

CASE STUDY: COPYRIGHT ISSUES IN DISTANCE EDUCATION

A Dissertation

by

MICHAEL B. HUDDLESTON

Submitted to the Office of Graduate Studies of
Texas A&M University
in partial fulfillment of the requirements for the degree of

DOCTOR OF PHILOSOPHY

August 2005

Major Subject: Educational Human Resource Development

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ABSTRACT

Case Study: Copyright Issues in Distance Education. (August 2005)

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Over the years, much attention has been given to copyright law in literature and as it pertains to textbooks and other original academic works. However, as the focus is narrowed to the copyright law as it relates to distance education within higher education, very little information or precedents can be looked to for guidance. For an institution of higher education involved in distance education, the problem demands that a model be developed specifically for universities to follow as they embrace distance education programs and course development. As the likelihood of lawsuits and grievances clearly exists, the motivation of faculty to create original works is potentially compromised when there is conflict between themselves and the universities who employ them. In addition, a set of guidelines in the form of a model lends a structural basis to university educators and administrators alike on which to formulate the process of developing distance education programs with a greatly reduced chance of legal incident.

A case study design was chosen because it adds strength to what is known and deepens understanding of complex issues. According to Lincoln and Guba in their 1985 book, qualitative research involves the studied use and collection of a variety of empirical materials:

case study, personal experience, introspective, life story, interview, observational, historical, interactive, and visual texts that describe routine and problematic moments and meanings in individuals' lives. Two major types of qualitative research are case study and action research. Larry Dooley, professor of Human Resources Development at Texas A&M University, sees case study research as a valuable method to satisfy scholarly inquiry. Case study, as it relates to a contemporary phenomena, examines the relationship of the phenomena as it resides in the realm of real life, and proceeds to make the distinction between the phenomena in question and its context using a variety of sources as evidence (Dooley). A qualitative case study proves advantageous because it enlightens and provides understanding when investigating a complex situation involving a number of multiple variables.

Through this case study a distance education copyright planning model and power point guidelines have been created that provide insight to the researcher and other interested parties. Recommendations and conclusions have been provided that will be beneficial to all parties involved in distance education copyright issues.

DEDICATION

This dissertation is dedicated to my lovely wife, Ingrid, and my children Kaylie, Hunter and Jett. Your love, patience and support throughout this process have been immense. I could not have done this without you. I love you!

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I would like to lovingly acknowledge my mother-in-law Linda Houser and my parents Jane and Billy Ray Huddleston. I will be forever grateful for their tireless help with the children, their constant encouragement, and their many expressions of love toward me and my family.

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CHAPTER I

INTRODUCTION

As a relatively new facet of education, technology mediated instruction has experienced substantial success in establishing itself as a respective form of instruction. Distance education, as it is sometimes called, has proven to be a much-needed avenue for universities to reach students whose geographical location makes traditional commutes difficult or impossible. Travel expenses are cut to a bare minimum, students acquire necessary requirements for degrees and certifications, and universities reap the benefits of increased enrollment. Overall, distance education, when implemented with enthusiastic, conscientious instructors who are capable of correctly operating and navigating cameras, video and audio tools, and along with conscientious reliable technical personnel who can maintain quality video equipment, is a very valuable resource for all parties involved. It is typically a win-win situation (Willis, 1994, p.168). Copyright laws, as well as patent laws, while completely necessary, are an element of distance education that has created a distinctive element of confusion and an infinite number of questions for university administrators and faculty. One of these areas is the question of who owns property produced by university professors who are hired to specifically develop curriculum for technology-mediated instruction and conversely, who owns original property produced as a by-product, or an accompaniment to the subject being taught. A statement by the American Association of University Professors states,

This dissertation follows the style of *Human Resource Development Quarterly*.

...The development of distance-education technologies has created conditions seldom, if ever seen in academic life...The teacher's academic and legal rights may not be fully or accurately understood or may be in dispute in this new environment. Also in potential dispute are issues regarding the faculty's overall authority in determining appropriate policies and procedures for the use of these new technologies...Questions arise regarding copyright for materials adapted from traditional classroom setting or created expressly for distance education. In addition, systems of interactive television, satellite television, or computer-based courses and programs are technically more complex and expensive than traditional classroom instruction, and require a greater investment of institutional resources, and more elaborate organizational patterns. These issues not only make more difficult the question of who is entitled to claim ownership of materials designed for distance education; they also raise questions about the appropriate distribution of authority and responsibility between the general administration of college or university... (AAUP 6/25/2002)

Thus, further complicating matters is when the sensitive subject of royalties is involved. While the copyright laws and policies do exist and are straightforward and fairly easy to decipher, they leave areas that must be dealt with through negotiations of the parties involved (Valauska & Innes, 1999, p. 6). Copyright laws cause these parties, namely the professors responsible for original text and curricula, and university

administration to depend on a contextual contract to determine or outline the details regarding joint ownership of the properties and the distribution of royalties. The potential for lawsuits clearly exist. Copyright laws also provoke questions regarding what materials can and cannot be used when developing curriculum especially with the pervasive use of the Internet and multimedia components (Innes & Valauskas, 1999, p.7). University policies created to supplement the copyright laws have not sufficiently satisfied both administration and faculty with regard to these areas. For the sake of this writing, Texas A&M University will be the university utilized as an example. However, this can apply to others involved in distance education.

Additionally, a concern that professors can sell their texts to other universities, has perpetuated an additional concern: in the now competitive business arena, universities could be selling off a portion of their academic uniqueness with the sale of original curriculum. This concern additionally permeates the realm of technology-mediated instruction curriculum developed at Texas A&M University. Will instructors hired to write and teach this curriculum be able to sell it to other universities? How will royalty payments be dispersed? Also, if the classes are videotaped, could the instructors' complete videos and curriculum be sold as a package to other institutions, thus, again, negating some of the academic uniqueness that Texas A&M possesses? These concerns aid in illustrating the validity of the administrators' allegations. How can concerned administration be satisfied? How can talented faculty continue to feel motivated to produce their best work? Who will draw the lines between copyright law and patent law, and who will differentiate policies and how they apply to traditional instruction versus

technology-mediated instruction? These questions will take time, human and financial resources, and trial and error to answer. However, as a start toward solving these difficult questions, concise negotiations resulting in explicit contracts would definitely be a strong beginning for universities struggling heavily with these issues. This would result in the development of a model designed to serve universities by eliminating such problems as the ones suggested. The American Association of University Professors supports such efforts, evidenced by their statement:

It is imperative, therefore, that colleges and universities now using or planning to use the new technologies of distance education consider the educational functions these new media are intended to perform and the specific problems they raise. Traditional academic principles and procedures will frequently apply to these new media, either directly or by extension, but they will not be applicable in all circumstances. When they are not, new principles and procedures will need to be developed so that the new media effectively serve the institution's basic educational objectives. (AAUP 6/25/2002)

While this cannot erase the biases of administration, it can aid in alleviating subjective consequences. During negotiations, it is extremely important to secure airtight contracts between the parties involved. Texas A&M has been working to reduce and hopefully completely eliminate these types of problems by incorporating specific details regarding ownership and royalty distribution and concisely incorporating these into a workable model which can easily be used by faculty and administration to help guide

them through the process of creating distance education courses while simultaneously establishing ownership, establishing what materials and elements can and cannot be used to teach the class, and addressing the question of whether curriculum for the course can be sold to other universities. Beginning in the fall of 1999, efforts have been applied to the research and study of problems and loopholes within these contracts and the subsequent answers and attempts to answer these potentially volatile situations. Case studies from different universities as well as other legal institutions and case law are valuable tools of reference for negotiators and contract administrators. Documentation and concise details are kept at Texas A&M University for reference to prove and support the decisions that are made and the contracts that are written. This information, which comprises the basis of the model, is used to defend decisions questioned by concerned administrators.

