rights, arising from the activities of University staff in the course of their employment by the University, which exist without the need for any formal application at the time these regulations are approved, belong to the University staff member who creates the results...’¹⁵

Imperial College:

‘In keeping with normal academic custom College generally waives its claim to copyright in teaching materials, textbooks and research publications. In these circumstances, individuals may publish these works to their own benefit. College will automatically receive an implied worldwide royalty-free licence in perpetuity entitling it to use all such materials for the purpose of research and teaching by College itself, in all media.’

The University of Bath policy was accompanied by a statement about academic freedom:

‘Over the centuries universities have had to struggle to establish, to maintain, and often to re-establish academic freedom, not for the comfort of academic staff, but for the health of the university. Where academic freedom has been suppressed the spirit of the university has suffered.’

The accompanying Ordinance provides that the University does not claim copyright in scholarly output produced by staff and includes within the definition of ‘scholarly output’: lecture notes; academic publications; seminar papers; course materials produced for issue to internal students, and; examination papers, questions, assignments. Particular effort is made to balance potentially conflicting legal provisions, by providing that in order for the University to meet its statutory obligation to make reasonable adjustments for students with disabilities, the ownership of copyright in lectures is subject to the right of the University to permit students to record lectures. Copyright in the content of the lecture remains the property of the lecturer, but if necessary to meet reasonable adjustment requirements a student may be permitted to record it and use the recording only for the purpose of personal study.

The University of Swansea policy states that:

‘The principle which the University applies to Teaching Materials and other Academic Materials is that the University should be entitled to use the IP for its own purposes and receive a share [15% of any sum over £2000] of any proceeds from commercialisation, but does not insist on ownership... The Creator shall own the copyright in teaching materials, academic and other publications (books, articles etc), theses and dissertations, lesson plans and learning modules...’

Royal Holloway, University of London, states that: ‘apart from works specifically commissioned by the College, the College will not assert any claim to the ownership of copyright in: (a) artistic works, films, books, articles, plays, lyrics, scores, or lectures...(b) audio or visual aids or written notes used as an aid to the giving of lectures.’ Similarly,

¹⁵ *Statutes and Ordinances of the University of Cambridge*, Chapter XIII, Finance and Property, clause 7

Goldsmiths, University of London provides that: ‘the College does not intend to assert any possible ownership of copyright in books, articles, lectures or other written work or art work, other than that specifically commissioned by the College...’. The University of Warwick states that it will not claim ownership of intellectual property in ‘Scholarly Works or Teaching Materials created by Employees and/or Other Creators except where Specifically Commissioned.’ It also, with the potential for some uncertainty in interpretation, asserts ownership of ‘intellectual property in course materials produced for the purposes of the curriculum of a University course created by University employees...’ The Universities of Aberystwyth and Bangor joint policy provides that intellectual property rights in scholarly materials and teaching materials are normally assigned to the staff who originate them. The use of ‘normally’ and the fact that intellectual property rights are purported to be acquired first by the universities, but then ‘assigned’ to the staff member, places academics in a more vulnerable position should the universities choose in practice to adopt a less faculty favoured approach.

Whilst the above policies provide examples of good or reasonably good practice from the perspective of academics, the same cannot be said for the approach of some other universities, especially in the context of teaching outputs. For instance, the Heriot-Watt University policy does not claim copyright in ‘books or in articles for learned journals’ but goes on to state ‘save where such books or articles form part of materials used for distance learning. Intellectual Property Rights arising from such distance learning materials shall be the exclusive property of the University.’ The University of Reading similarly does not claim copyright in scholarly works ‘produced solely in the furtherance of an academic career, such as articles in journals, papers for conferences, study notes not used to deliver teaching and books not commissioned by the University.’ However, it does assert ownership over rights in ‘the content of the scholarly work, where the content is based on work to which the University asserts its ownership as a result of an employment or other contract.’ Read in conjunction with the provision that the university asserts ownership of ‘all Teaching and Learning Materials’, other than those produced by the staff member ‘for their personal use and reference in teaching (for example as personal notes and annotations to support teaching materials)’ there may be significant academic outputs the ownership of which is lost by the academic author.

