

National Association of College and University Attorneys  
Research Universities: Evolving Intellectual Property Policy  
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**Intellectual Property Policies**  
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### **Historical Notes on Intellectual Property**

Three hundred years after the invention of the printing press, Immanuel Kant and every other writer in the German city states, had a problem. The public was suddenly inundated with printed works --- plays, poems, novels, and philosophy. Once the works were published in one city-state they were copied in others without payment to the authors. The debate raged for over 20 years and involved many of the best minds in Germany. Kant wrote in the Critique of Judgment (1790): "Every artistic work consists of a physical object and a piece of its creator's spirit. People can buy the object but not the spirit, for soul cannot be purchased. Thus readers can freely copy books, but only in ways that respect the writer's integrity." This idea grew into the current European system of copyright ("Who Will Own Your Next Good Idea?" *Atlantic Monthly*, September 1998).

There is a 300-year legal history of protection of copyright in English and American law. At its earliest conception in England it was viewed as a natural right of authors to protect their written work so they could "reap the profits of their own ingenuity and labor." ("Preserve Copyrights and Protect Us All," *Washington Post*, Outlook Section, Sunday November 1, 1998)

By the time of the writing of the U.S. Constitution copyright was recognized as a common-law right that served to both reward and author's efforts and provide an incentive to create original works for public dissemination. The founders believed that copyright was essential to democracy and included it in the constitution. Article I, Section 8 instructs Congress to "secure for limited Times to Authors and inventors the exclusive Right to their Respective Writings and Discoveries. " When George Washington asked Congress to enact copyright legislation he argued that it would increase the national stock of knowledge. And knowledge, he said, is the "surest basis of public happiness." (*Atlantic Monthly*, Sept. 1998, p. 5)

Now like eighteenth century Germans, we are experiencing powerful cultural changes. The rise of digital media and the Internet for communication is forcing us to revisit the question of intellectual property. In the fall, Congress passed the Digital Millennium Copyright Act of 1998 which has important implications for campuses. Also enacted was

the Sonny Bono Copyright Term Extension Act which extends the copyright protection from 20 years to 50 years after the death of the author (or 75 years after publication for corporate authors) and makes it a crime to circumvent copyright protections. The legislation brings the United States in compliance with the terms of the World Intellectual Property Organization Treaty on Copyrights (WIPO). There is a session on the new legislation tomorrow, so I won't go into further details here.

NEA's concern in lobbying for this legislation and for WIPO was the protection of the rights educators to own their work, and the "fair use" of materials for educators." NEA, library groups, and other education groups were successful in preventing a provision that would have established legal protections for virtually any collection of information (databases), even those currently in the public domain.

### **Intellectual Property Language in Bargaining Agreements**

Karen Hershey outlined what was necessary for a good policy on intellectual property in her remarks. In NEA's view a good policy is a well-negotiated labor agreement with binding arbitration. We assert that "faculty and staff should own the rights to their intellectual property." Unions protect faculty rights in this area through negotiations.

NEA maintains a database with over 500 higher education contracts for two and four-year campus. When language on patents, copyrights, royalties is reviewed there are several trends that become apparent (Note: Attachment 1 has examples of contract language in this area):

1. If the research is funded by another agency then the contract or grant for that research determines the distribution of income from the product.
2. If a faculty member invents, writes, or produces a product without the use of campus resources then they own full rights to the income from that product.
3. If the faculty member uses campus resources there are several options:
  - a. The proceeds are shared by the individual faculty and the campus - percentages are determined by the labor agreement.
  - b. Or the proceeds are shared until the "fair market value" of the resources has been repaid.
  - c. Sometimes there are provisions that students and other faculty on the campus may use the product for no charge. If it is marketed off the campus than the individual faculty member and the campus share the proceeds.
4. The faculty own the copyright to their classroom lecture notes and materials; and to their publications.
5. The administration cannot make signing away rights a condition of employment.