Therefore, this dissertation will be a case study focused on Texas A&M University's distance education program and the development of an instructional model that addresses the issues, concerns, complexities regarding protection of copyrighted material, ownership of copyrights, rights of distribution and distribution of any future royalties as they relate to the development of a technology mediated instruction program.

Problem Statement

Over the years, much attention has been given to copyright law in literature and as it pertains to textbooks and other original academic works. However, as the focus is narrowed to the copyright law as it relates to distance education within higher education, very little information or precedents can be looked to for guidance. For an institution of

higher education involved in distance education, the problem demands that a model be developed specifically for universities to follow as they embrace distance education programs and course development. As the likelihood of lawsuits and grievances clearly exists, the motivation of faculty to create original works is potentially compromised when there is conflict between themselves and the universities who employ them. Should this type of scenario become common, it carries with it the potential to affect the value of the college education. This “watering-down” of the value of a college degree can certainly occur when faculty members realize their efforts to create and produce superior research and materials are not rewarded or respected to the extent that was once awarded to original academic work. Why would faculty desire to give universities their best effort and work when it may not be given sole ownership and they may have to face legal conflict in addition? Conversely, with worldwide web use having become pervasive and practically second nature when seeking to obtain research information, complexities regarding what can and cannot be legally incorporated into a distance education course have evolved. Again, the potential is greatly expanded when the Internet enters the picture where the lines are blurred regarding copyrights and legal ownership. The incorporation of the Internet presents further questions of who owns the property, and even could suggest that multiple individuals or entities could claim part-ownership if the right parties so desire. This can be summarized into four questions: 1) What materials can be legally used in the development of curricula when it is used for distance education courses? 2) Who receives royalties when an original curriculum for

distance education is distributed? 3) Is copyright owned exclusively by authors or jointly between authors and institution? 4) Can curriculum be sold to other universities?

Purpose of the Study

The purpose of this study is to provide clear guidelines to educators regarding copyright issues in distance education. At this time many educators are simply relying on the copyright laws and fair use guidelines that are in effect for traditional classroom settings and are insufficient for today's expanded educational venues and avenues of transmission. The study will also provide guidance to the researcher and others who will be developing distance education courses in the future so that proper and conscientious planning may occur, therefore preventing unnecessary cost in both financial and human resources. Texas A&M University has been working to reduce and hopefully completely eliminate these types of problems by incorporating specific details regarding ownership and royalty distribution and concisely incorporating these into a workable model which can easily be used by faculty and administration to help guide them through the process of creating distance education courses while simultaneously establishing ownership, establishing what materials and elements can and cannot be used to teach the class, and addressing the question of whether curriculum for the course can be sold to other universities. Therefore, the development of an original model will clarify ownership and will seek to negate potential problems for the distance educator is the result of this study.

Research Questions

1. What methods were used when developing the copyright guidelines for the distance education program at Texas A&M University?
2. How congruent are these copyright guidelines with the current copyright literature and current case law?
3. How can these copyright guidelines be presented in such a way as to provide a model for others wanting to develop copyrightable distance education coursework?
4. How can this model prevent legal conflict for the faculty who develop the curriculum?

Operational Definitions

Copyright – “A bundle of exclusive rights conferred by a government on the creator of original literary or artistic works such as books, articles, drawings, photographs, musical compositions, recordings, films, and computer programs. International in scope, copyright grants the creator reproduction, derivation, distribution, performance, and display rights... Current U.S. copyright law is based on the Copyright Act of 1976 and its amendments.” (US Copyright Office, 2004)

Texas A&M Contracts Department - Department at Texas A&M University responsible for all contracts and contract administration at Texas A&M University.

Patent – “A legal grant issued by a government permitting an inventor to exclude others from making, using, or selling a claimed invention during the patent's term... To receive patent protection, an invention must display patentable subject matter (a process,

machine, article of manufacture), originality, novelty, nonobviousness, and utility.” (US Patent & Trademark Office, 2004)

Distance Education - "Distance education is planned learning that normally occurs in a different place from teaching and as a result requires special techniques of course design, special instructional techniques, special methods of communication by electronic and other technology, as well as special organizational and administrative arrangements".

(Moore & Kearsley, 1996, p. 81)

Fair Use – “Codified in the 1976 U.S. Copyright Law and frequently used by scholars, journalists, and librarians, the fair use provision permits the limited use of copyrighted scientific and artistic material to supplement or briefly illustrate oral or written commentary, literary or artistic criticism, or teaching materials. In determining that a use is fair, four factors must be considered: (1) the purpose and character of the use -- whether it is commercial or nonprofit; (2) the nature of the copyrighted material; (3) the amount of the total work used; and (4) the effect of the use upon the potential market -- whether or not the author is deprived of sales.” (US Copyright Office, 2004)

DMCA – Digital Millennium Copyright Act The passage of the most comprehensive reform of copyright law in a generation, the Digital Millennium Copyright Act, along with passage of the Copyright Term Extension Act take copyright principles into the digital information age and establish complicated rules that most users do not yet appreciate.

Berne Convention – “The 1886 multinational treaty on copyright protection signed at Berne, Switzerland; officially titled The International Union for the Protection of

Literary and Artistic Works. Prior to the 1996 World Intellectual Property Organization (WIPO) Conference, the Berne Convention was revised in 1914, 1928, 1948, 1967, and 1971. The convention grants the moral rights of attribution and integrity, and certain exclusive economic rights to a work's translation, reproduction, performance, and adaptation. The United States became a signatory to the Berne Convention in 1989.”

(World Intellectual Property Organization, 2003)

TMI - Technology-mediated instruction

Intellectual Property – “Creative ideas and expressions of the human mind that possess commercial value and receive the legal protection of a property right. The major legal mechanisms for protecting intellectual property rights are copyrights, patents, and trademarks. Intellectual property rights enable owners to select who may access and use their property, and to protect it from unauthorized use.” (US Patent & Trademark Office, 2004)

WIPO (World Intellectual Property Organization) – “A specialized Geneva-based agency of the United Nations, created in 1967 that promotes international cooperation in intellectual property protection. WIPO administers various "Unions," including the Paris Union and the Berne Union, and other treaty organizations founded on multilateral treaties. The organization also creates model laws for adoption by developing nations. More than 160 countries are WIPO members.” (World Intellectual Property Organization, 2003)

Strategic Planning - “Strategic planning is a disciplined effort to produce fundamental decisions and actions that shape and guide what an organization is, what it does, and

why it does it, with a focus on the future.” (Adapted from Bryson’s Strategic Planning in Public and Nonprofit Organizations)

TEACH Act – Technology, Education and Copyright Harmonization Act

Assumptions

The following assumptions are being made regarding this study:

1. The Texas A&M University Department of Contract Administration has an accurate and legal process for determining copyright guidelines for distance education.
2. Texas A&M University contract personnel and faculty involved in the copyright issues are willing to discuss their experiences and share their insights.
3. The case study findings result in the culmination of a model would lend themselves to the development of a guide that would help others involved in copyright issues for distance education.
4. The researcher will review and present data without excess personal bias.
5. The researcher will assume timeliness.

Limitations

1. This study is limited to the information acquired from literature review, personal research and written documentation acquired while compiling copyright guidelines during the period 1999 to 2004.
2. This study is based on perceptions and observation of both subjects and observer.

Findings can be generalized only to the Texas A&M University Department of Contract Administration, where the case study was conducted but should provide guidelines for others, especially Texas A&M University System partners.

Significance of Study

This literature review and case law review was conducted to identify dominant points and features of the copyright law as it relates to distance education. These key points and features were used in the construction of a model utilized by distance education course developers at Texas A&M University. There is very little written in the field of copyright law specifically related to distance education in the higher education setting. This case study was conducted at Texas A&M University and will contribute to the practice of distance education coursework development. This case study is significant because it will contribute to the literature and knowledge base of copyright law as it relates to distance education, and it will continue to encourage excellence in the teaching and development of distance education courses by allowing faculty the freedom to create and administer without concern over legalities.