The University of Glasgow asserts ownership of all teaching materials created within or on behalf of the University. The University also asserts the right to ‘commercialise such Teaching Materials as it sees fit, including licensing or assigning the IP in the Teaching Materials to third parties’, with specified revenue sharing provisions in place to benefit the creator of the materials. The creator is granted:

‘a royalty-free, non-exclusive license to use the Teaching Materials created by them for teaching or research purposes which are non-commercial only for as long as the Individual remains employed by the University. If the Individual ceases to be employed by the University, the Individual may request a single copy of the Teaching Materials for his/her personal use and for teaching and research purposes which are non-commercial.’

The University of Manchester adopts a similar approach, granting a license only for the period of employment, after which ‘the licence shall be treated as having terminated. Such licence may continue after the Originator has ceased to be employed by the University... if the use of the Teaching Materials does not damage the University’s Commercialisation of the Teaching Materials or prejudice in any way the interests of the University.’ ‘Non-

commercial' in the case of the Glasgow policy lacks clear meaning in an environment of potentially increasing tuition fees and the emergence of for-profit institutions, to which some academics may move. The final lines of the Manchester provision, not to 'damage the University's Commercialisation of the Teaching Materials', appears to be even more clearly weighted in the interests of the university. The University of Abertay grants a licence to staff for use of teaching materials 'for other teaching carried out by the member of staff out with his/her normal course of employment' but the 'licence will terminate immediately upon a member of staff leaving and no longer being employed by the University.' The University of Chichester grants a licence for use, but without specific mention in this clause about the post-employment position. However, a later clause states that on leaving the university an employee is not entitled to use any materials to which the University owns intellectual property rights without prior written permission. The University of Newcastle policy states that the University will grant a personal licence for use in future employment, if the material 'does not form part of any team-based course material, or material in which the University has a reasonable commercial interest.' If either of the latter applies, the university will 'consider' a request for use or partial use. In light of increased tuition fees and competition for students, it seems likely that the University could claim a 'reasonable commercial interest' in any materials which underpinned courses it offered and which could result in a competitive disadvantage if permitted to be used elsewhere. The team point is pertinent in a higher education environment which increasingly involves academic teams creating and teaching courses.

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Overall, the 81 university copyright policies studied were divided into three broad categories: (1) the most academic freedom centred permits the academic creator to retain copyright in all materials, usually with an accompanying licence benefitting the university with regard to some teaching materials; (2) policies which assert institutional copyright over teaching materials, but grant a licence to the academic originator for future use. Some of these licenses are unrestricted, others not – for example, by restricting us to non-commercial purposes; (3) policies which assert copyright over teaching materials, but deny a licence to the originator for future use after leaving the employment or which are silent on the licence point. Categories (2) and (3) both have the potential to stifle academic freedom, with (3) being particularly restrictive in terms of the freedom of academics to move between institutions and to take *all* of 'their' academically generated intellectual property with them.

Of the intellectual property policies considered only a small minority, approximately 20 per cent, were in category (1). Of these, almost 88 per cent were pre-1992 universities, the other 12 per cent post-92. A slightly larger minority, approximately 25 per cent, of policies were in category (2), including some which had a discretionary rather than automatic licence provision and so the possibility arose that for some former employees the reality could actually be a category (3) scenario. 75 per cent of the category (2) policies were from pre-1992 universities, 25 per cent post-1992. The remaining 55 per cent of policies were in category (3). Of these, around 33 per cent were from pre-1992 universities, 67 per cent related to post-1992 institutions.

Overall, therefore, in approximately 80 per cent of the universities considered, academic staff were purportedly granted no ownership rights in some or all of the teaching materials they

had created,¹⁶ and 55 per cent granted creators no license to utilise materials after changing employer.

Very few university intellectual property policies directly mentioned academic freedom in the context of intellectual property ownership. Far more frequently, reference was made to commercialism and protection of the university's financial interests.