Distance education and other uses of technology are raising new questions: Who owns the products of distance learning? If a web site is created for a course who owns copyright? If a class is video taped who owns the tape? Administrators did not care about owning faculty members' lecture notes or books that sold 500 copies. But the market is hungry for courseware and now those notes suddenly have value, especially when they are in an electronic format.

## Future Trends

We may be disputing the ownership of outmoded products. Several developments will bring up new ownership issues.

1. The invention of electronic paper - a flexible, cordless computer screen that looks and acts like a piece of paper. If e-paper is widely accepted it will "turn the world of copyright upside down, and with its literary culture." Each Gyricon sheet is made of transparent silicone rubber with millions of plastic balls, smaller than a human hair, which carries an electrostatic charge. Arranging these balls creates black and white dots that can be arranged like pixels on a computer screen. Once they have been given a charge they will last a very long time, but they can also be run through the charge again to make another image. Other companies are developing versions of electronic books that will look and feel like a paper. (*Atlantic Monthly*, September 1998)
2. Musicians face new challenges in the digital age where people can download the latest music from the Internet. Companies are developing markers that will make it possible to determine who owns the product and which web sites it has been on. The same markers are being developed for printed materials ("New Electronic Tags Carry Copyright Information About On-Line Publications," *The Chronicle of Higher Education*, October 3, 1997)
3. There is growing resistance to the high cost of refereed journals in higher education. Faculty members in some disciplines are looking for ways to have research peer reviewed through publications on the Internet without the journals.
4. The NEA is releasing a multi-media, interactive CD-ROM on the future of higher education. Included are scenarios on campuses that may exist in the future. To obtain a copy send an e-mail to [HigherEd@nea.org](mailto:HigherEd@nea.org) or visit web site at <http://www.nea.org/he>

In preparing for this session, several web sites that have good information on the topic were found. The URL's are below:

<http://www.wtaccess.com/users/gummess/coprby/coprby.htm>). George Washington University graduate students developed "Copyright Bay" that uses coastal metaphors to help teachers and faculty members navigate "Fair Use Harbor" and avoid the dreaded "Infringement Reef."

<http://www.lib.uiowa.edu/proj/webbuilder/copyright.html>

Sites about copyright that are linked to the University of Iowa's Copyright and Multimedia Law for Webbuilders and Multimedia Authors.

<http://www.theatlantic.com/issues/98sep/copy.htm>

*Who will own your next good idea?* This article in the September 1998 issue of Atlantic Monthly talks about the future of copyright and impact of inventions like electronic paper.

## **Attachment 1** **Intellectual Property Language in Labor Agreements**

### **Article 10 of the University of Hawaii 1995-1999 on Intellectual Property, Patents and Copyrights has the following provisions:**

#### General Scope

Except in the case of works written or produced for hire, and subject to any restrictions imposed by outside sponsoring or funding organizations, a Faculty Member who writes or produces any work shall have exclusive rights thereto, including the ownership of copyright.

It is recognized that there are usually three interests involved in connection with research work and invention performed with the resources of the University. These three interests are the Faculty Member researcher or inventor, the University, and the general public whose taxes support the University. If the research is financed wholly or in part by an outside agency, there exists an additional interest. Rights, royalties, and other net profits shall be shared fairly amongst the parties. In most cases, the Faculty Member will receive fifty percent (50%) of the net profits from the sale or exploitation of Patents.

#### A. Classroom lectures and the recording of presentations.

Faculty Members shall own all rights to materials prepared on their own initiative for classroom, educational or professional purposes, and shall be exclusively entitled to the benefit of any royalties derived therefrom.

For personal educational purposes, students may record classroom lectures or other presentations, using tape recorders or other electronic or mechanical devices, unless the Faculty Member denies permission for such recording. Permission shall not be denied when the student requires such devices as the result of a physical disability.

#### B. Distance Learning and Multimedia Presentations

The Employer may transmit or record for transmission any classroom instruction, lecture or other instructional or performance event produced by Faculty Members as a part of a program of distance learning, e.g., HITS and SkyBridge, where the Faculty Member has received either an equivalent reduction in other classroom assignments or overload compensation as set forth in Article XX, Salaries. The Employer, however, may not sell or re-transmit in future semesters any such recording except under the terms of a written

Agreement between the Employer and the Faculty Member providing each party with a fifty percent (50%) interest in the net profits from either the sale or rebroadcast.