Organization of Study

Chapter I began with an introduction that included a brief history of the copyright law, technology-mediated instruction (distance education), and related policies at Texas A&M University followed by the statement of the problem, purpose of the study, significance of the study, research questions, definitions, assumptions, and limitations to assist in understanding the case study. Chapter II contains a literature review and case law review that provided the foundation for model, which this case study is based upon.

The review includes definitions, summary of copyright law and patent law, policies at Texas A&M University and other institutions in higher education, and the importance of negotiated contracts to delineate copyright ownership. Chapter III contains a detailed description of the methodology to be used in this case study. Chapter IV will include a detailed presentation of the case study and an analysis of this data. Chapter V will focus on conclusions from the case study, implications, recommendations and suggestions for future study.

CHAPTER II

REVIEW OF LITERATURE

The importance of embracing the potential for litigation and preparing sufficiently for it as it applies to universities and their faculty and the development of original material for technology mediated coursework cannot be ignored. It is the responsibility of the university to develop a system that thoroughly guides the instructor, the respective department, and the university administrators in a direct manner that allows for compliance for copyrights on all fronts, and takes into account former legislation such as the Copyright Act and the Patent Law, and newer legislation such as the very important TEACH Act and the DMCA. Because the growth of distance education is virtually explosive and expands the magnitude of the issues at stake, copyright protection has had to expand as well (Crews, 2003). This expansion resulted in the TEACH Act, which stands for Technology, Education and Copyright Harmonization Act (Appendix A). The development and implementation of these newer laws reflect the widespread concern educators and members of Congress, alike, feel for the complexities involved in the fast growing distance education sector. Dr. Kenneth Crews, Professor of Law at Indiana University School of Law and Director of the Copyright Management Center states, “The TEACH Act is a clear signal that Congress recognizes the importance of distance education, the significance of digital media, and the need to resolve copyright clashes” (Crews, 2003). He also focuses on the possibility of litigation and says, “Educational institutions are probably at greater risk than are individuals of facing infringement liability, and individual instructors will most likely

turn to their institutions for guidance about the law” (Crews, 2003). To better understand the issues at hand, the elements of the copyright law, as well as the patent law, the TEACH Act and the DMCA must be examined.

Copyright Law

To better understand the issues at hand, the elements of Copyright Law must be examined. When an author produces an original work, a copyright protects that author and provides immediate ownership over that work. Works may include literary, dramatic, artistic, musical, or other intellectual works. In order to reproduce the work, to prepare derivative works based on the work, to distribute, perform, or display the work, one must receive authorization from the owner of the copyright (Brinson & Radcliffe, 1994, p.16). Section 106 of the copyright law gives the author (owner) that power. While it sounds straightforward, there are still a significant number of lawsuits filed every year disputing ownership. Usually, the litigation questions whether an employee was hired to produce the specific work in question or if this work is simply a byproduct of the job. (Brinson & Radcliffe, 1996, pp.11-12). Section 101 of the copyright law states that when an employer hires original works to be done, then the employer, not the employee, is considered the owner. More specifically, the statute states that “a work made for hire” is

work prepared by an employee within the scope of his or her employment; or a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a

compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire...

(United States Copyright Office).

The law also provides protection for the creator by providing them with 1) the right to copy; 2) the right to prepare derivative works; 3) the right to distribute copies of the work; 4) the right to perform the work; and 5) the right to display the work (Baumgarten, et.al. 1997, p.212).

Of equal importance are the four fair use guidelines, which are stated in Section 107 of the Copyright Act. It is imperative for administration as well as professors to also understand fair use guidelines and they must ask themselves if they are complying as they begin to develop their properties. These fair use guidelines are stated as follows:

1. The purpose of the use (is it for profit or nonprofit?)
2. The nature of the work itself.
3. The amount or substantiality of the segment used in relation the whole.
4. The effect of the use on the potential market for the work.

All of these components combined are essential for administration and professors alike to comprehend and apply to their respective projects. An example of confusion regarding fair use guidelines is that education purposes clearly fall under the nonprofit umbrella. Yet university administration is asking the question to faculty when they, in

turn, sell their developed curricula in the form of texts or videos, “What was the purpose, profit or nonprofit? (Brinson & Radcliffe, 1996, pp.300-301). Even with these laws and policies and the addition of university policies, and the precedent pertaining to university professors’ production of and subsequent ownership of textbooks, Texas A&M University administration has established a policy mirroring professors’ rights to copyrights as they apply to technology mediated instruction.

Patent Law

Complicating matters more and seeming to compound the issue is the confusion between copyrights and patents. Often these are misunderstood with the distinctions between these becoming intertwined. It is important to clarify the differences by understanding each. Simply worded, patent law states that when an employee is hired to develop certain intellectual properties, the employer owns the patent (Brinson & Radcliffe, 1996, p.67). University administrators have now allowed this fact to come into play when considering who owns what property. What role does patent law assume when an instructor is hired to create original curricula? When professors invent a product, which can be a process, method, discovery, device, plant, composition of matter, or other invention that reasonably falls under the United States patent law, that they were hired to produce while employed at a university, the patent belongs to the university (Brinson & Radcliffe, 1996, p.229-301). It is this fact that causes some consternation for administrators because of the inconsistency concerning professors producing textbooks and curriculum versus those individuals developing products. Those administrators familiar with patent law seem to be questioning the status quo.

The lines between patent law and copyright law have now been blurred (Valauskas & Innes, 1999, p.23). It does not matter that the copyright law states that of those categories not protected: “Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices as distinguished from a description, explanation, or illustration” are included, which is in direct opposition to aforementioned statutes of the patent law. (Copyright Office Library of Congress 1998). If the patent law is such, why is the university’s policy regarding copyrights different? While both laws are straightforward and seemingly clear, it is the opinions of different individuals that instigate questions and lawsuits. Which brings up the questions: would a distance education curriculum using multimedia methods be considered under copyright or patent law, and if technology mediated instruction ultimately produces videos that could possibly be sold, in the future along with curriculum, then should patent laws be applied or copyright laws? (Valauskas & Innes, 1999, pp.16-17). These are the controversial questions that have begun to be asked.

Another concern in regard to patent rights and technology mediated instruction is the transmission of patented properties developed at the respective universities that are included in the curricula. In many cases, patent rights, like copyright laws, are being infringed upon when incorporated into videotapes, new documents, CD-ROMs, and computer software (Council on Governmental Relations, 1996, pp.6-7). As curriculum is being dispersed to many different locations, patent and copyright owners are losing control over their licenses (Innes & Valauskas, 1999, pp.4-6). University administrations admit this is a concern for them and the possibility of lost revenue as

technology specified for their courses makes it to the Internet and becomes available to the public (Dede, 1996, p.5). It is conceivable, however that because of the possibility of university courses containing copyrighted and patented information becoming circulated on the Internet, that universities have begun discussing nationwide course offerings. These classes would be “taught by telegenic, internationally recognized authorities” (Dede, 1996, p.31). This may or may not result as a consequence of copyright owners (faculty) selling their curricula. However, when a faculty member is the one doing the selling and the material was produced at the university, disputes frequently can arise between faculty and administration (Valauskas & Innes, 1999, p.16).

The TEACH Act

In order to meet the demands of such an expansive entity as distance education, Congress enacted the Technology, Education and Copyright Harmonization Act on October 4, 2002. The TEACH Act was meant to “establish a critical balance between the needs of educators and students on the one side and the rights of copyright holders on the other” (Gasaway, 2001, pp.82-83). Kenneth Crews states, “The law is a complete revision of the current Section 110(2) of the U.S. Copyright Act, and one of its fundamental objectives is to strike a balance between protecting copyrighted works, while permitting educators to use those materials in distance education” (Crews, 2003). He additionally quotes,

The new law offers many improvements over the previous version of Section 110(2), but in order to enjoy its advantages colleges, universities, and other qualified educational institutions will need to meet the law’s

rigorous requirements. Educators will not be able to comply by either accidental circumstances or well-meaning intention. Instead, the law calls on each educational institution to undertake numerous procedures and involve the active participation of many individuals (Crews, 2003).