Barrow's (2009) observation that 'commercialisation of higher education...can result in universities having a weak grasp of the scope of their educational mission' – the 'fundamental *raison d'être*' of which should be 'the pursuit and passing on of understanding' is particularly pertinent. Academic freedom within the university sector as a whole suffers if academics face legal obstacles which limit, even remove, control of parts of their academic output and ability to take elements of it from one job to the next. Even with the same employer, an academic who lacks control of teaching materials she or he has created faces the possibility of being pushed aside and others put in place to teach the course(s). The extended problems this may cause are reflected in other contexts. For example, even though academics are employed by universities, they are also part of national and international disciplinary communities of scholars (Hill 2011, citing Abbott 2002). In essence, the body of knowledge and ideas in a disciplinary area crosses institutional boundaries and, in terms of teaching, historically it has been taken for granted within subject-discipline communities that individual academics can, if they choose, freely share the output from their intellectual endeavours.

New media

Academic freedom has the potential to be further diminished by technological developments (O'Neil 2008). Questions posed, but not readily answered, include whether academics are 'entitled to academic freedom in the cyberclassroom?'; does the cyberprofessor have the freedom to design and deliver a course without restriction from those funding it?; who 'owns knowledge products developed for Internet use?' (Altbach 2001). In terms of the potential impact of new technologies on the freedom to choose what and how to teach - learning-management systems offer university managers greater opportunities to closely monitor exactly what academics are doing and, in turn, to dictate what should be done in future. The American Association of University Professors (AAUP), by way of example, argues that monitoring should be permitted only with the explicit and voluntary permission of the instructor involved (AAUP, 2014).¹⁷

Little guidance is available in the UK. The Higher Education Funding Councils for England, Scotland and Wales and the Department for Employment and Learning (Northern Ireland) have jointly produced 'Guidance for Senior Managers' relating to *Intellectual property rights in e-learning programmes*. However, no mention is directly made of academic freedom and decisions relating to the policy adopted is left with each individual institution.¹⁸ By way of

¹⁶ The term 'some' is used because categories (2) and (3) in some policies permitted employees to retain ownership of, say, private notes used to support teaching but asserted ownership of key aspects of other teaching materials.

¹⁷ The AAUP also addresses the importance of electronic communication media to exercising academic freedom. For example, university policies which require permission before sending messages to large groups of recipients have the potential to inhibit freedom if permission is denied inappropriately. Institutions should have clear, academic led policies: 'electronic communications are too important for the maintenance and protection of academic freedom to be left entirely to institutional technology offices.'

¹⁸ http://webarchive.nationalarchives.gov.uk/20100202100434/http://www.hefce.ac.uk/pubs/hefce/2006/06_20/

international comparison, the AAUP addressed the challenges to academic freedom posed by new media in a 2004 report, updated in 2013. The AAUP's starting position is that freedom 'may be limited to no greater extent in electronic format than they are in print, save for the most unusual situation where the very nature of the medium itself might warrant unusual restrictions.' The report noted that the idea of 'classroom' must be expanded to reflect increasing interaction through new technology media: 'a classroom is not simply a physical space, but any location, real or virtual, in which instruction occurs, and that in classrooms of all types the protections of academic freedom and of the faculty's rights to intellectual property in lectures, syllabi, exams, and similar materials are as applicable as they have been in the physical classroom' (AAUP, 2014).

In the UK, even some universities with intellectual property policies which are favourable in other respects to academic freedom have tended to take a more restrictive approach in the case of new technologies. For example, the University of Bath, with one of the most academic freedom friendly policies in other respects, provides that academic staff do not retain copyright in course materials or e-learning materials produced for distance-learning or virtual learning courses where the author has been specifically assigned duties in order to produce the output. Until recently a provision of this type would have seemed to be of little consequence to most academics. However, with the growth of lecture recording and pressure on academics to use virtual learning environments, the model of teaching in many universities is moving further in this direction.