### C. Patents and Copyrights

The rights of Faculty Members relating to patents and copyrights shall be governed by the University of Hawaii Patent and Copyright Policy (effective 11/22/68), and the Executive Policy E5.500 Administration of the Patent and Copyright Policy and the Administrative Procedures A5.500, A5.501, and A5.502 (as in effect on 12/14/96), which are incorporated herein by reference. (See R-10, R-11, R12, R-13, R-14 of Reference Section.)

### D. Review and Amendment

The parties recognize that the issue of intellectual property is complex and that there may be a need to amend or modify the current University of Hawaii Patent and Copyright Policy. Therefore, a Joint Committee shall be established to periodically review the issue of intellectual property rights and the applicable policies and procedures. The Joint Committee shall be comprised of three representatives appointed by the UH President and three representatives appointed by UHPA. The Joint Committee shall meet at least once each academic year and report its deliberations, findings, and recommendations, if any, to the Employer and the Union.

### **Agreement for Youngstown State University 1993 – 1996 (Ohio)**

24.3: Research Proceeds: All proceeds which result from faculty research, including marketable computer software programs, belong to the faculty member unless the research is subsidized by YSU or an external agency which stipulates contrary terms in a separate and specific contract as a condition of support. Research is considered to be subsidized by YSU only if the faculty member receives a reduction in teaching load, a Research Professorship, a Sabbatical/Faculty improvement Leave, or a University Research Council grant, for the purpose of conducting the research. Under no circumstances shall YSU's share exceed 25% of the proceeds after the recovery by YSU of the cost of subsidy specified in the contract. The signing of a specific contract with YSU for subsidized research cannot be a stipulated condition of employment. This policy shall not apply to royalties, which shall go exclusively to the author.

### **Agreement for State University System of Florida 1995-1998 (excerpts)**

#### Article 18 Inventions and Works.

18.1 University Authority and Responsibilities. Section 240.229, Florida Statutes, authorizes each university to establish rules and procedures regarding patents, copyrights,

and trademarks. Such rules and procedures shall be consistent with the terms of this Article.

18.2 Definitions. The following definitions shall apply in Article 18: (a) A "work" includes any copyrightable material, such as printed material, computer software or databases, audio and visual material, circuit diagrams, architectural and engineering drawings, lectures, musical or dramatic compositions, choreographic works, pictorial or graphic works, and sculptural works. Instructional technology material, as defined in Section 9.8(b), is included in this definition.

(b) An "invention" includes any discovery, invention, process, composition of matter, article of manufacture, know-how, design, model, technological development, strain, variety, culture of any organism, or portion, modification, translation, or extension of these items, and any mark used in connection with these items. Instructional technology material, as defined in Section 9.8(b), is included in this definition.

(c) "Instructional technology material" is defined in Section 9.8(b).

(d) "University support" includes the use of university funds, personnel, facilities, equipment, materials, or technological information, and includes such support provided by other public or private organizations when it is arranged, administered, or controlled by a university.

### 18.3 Works

#### (a) Independent Efforts.

A work made in the course of independent efforts is the property of the employee, who has the right to determine the disposition of such work and the revenue derived from such work. As used in this Section, the term "independent efforts" means that:

- (1) the ideas came from the employee;
- (2) the work was not made with the use of university support; and
- (3) the university is not held responsible for any opinions expressed in the work.

#### (b) University-Supported Efforts.

(1) If the work was not made in the course of independent efforts, the work is the property of the university and the employee shall share in the proceeds therefrom.

(2) Exceptions. The university shall not assert rights to the following works:

- a. Books, articles, and similar works, the intended purpose of which is to disseminate the results of academic research or scholarly study; and
- b. Works developed without the use of appreciable university support and used solely for the purpose of assisting or enhancing the employee's instructional assignment.