In addition to defining the TEACH Act, with this quote, Crews further underscores the need for the development of a model that universities can apply to the structure of their distance education programs that can help alleviate possible problems regarding the development and implementation of distance education courses and possible infringement issues which result in costly litigation. The major changes that the TEACH Act brings forth are outlined by Laura Gasaway, Director of the Law Library and Professor of Law at the University of North Carolina, in her article, *Balancing Copyright Concerns: The TEACH Act of 2001*:

1. Expands the categories of works that can be performed in distance education beyond non-dramatic literary and musical works to reasonable and limited portions of other works, with the exception of works produced primarily for the education market.
2. Removes the concept of the physical classroom and recognizes that a student should be able to access the digital content of a course wherever he or she has access to a computer.
3. Allows storage of copyrighted materials on a server to permit asynchronous performances and displays.

4. Permits institutions to digitize works to use in distance education when digital versions do not already exist and when the digital work is not subject to technological protection measures that prevent its use.
5. Clarifies that participants in authorized distance education courses and programs are not liable for infringement for any transient or temporary reproductions that occur through the automatic technical process of digital transmission.

Additionally, Dr. Gasaway states that there are more safeguards needed to limit the use of “unauthorized and inappropriate” copyright materials and the TEACH Act acknowledges these as well (Gasaway, 2001):

1. The TEACH Act adds a requirement that performances and displays be part of mediated instruction under the supervision of an instructor.
2. The TEACH Act limits portions of works to be performed, other than non-dramatic literary and musical works, to reasonable and limited portions,
3. The TEACH Act restricts displays to amounts typically displayed in a live classroom setting,
4. The TEACH Act limits receipt of materials to enrolled students to the extent technologically necessary,
5. The TEACH Act requires the educational institution to apply technological protection measures that reasonably prevent retention of the

work for longer than is necessary and that prevent downstream copying or dissemination, and

6. The TEACH Act requires performances and displays be given by means of lawfully made or acquired copies of the works (Gasaway, 2001).

Texas A&M University System Policy

Paragraph 5.1.1 of the Management of Intellectual Property of Texas A&M University System states that “the System does not claim ownership to pedagogical, scholarly or artistic works, regardless of their form of expression” (Appendix B).

Conversely, section 5.1.3 states that:

Copyrightable Works that are not works for hire but are works that are developed with integral and significant use of funds, space, hardware, or facilities administered by a System component, where use was essential and substantial rather than incidental shall be owned by the System component. Furthermore, Copyrightable Works that are not works for hire but are developed in the course of or resulting from research supported by a grant or contract with the federal government (or an agency thereof) or a nonprofit or for-profit nongovernmental entity, or by a private gift or grant to the System, shall be determined in accordance with the terms of the sponsored grant or contract, shall be owned by the System component administering the grant or contract (TAMU Management of Intellectual Property).

Thus, this historic practice is based on policy and is not questioned nor is it considered anything but usual. Additionally, because the economic benefits of this association and cooperation between faculty and the institution that employs them are recognized, it seems less likely that conflict would occur in the realm of technology mediated instruction (Willis, 1994, p.266). Nonetheless, recently, and possibly because of the relative newness of technology mediated instruction, it has been questioned by some university administrators whether the original works of a distance education instructor totally belonged to the instructor. Consequently, it was claimed that the university hired the professor to produce curricula specifically for this class. Not only that, but the university contributed high dollar technological equipment, transmission of the class, and state of the art facilities. Now, the professor is able to reproduce works and sell them to other universities and be paid royalties. The contributing university will not receive a percentage of royalties. This type of conflict, considered a “works for hire” conflict, is not unusual (Brinson & Radcliffe, 1996 p.63-66). However, it is new as it applies to the ownership of curricula developed specifically for distance education courses (Colyer, 1997, p.45). Should a university have legal rights to a professor’s original works in distance education and consequently be eligible for a percentage of proceeds from royalties because of its contribution and because of Section 5.1.3 of the university policy on Management of Intellectual properties? If policy is reexamined in regard to technology mediated instruction as is being discussed; will it, as a result, affect instructors of traditional classrooms? (Gunawardena, 1992, p. 69). It is important to fully embrace and answer these questions, yet faculty and staff involved must be informed of

the potential problems associated with both copyright law and university policy, and must be knowledgeable with regard to negotiation of their contracts. Don Olcott, Jr. and Stephen J. Wright in their article, “An Institutional Support Framework for Increasing Faculty Participation in Postsecondary Distance Education”, in *The American Journal of Distance Education*, state that in order for universities to keep up with their ever-accelerating distance education programs, they must renew a commitment that favors faculty (Olcott & Wright, 1995, p.5). If universities continue on this path of questioning in regard to technology-mediated instruction and the question of who will receive what royalties, then they will not be perceived by faculty to be supportive. Thus, contract administration departments must commit to strategic and careful negotiation of faculty contracts, as well as keeping abreast of all new academic developments with regard to technology mediated instruction. Additionally, because university “presidents, vice-presidents, and provosts control resources and establish policies that affect the perceived importance of distance education, particularly in terms of its value as an academic endeavor and its consistency with the academic mission,” then they should be prepared to reexamine the emerging disputes concerning faculty and their subsequent royalties (Olcott & Wright, 1995, p.11). It has been shown that just because a practice is a law and a policy does not inherently mean there will not be questions, debate, and sometimes, lawsuits (Valauskas & Innes, 1999, p.9). Another problem that is perpetuating the conflict of who owns what rights to technology mediated instruction is the fact that one of the most neglected aspects of this instruction within the university setting is the area of management (Murgatroyd & Woudstra, 1989, p.14). This may also account for the

lack of support from administration. Strategic measures from administration should be put into place in order to encourage faculty in the technology mediated education arena.

Dr. Charlotte Gunawardena, distance education professor at the University of New Mexico, and author of “Changing Faculty Roles for Audiographics and Online Teaching”, in the American Journal of distance Education, states that, “Distance teaching must be rewarded in the tenure and promotion system to encourage faculty to teach at a distance and to experiment with new technologies and methods of teaching” (Gunawardena, 1992, p.71).

Another area causing concern to distance education faculty involves the question of what instructors can and cannot use in the development of their course materials especially in view of material acquired from the Internet and multimedia components. While this encompasses both instructors and distance education instructors alike, an additional complication for the distance education instructors is the possibility future videotapes of their classes and the question of who owns them if they are sold. Additionally, what is included in distance education curriculum and possible videos, such as photographs, music scores, cartoons, quotes, or material from various texts, presents significant concerns for instructors. Much of this material is acquired from the Internet and as a result, copyright authorization is not always sought. This is a nightmare for collegiate counsel. The lack of acquisition of copyrights is often due to ignorance. Much of the Internet material does not display itself as copyrighted material. Thus it is used in ignorance. (Colyer, 1997, p.44). Sometimes the task of acquiring all the copyrights for many small pieces of information seems daunting for such small

amounts of information, pictures, songs, etc. One may “overlook” seeking the authorization on every little component. It is quite tedious as well as difficult to develop curriculum using the now commonplace resource of the Internet and avoid violating copyright laws. (Colyer, 1997, p. 51).