None of the UK university intellectual property policies researched for this article specifically mentioned relatively new media such as Twitter, Facebook, YouTube and blogs. These potentially provide new intellectual property ownership and academic freedom challenges.¹⁹ The position may be further complicated by traditional academic working practices, which don't necessarily differentiate clearly between work time and non-work time. If an academic contract of employment doesn't specify set working hours, are there any points in the day when an academic blogging on matters relevant to their academic expertise could definitely be said to be engaged in their pastime as a hobby rather than as part of their salaried academic role? Some university intellectual property policies address this in ways likely to be beneficial to the institution. For example, the Swansea policy states that 'Intellectual Property created by a member of staff within his or her employed area of academic or research expertise during his or her period of employment with the University are presumed to have been created during the course of his or her employment, and so belong to the University'. Even where the terms used by a university are less clear, for example 'in the normal course of their employment' is common wording, an academic who flits in the evenings between responding to work emails and blogging or tweeting on academic matters may find it problematic to argue that the latter was outside of work practice whilst the former clearly was not. Similarly, if communications are made using the employer's IT hardware or software

¹⁹ Some evidence of potentially academic freedom impinging responses has begun to emerge from other jurisdictions. For example, in 2013 it was reported that a tenured journalism professor at the University of Kansas had been suspended from teaching over a strongly worded tweet. John Milburn, 'University Of Kansas Professor David Guth Suspended Over Tweet Won't Return in 2013' and 'University Of Kansas Professor David Guth Suspended Over Tweet Won't Return in 2013' and 'KU Professors Say Punishment For David Guth's Tweet Violates Free Speech Rights', *Huffington Post*, 09/28/13 and 10/24/13 (http://www.huffingtonpost.com/2013/10/25/university-of-kansas-david-guth_n_4164298.html). This, in turn, reportedly led to the Kansas Board of Regents granting discretion to state universities to suspend or dismiss any faculty or staff member who improperly uses social media. 'Improperly' could be anything 'contrary to the best interest of the university'. Peggy Lowe, 'Strict Social Media Policy Approved By Kansas Board Of Regents', May 14, 2014 <http://kcur.org/post/strict-social-media-policy-approved-kansas-board-regents>

resources, either on campus or remotely, this may strengthen arguments that the employee was acting in the course of employment. The University of Greenwich, for example, states that where ‘there has been more than incidental use of University resources or equipment such materials will be classed as University-owned IP.’ Similarly, the University of Leeds claims ownership if materials are created ‘utilising any equipment, hardware, software or facilities of the University.’²⁰ King’s College, London states that an employee creating intellectual property outside the normal course of his or her employment duties with significant use of College resources will be deemed to have agreed to transfer such property to the College.

Conclusions

Commentators have argued, some approvingly and others critically, that the concept of a university has changed from one which focuses upon research and teaching as social goods in themselves, to one which stresses the need to exploit the results of academic enterprise. A ‘revolution’ aimed at turning the traditional university model into an ‘entrepreneurial’ model (Stallberg, 2007, 529-30). Some critics have argued that the commercial world and academia should remain fundamentally different in nature - ‘The bottom line for business is the search for profit through the development and delivery of saleable products. Academic organizations seek an ageless commodity - timeless truth’ (Burke, 1993, 3-4).²¹

The legal protections for academic freedom in the UK are minimal and compare poorly with some other jurisdictions. In this unprotective legal environment, any moves which further threaten academic freedom may lead universities further along to path to commercial models of higher education. Consideration of the intellectual property policies of a significant majority of UK universities suggests that, in many, academic outputs, especially those relating to teaching, have already fallen within the entrepreneurial models of higher education and have become potentially saleable products to be owned and exploited by universities as they see fit. Government initiatives further support these moves.²²

Until relatively recently, a few lecture notes coupled with a handful of photocopied pages of handouts and possibly a few overhead projector slides provided in themselves little of financial value that the university could utilise. In such circumstances, universities in the UK demonstrated little interest in asserting ownership. The position has and continues to change. Technological advances mean that recordings of lectures, especially if relating to subject matter which only changes infrequently, coupled with detailed handouts and virtual learning environment resources can constitute 60-80 per cent of ‘teaching’ on some courses. Academics who lose ownership of their teaching materials, and in some instances any right to

²⁰ The University of Leeds was unusual in explicitly providing a staff member who wishes to claim ownership of intellectual property on the grounds that it was not produced during the course of employment and did not require substantial use of University facilities with the opportunity to assert this. If not resolved at local level, ultimate determination is by a panel consisting of senior academic office holders, a union nominee and a lay member of the University Council.