While following fair use guidelines and copyright and patent laws, these guidelines provide educators with some assurance that they would not be sued should they adhere to them, however, extracting information from the Internet for educational purposes definitely has higher risks. (Colyer, 1997, p. 48). For example, if a distance education professor in creating class materials wishes to enhance curriculum with multimedia to illustrate important points using five minutes of a motion picture, one minute of two different symphonies, and would like to digitize a few photographs, the professor will risk being sued. And if copies are made of the session, especially more than thirty copies, then at a later date are sold; the professor could find himself in multiple lawsuits. (Brinson & Radcliffe, 1994, p. 125) The problems become even greater because of the lack fair use guidelines for educational multimedia. According to Chris Dalziel in the “Fair Use Guidelines for Educational Multimedia,” and as stated above,

Digitizing an image to incorporate it into a multimedia project requires faculty to obtain permission for each copyrighted piece they use in their program. When one multimedia production can easily contain over 2,000 copyrighted works, paying royalty fees and obtaining formal permission to use each piece can be extremely costly and time consuming. Often it is

impossible to track down who owns the rights to a certain photograph or other piece of work (Dalziel, 1997, p. n/a).

While not a practice yet, the suggestion that distance education classes may be videotaped and later sold has been made. It is almost mind boggling to think of the multiple copyright authorizations that will be required and the records that must be kept. Punishment for this is not limited to just those responsible. An example of this occurred when a sales training video included a video clip from the “Terminator” from the Internet for a sales training class. The developer of the video did not think to seek copyright authorization for the clip. The publisher of the video thought all avenues were covered and received a guarantee for non-infringement. The video was then distributed and sold in retail stores. The television studio discovered the video, sued the publisher and the developer, and both parties even though a guarantee was issued. Both parties are eligible for infringement (Brinson & Radcliffe, 1994, p.137). These kinds of cases are common. Therefore, it is imperative for universities to be aware of and informed of these potential risks.

An avenue for instructors to take to ensure more adequate and complete authorizations for the development of distance education curriculum is a source called Rights Clearance Agencies. Rights Clearance Agencies can be hired to seek out ownership of copyrighted works and to acquire permission for the requesting party. These agencies can expedite the process for instructors, which may be on short time schedules. University contract administration must become familiar with these agencies

and know which are the most reputable in order to construct effective contracts between the agency and the professor (Brinson & Radcliffe, 1994, p.126-127).

An additional source for instructors to tap is the newly established stock houses and libraries. These stock houses and libraries usually own the copyrights for a large volume of films, video clips, photographs, illustrations, music and sound effects. They can be hired also, to help instructor's research to find the best possible materials. The comforting aspect and selling point for stock houses and libraries is that they cover all of the rights needed for the instructor's intended uses of the licensed works (Brinson & Radcliffe 1994, p.126-127).

DMCA

The Digital Millennium Copyright Act (DMCA), PL 105-304, was signed into law by President Clinton on October 28, 1998, and required implementation by October 28, 2000. The passage of the most comprehensive reform of copyright law in a generation, the Digital Millennium Copyright Act (DMCA), along with passage of the Copyright Term Extension Act take copyright principles into the digital information age and establish complicated rules that most users do not yet appreciate. The implications of the new statutes for library and educational use of copyrighted materials, however, were not fully resolved in the legislation (Lutzker, 1999, ARL). The DMCA legislation implemented requirements of the World Intellectual Property Organization (WIPO) and brought the United States into compliance with the WIPO treaties. In order to facilitate the development of electronic commerce in the digital age, Congress implemented the WIPO treaties by enacting legislation to address those treaty obligations that were not

adequately addressed under existing United States law (Copyright Office-Executive Summary, 1998).

HRD and Distance Education

“It is widely acknowledged that HRD is a discipline rooted in multiple theories” (Swanson & Holton, 2001, p. 114). HRD academics and practitioners are involved in a large variety of activities surrounding strategic planning and training at universities and organizations. Distance training continues to rise in popularity with organizations and universities. Managers are facing a difficult economy and are being forced to cut costs and use more cost effective training methods. One way that educators and organizations are looking to reduce costs is through the use of technology. Schreiber and Berge (1998) present cases from San Diego State and Northwestern who are using technology to further the scope and reach of their programs. San Diego State University has a master’s program utilizing, desktop videoconferencing, audio and video tapes and the Internet to present information. Northwestern University’s Institute for Learning Services uses desktop video teleconferencing, access to the Internet, a multimedia notebook with embedded templates for sharing information, and scientific visualization software called “Collaborative Visualization” project. San Diego State University and Northwestern University’s Institute for Learning Services are considered a success and can be used as models for other universities who want to capitalize on new technology (Schreiber & Berge, 1998). In order to ensure that the proper copyright laws are followed it is important to have a strategic plan in place for implementing these distance learning programs at universities.

Strategic Planning in Higher Education

General system theory, cybernetics theory, chaos theory and complex adaptive systems theory are some of the theories that are considered foundational to strategic planning. Ludwig Von Bertalanffy, the father of the system theory, had the idea that many different disciplines could be unified under one theory. General system theory is concerned with structure and explores the wholes, parts and the relationships of systems to their environment. “Cybernetics is the science of information, communication, feedback and control both within a system as well as between a system and its environment (Swanson & Holton, 2001, p.115).” How the system functions is more important than the structure. Chaos theory attempts to uncover a pattern in what appears to be random behavior. Complex adaptive systems theory evolved from chaos theory and presents the idea that somewhere in between order and chaos is where a system functions.

Lazlo and Lazlo (1997) capture the somewhat indescribable meaning of system theory when they state: systems sciences defy classification as constituting either an epistemology or ontology. Rather they are reminiscent of the Greek notion of nosology concerned with holistic and integrative exploration of phenomena and events. There are aspects of the systems approach that are ontological and aspects that are epistemological, and aspects that are at once both and should not be circumscribed to either (Swanson & Holton, 2001, p.116).

Looking at systems theory using the ontological view a person would believe that the world is made up of sets of interrelated components that when viewed as a whole have properties that do not exist in any of the sets. The epistemological view is that systems are mental constructs seeing the world in a more holistic way, looking at all of the parts together rather than separately (Swanson & Holton, 2001). The system theory is essential for strategic planners because it explains the complexity and presents methods for analyzing, modeling, and problem solving approaches.

Strategic planning allows, “the organization to gain greater control over its destiny, greater capacity to bring about some events and avoid others, and greater ability to adjust constructively to those events it cannot control (Lelong & Shirley, 1984, p.2).” Lelong and Shirley (1984) support strategic planning for the following two reasons. Organizations are pushed to communicate and uncover the deep problems rather than focusing on the insignificant surface problems. Strategic planning requires everyone within the organization to look toward and commit to common beneficial goals.

Institutes of higher education are constantly facing change. Decreasing funding and rapid technological growth are two areas that higher education institutions have to face. Rowley, Lujan, and Dolence (1997) feel that it is beneficial for institutions of higher education use strategic planning to survive change. Glassman, Rossy & Winfield, (n.d.) stated that institutions of higher education that do not rethink their roles, responsibilities, and structures can expect a very difficult time in the next decade. “Institutions will be compelled to become more introspective and analytical, to undertake to set priorities and develop strategies, overcome institutional inertia and

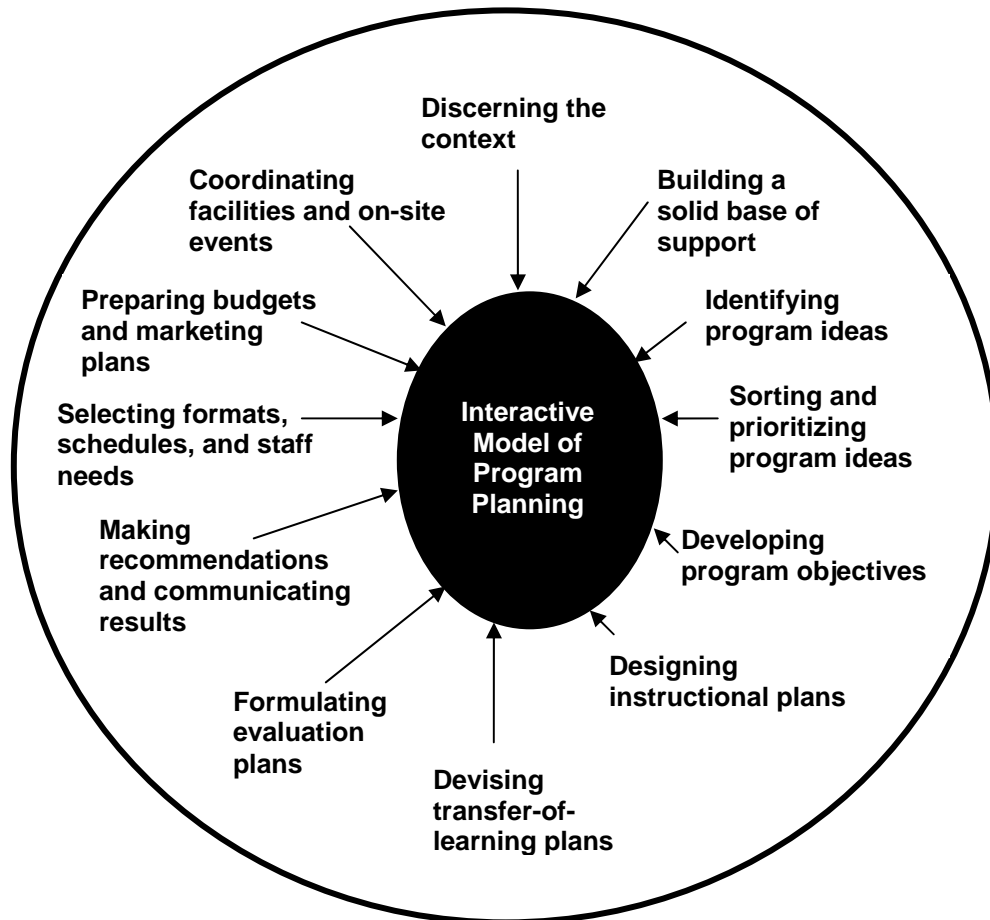
make long overdue choices – for example, to identify areas of growing student interest and create new programs to replace those for which demand may have fallen off (Kotler, 1981, p.23).” According to Zaltman, Florio, and Sikorski (1977) planning is the most important step for successful adoption, implementation and institutionalization of educational change. Senge (1990) believes that an organization will not foster a proactive environment unless they embrace strategic planning. Bryson (1995) feels strategic planning can help foster goodwill by exploring the different viewpoints of all groups, and encouraging groups to use open communication to develop a plan that produces the most reasonable decisions. The use of technology driven education is going to continue to grow and educators are going to continue to develop distance education programs. If there is no forethought or planning a wall could form between educators and administration regarding the process for using distance education. Institutes of Higher Education need to plan for possible copyright problems and ensure that educators as well as the institute are following copyright laws.

Caffarella’s model presents a dynamic planning process and is an alternative to linear or step-by-step models (Figure 1). This allows for the flexibility needed in institutes of higher education. The model is based on the following seven assumptions:

1. Educational programs focus on what the participants actually learn and how this learning results in change.

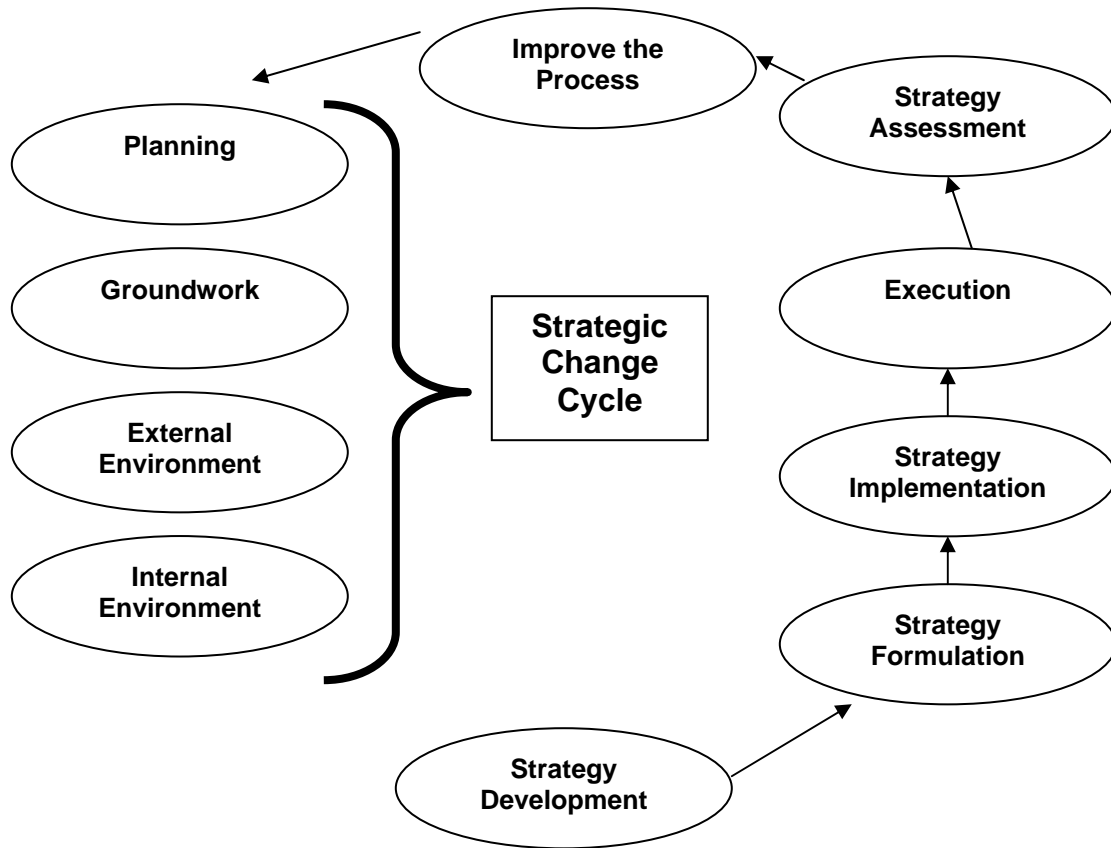
2. The development of educational programs is a complex and non-sequential interaction of institutional priorities, tasks, people, and events.
3. Program planning is contextual in nature: social, economic, cultural, and political climates will have an impact on individual program planners.
4. Both preplanning tasks and last-minute decisions are necessary when planning programs.
5. Effective planning requires respect and honor for diversity and cultural differences.
6. Individual program planners' work differently and there is no single method of planning education that ensures success.
7. Program planners are learners, too; reflection and evaluation will strengthen individual abilities (Caffarella, 1994).

Figure 1. Caffarella Interactive Planning Model



John M. Bryson developed a model using a sequential process to conduct a complete organizational assessment and build a strategic plan (Figure 2). Bryson's model is called the strategic change cycle and allows for input at any stage. The strategic change cycle allows the planner to begin the planning process at any stage.

Figure 2. Bryson Strategic Change Cycle



Summary

While once viewed as fairly cut-and-dry entities, the copyright law and patent law and how they apply to university instructors and the development of their respective curriculums, is being questioned. Technology Mediated Instruction has helped precipitate these questions because university administration has realized that instructors may be profiting from material they were hired to develop while universities contributed greatly to the development. Patented materials, such as technological developments, are included in the curricula created by university faculty and used in transmission in technology mediated courses. Original curricula, which allow universities their uniqueness through their courses, will be sold it seems in the near future on videotapes to other universities for use as technology mediated courses. University administrations are concerned over this practice, but more so over the fact that they contribute a significant wealth of resources to the faculty to develop this curriculum, yet do not obtain royalties from it. Administration is looking to the future to see what revenues can be made from these created curriculums. Concise record keeping, staying abreast of the most recent developments and stringent contract negotiations are crucial elements that university contract administration must employ to alleviate problems as well as quiet the vocal opposition from university officials. It is imperative for the university president, vice-presidents and other administrators to be supportive and knowledgeable with regard to technology mediated instructors and the curricula they develop. This form of education is growing rapidly, and in order to maintain quality instructors, administration must find ways to alleviate tensions concerning original curricula and the legal

ownership of that material. Additional problems with regard to the creation of original curriculum for distance education exist in the acquisition of copyrighted works which should be addressed as resources are copious via the Internet, yet lack copyright distinction.