²¹ A continued disconnect between the business understanding of what universities should be about, and the view from some within academia is illustrated by a recent book review by a practising intellectual property lawyer - John A. Tessensohn (Richards, 2013). Tessensohn notes that the ‘least satisfactory parts of the book are written by academics. One chapter... is written by an academic who was one of the drafters of *Who Owns Science? The Manchester Manifesto*, a document that identifies the usual Luddite inspired problems with patenting and calls for patenting to assume a ‘marginal role to minimize damage to academic freedom’—this emotional but ultimately misguided call is ... divorced from real world realities. ...’

²² For example, in 2011 the Intellectual Property Office launched a strategy guide, *Intellectual Asset Management for Universities*. This 48 page document contains no mention of academic freedom.

personally utilise them in future, risk reduced opportunities to change employer and, at the extreme, provide their existing employer with the wherewithal to make significant elements of their job redundant.²³

Such approaches risk undermining the traditional *raison d'être* of universities and aspects of academic freedom which underpin this. As Macdonald observes, UK universities:

‘should be contributing to the sum of human knowledge, not trying to make money.... As the modern university is very interested in being paid, it is loath to regard information produced within its walls as a public good...’ (Macdonald, 2011)

Academics, therefore, face a choice- they can drift or be pushed into becoming an occupational group who, as Hayes (2009) puts it, lack ‘noble’ goals, or they can rise to the challenge of defending academic freedom. This latter aim requires ideas of academic freedom to be regularly reviewed. Principles of professional autonomy and ‘the freedom of individual academics to pursue academic activities in academic settings in a manner and to an end of their own choosing’ (Nixon et al 1998, cited by Williams 2008, 544) remain important but can be seriously undermined if some of the outputs of such pursuits are ‘taken’ from academics by their employers.

There is debate within the legal community regarding the effectiveness of university regulations which purport ownership of the intellectual property created by its academics (See, for example, Pila 2010, at 351), but it is likely that a legal battle between university and academic is one that the latter may find difficult to pursue, unless he or she is personally wealthy or secures trades union or other support.²⁴ It is also acknowledged that protecting intellectual property against external threats can be legally complex and expensive. Whilst some academics may take the view that protection is unnecessary, because they are happy that their ideas should be freely exploited, others may not – as Crespi (1997) says, the ‘academic community has never been a monolith of opinion’ in this regard. Universities are likely to be less willing use their resources to protect intellectual property in which they have no stake.

Progress, it seems, would best be made by ensuring that policies regarding ownership and use of intellectual property are fully discussed within universities – to ensure that the collegiate academic voice is heard and an appropriate balance drawn between protecting academic freedom and ensuring the future financial viability of the institution. Lawyer input at various stages of this process is likely to be beneficial, but as servants of the academic community to ensure an efficient and legally compliant process, not as drivers of the process towards an unduly legalistic ‘business’ model.

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²³ Section 139 Employment Rights Act 1996 provides, inter alia, one definition of dismissal by reason of redundancy as: “the fact that the requirements ... for employees to carry out work of a particular kind... have ceased or diminished or are expected to cease or diminish”.

²⁴ Recent changes to the litigation process relating to low value intellectual property disputes may reduce, although do not completely eliminate, the financial risks. However, the High Court remains the venue for more complex and high value cases, with the prospect of unlimited damage and cost awards, including orders that the losing party pays the legal costs of the winning party. See further <https://www.gov.uk/intellectual-property-an-overview/legal-action-about-intellectual-property>; <http://www.inhouselawyer.co.uk/index.php/intellectual-property/9832-the-new-small-claims-track-for-ip-cases>

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