The Internet, while extremely resourceful, sometimes makes it too easy to incorporate copyrighted works without actual permission. The desire for multimedia components to enhance curriculum adds an additional element of tedious attention to ownership, and the possibility of video production and sale of distance education courses puts university administration on edge. Technology Mediated Instruction is a necessary and extremely positive, respectable form of education and careful attention to copyright laws and policies will only serve to enhance its success.

CHAPTER III

METHODOLOGY

Qualitative Research

According to Peck and Secker in 1999, qualitative research has three important implications from a research perspective.

1. Purpose of research not to establish objective facts but to explore how subjects make sense of topics of interest.
2. Theories are researchers own interpretation of the subjects understanding
3. To assess qualitative research, one must provide detailed description of data and make process of analysis transparent.

Qualitative research is an asset when used in cases in which the researcher is trying to acquire information of a more in depth nature.

According to Gall, Borg and Gall (1996) qualitative research is inquiry that is based on the assumption that individuals construct social reality through meanings and interpretations that are usually situational. The dominant methodology used to uncover these meanings is do intensive study in natural settings. Qualitative research involves the use of qualitative data, such as interviews, documents, and participant observation data, to understand and explain social phenomena (Merriam, 1988). Qualitative research should maintain such essential components as, “the goal of eliciting understanding and meaning, the researcher as primary instrument of data collection and analysis, the use of fieldwork, and inductive orientation to analysis, and findings that are richly descriptive” (Merriam,1998). Qualitative researchers can be found in many disciplines and fields

(Lincoln & Guba, 1985), and they use a variety of approaches, methods and techniques (Merriam, 1988). Qualitative research can be positivist, interpretive, or critical. Positivist studies generally attempt to test theory, in an attempt to increase the predictive understanding of phenomena. Interpretive researchers begin with the assumption that reality can be obtained only through social constructs like shared meanings and common language. Critical research attempts to be emancipatory in that it focuses on opposition and contradictions in society. People try to change their status but critical researchers know that they are sometimes hindered by social, cultural or political domination. Qualitative research involves the studied use and collection of a variety of empirical materials; case study, personal experience, introspective, life story, interview, observational, historical, interactive, and visual texts that describe routine and problematic moments and meanings in individuals' lives (Lincoln & Guba, 1985). Two major types of qualitative research are case study and action research. Dooley (2002) uses Yin's work to define case study research as "scholarly inquiry that investigates contemporary phenomena within its real-life context, when the boundaries between phenomenon and context are not clearly evident; and which multiple sources of evidence are used."

A qualitative case study proves advantageous because it enlightens and provides understanding when investigating a complex situation involving a number of multiple variables. Merriam (1988) also believes in the particularistic, descriptive, heuristic, and inductive natures of the qualitative case study. An important revelation as a result of the

case study and the subsequent end product as a detailed, or thick description of the phenomenon in question, hallmarks the qualitative case study in a particularistic way. Additionally, Stake (1994) maintains that consideration of the fact that the case study operate within a physical, economic, ethical and aesthetic context is important. These constraints determine the length and the quantity of time the researcher should investigate the study (Stake, 1994). For this reason Merriam (1988) believes the case study can be limiting and can possibly simplify or exaggerate the situation in question.

Denzin and Lincoln (1994) give a more in-depth definition: Qualitative research is multi-method in focus, involving an interpretive, naturalistic approach to its subject matter. This means that qualitative researchers study things in their natural settings, attempting to make sense of, or interpret, phenomena in terms of the meanings people bring to them.

Qualitative research involves the studied use and collection of a variety of empirical materials; case study, personal experience, introspective, life story, interview, observational, historical, interactive, and visual texts that describe routine and problematic moments and meanings in individuals' lives. (Swanson, Watkins, and Marsick, 1997, p.88)

“Qualitative researchers should have an ability to gather large amounts of data, to learn from them, to adjust their thinking, and to synthesize the data for the purpose of derived meaning (Swanson, Watkins, and Marsick, 1997, p.111).”

The researcher based this decision on practical and theoretical considerations supplied by Gall, Borg & Gall (1996) and Yvonna Lincoln and Egon Guba (1985). Gall,

Borg, & Gall (1996) states that time and budgetary constraints must be considered while Lincoln and Guba (1985) identified four criteria; exhaustion of sources, saturation of categories, emergence of regularities, and overextension, for deciding when to stop data collection. The researcher was under time constraints and recognized that each of the four criteria supplied by Lincoln and Guba had been met (Dooley, 2002).

Naturalistic Inquiry

In Qualitative Research, it is the Metaphysical and Ethical truths, which most interest us, as they are the most resistant to traditional positivistic research. We seek ways of understanding negotiated meanings in human relationships, just as we seek to understand humanity. Thus, a new kind of systematic set of beliefs and methods have developed that help define the researcher's perspective in the gathering of such research data; this set of beliefs is what makes up the paradigm of "Naturalistic Inquiry," using qualitative research tools as its sources of information gathering (The Socrates Institute, 2004).

Naturalistic inquiry can add insights into problems that cannot be reached using conventional methods. The key in naturalistic inquiry is not to manipulate events but to observe them as they happen in a natural setting. Naturalistic inquiry findings are created through a variety of interactions between groups and the inquirer found in the environment. "Educational institutions are dynamic, animate, changing environments. What might have 'worked' or been effective several years ago may or may not be appropriate today (Erlandson, Harris, Skipper, & Allen, 1993, p.46)." This research study will examine the copyright laws and procedures used by Texas A&M University

while creating a model for distance education that will be mutually beneficial to faculty members and the university.

Design of Study

Dooley (2002) defines case study as, “Scholarly inquiry that investigates a contemporary phenomena within its real-life context, when the boundaries between phenomenon and context are not clearly evident; and which multiple sources of evidence are used” (p. 335). “Case studies are differentiated from other types of qualitative research in that they are intensive descriptions and analysis of a single unit or bounded system such as an individual, program, event, group, intervention, or community,” states Merriam (1998, p. 19). Gall, Borg & Gall (1989) defined the case study as research with an investigator making a detailed examination of a single subject, group or phenomenon. Merriam (1988) said that the selection of methodology is determined by the nature of problem and type of product expected. The researcher chose a qualitative case study because it is best suited for this research project. In this case study the researcher is examining the copyright laws with regard to its effect on distance education. The purpose of this study mirrors the purposes of the case study as defined by Lincoln and Guba (1985):

- to record history
- to teach (as in the case studies used in educational psychology)
- to provide vicarious experiences for the reader in the context being described
- to chart future directions of an organization

- to facilitate change
- to revise issues for future consideration.

Additionally, the case study method is most appropriate and provides the following advantages as again outlined by Lincoln and Guba (1985, pp.359-360):

- The case study is better suited for *emic* inquiry (a reconstruction of the respondent's constructions), while the conventional report seems better suited for *a priori etic* inquiry.
- The case study builds on the reader's tacit knowledge by presenting holistic and lifelike descriptions that allow the reader to experience the context vicariously.
- The case study, more than the conventional report, allows for the demonstration of the interplay between inquirer and respondents.
- The case study provides the reader an opportunity to probe for internal consistency (factualness and trustworthiness).
- The case study provides the "thick description" necessary for judgments of transferability between the sending and receiving contexts.
- The case study provides a grounded assessment of context by communicating contextual information that is grounded in the particular setting being studied.

According to the requirements of naturalistic inquiry (Lincoln & Guba, 1985), this study was conducted in natural settings. Erlandson et.al. (1993 p.163) says, "In a naturalistic study the principal task of the researcher is to communicate a setting with its

complex interrelationships and multiple realities to the intended audience in a way that enables and requires that audiences interact cognitively and emotionally with the setting.” Texas A&M University and the office of the researcher were the primary settings in which this study commenced.

Data Collection

In naturalistic inquiry the primary purpose of data collection is to obtain the ability to construct reality in ways that are consistent and compatible with the participant’s real world. The researcher in this case study used a variety of data collection methods. “There are basically four general sources that the researcher utilizes in naturalistic research: interviews, observations, documents and artifacts (Erlandson, et. al, 1993, p. 85). According to Borg & Gall 1989 data can be obtained through public archival records, private archival records such as journals and calendars, direct response such as interviews and observation. The researcher is the primary instrument for data collection and analysis (Merriam, 1988). In this case study the researcher used participant observation, unstructured interviews, documents, calendars, meeting notes and recollection of non-verbal cues (Lincoln & Guba, 1985).

A key advantage to observation is that it provides an immediate in-depth experience. “Observation ...maximizes the inquirer’s ability to grasp motives, beliefs, concerns, interests, unconscious behaviors, customs, and the like (Lincoln & Guba, 1985, p.273). Non-verbal cues are part of observation because there are times when recording the words said do not accurately convey the meaning.

Interviews in naturalistic research are more of an interaction or dialogue. These interviews allow a researcher to go back and forth in time to reconstruct the past, interpret the current situation and predict the future. In this case study the researcher will have informal interviews with participants to ensure that information presented is correct (Erlandson et. al, 1993).

“The term documents refer to the broad range of written and symbolic records, as well as any available materials and data” (Erlandson, et. al, 1993). The researcher will be using a variety of documents from the literature review, public and private records and archival records such as journals, meeting notes, calendars and correspondence.

“In the collection and analysis of data it is sometimes hard to distinguish between when the collecting ends and when analysis begins, for gathering and analysis is complementary, ongoing and often simultaneous” (Erlandson, et. al, 1993, p.18). The researcher will continue to do research and update information until such a time as it becomes problematic to add more data without prolonging the case study, ensuring that information will be current when the study is complete.

My Background and Possible Biases

According to Lincoln and Guba, 1985, since the researcher is the primary instrument for data collection and analysis in a qualitative case study the researcher must be sensitive to the data and to his own biases. As the Executive Director and University Contracts Officer, the researcher will have some personal bias that he will temper by using documentation, archival materials and interviews to provide more objectivity. In addition, because the researcher, as an employee of Texas A&M University, was

instrumental in writing portions of the University Rules and Administrative Procedures, he will likely be compelled to reflect those policies in this case study. Strauss and Corbin, 1990, said, “Choosing a research problem through the professional or personal experience route may seem more hazardous than through the suggested or literature routes. This is not necessarily true. The touchstone of your own experience may be more valuable an indicator for you of a potentially successful research endeavor” (Erlandson, et. al, 1993, p.35). The researcher in this case study is interested personally and professionally in the outcome and has been meticulous in each step to ensure that the results are trustworthy.

Trustworthiness

In qualitative research the term trustworthy refers to the procedures used to ensure validity and reliability. According to Merriam (1998) in order to assess the validity and reliability of a qualitative study the researcher must examine the component parts as you would in other types of research. Validity and reliability in this study have been addressed using the naturalistic terms coined by Lincoln and Guba (1985), “credibility (paralleling internal validity), transferability (paralleling external validity), dependability (paralleling reliability) and confirmability (paralleling objectivity).”

Erlandson et. al. defined credibility as “the compatibility of the constructed realities that exist in the minds of the inquiry’s respondents with those that are attributed to them” (p.30). In this study credibility is ensured by using Merriam’s (1998) six strategies:

1. Triangulation – using multiple investigators, multiple sources of data, or multiple methods to confirm emerging findings
2. Member checks – taking data and interpretations back to the people from whom they were derived and asking if the results are plausible
3. Long-term observation at the research site or repeated observation of the same phenomenon – gathering data over a period of time
4. Peer examination – asking colleagues to comment on findings as they emerge
5. Participatory modes of research – involving participants in phases of research
6. Researcher’s biases – clarifying the researcher’s assumptions, world view, and theoretical orientation at the outset of the study (pp. 169-170)

Gall, Borg and Gall (1996) define transferability as, “The extent to which the results of a research study can be generalized to individuals and situations beyond those involved in the study (p.759).” Merriam (1998) provided three ways that qualitative researchers could increase the transferability of their study.

1. Providing a thick description that provides the readers a base of information on which they can base their judgment.
2. Establishing a model category so that readers can compare to their own situations.
3. Conducting a cross-site or cross-case analysis.

Dependability and reliability parallel each other and Gall, Borg and Gall (1996) defines reliability as “the extent to which other researchers would arrive at similar results if they studied the same case using exactly the same procedures as the first researcher”

(p.768). In qualitative research there are often many different interpretations of what has happened (Merriam, 1988). An audit trail reflects the culmination of the documents gathered and processed during the study, and is considered to be a vital component in a naturalistic study (Lincoln & Guba, 1985). Merriam (1988) suggests three ways a researcher can improve dependability.

1. The researcher should explain assumptions and context in which data was collected.
2. The researcher can use multiple methods of data collection and analysis.
3. Describe in detail data collection procedure, and how decisions were made.

In qualitative research confirmability takes into account the subjective nature of the research. Triangulation is used because it allows for collection of data from a variety of sources using a variety of methods, “the inquirer should provide documentation for every claim from at least two sources; alternative possibilities and negative instances should be ruled out; and so on” (Guba & Lincoln, 1981, p. 87). Reflexivity, where the researcher states assumptions up front, should also be used to ensure confirmability.

Trustworthiness is a key component of any research study. In this case study the researcher used information on trustworthiness as a guide while conducting the study. In Chapter Four the researcher will provide a detailed account, as part of the telling of the case study, of the steps taken to ensure trustworthiness.

Validity and Reliability

Dooley (2002) presented the following six steps to insure validity and reliability in a case study. The researcher has supplied detailed explanation of how each step was used in this case study.

1. **Determine and define the research questions.** Dr. Lloyd Korhonen helped the researcher with the first step of establishing the focus of this study. The literature review allowed the researcher to narrow down the intent and focus of the case study. Next the research questions, as stated in Chapter I, were established.
2. **Select the cases and determine data gathering and analysis techniques.** Copyright Issues in Distance Education was chosen for several reasons. First the researcher was the Executive Director of the Department of Contract Administration at Texas A&M University, and was charged with the task of developing a contract between the University and three of its faculty members that would sufficiently address the duties and obligations of each party, period of performance, delivery date, payment schedule as well as ownership of copyrights, distribution rights and distribution of future royalties. Second, the researcher is a PhD. candidate in Educational Human Resource Development and has been involved in distance education courses. Third, this is a real life situation where further study will expand the current body of knowledge in the field of HRD.
3. **Prepare to collect data.** Yin (1994) listed six data sources; archival records, documentation, direct observations, interviews, participant observation, and

physical artifacts. The following is a description of the data sources that were used in this study.

1. This is a subjective account based on events that were documented as they occurred. The researcher made use of his experiences as Executive Director of the Department of Contract Administration responsible for developing the distance education contract.
2. As suggested by Yin, the researcher used calendars, weekly meeting notes, monthly letters, informal conversations with participants and other written documentation to insure the accuracy of events and timelines used in final report.
3. The researcher examined all correspondence, published articles, training manuals, meeting notes, and contracts regarding the copyright issues for distance education.
4. The researcher reviewed meeting notes and correspondence with participants to insure that the case study data was presently accurately.

Using a variety of documentation brought validity and a measure of objectivity to the case study. The researcher conducted all fieldwork, collected data and performed document analysis.

4. **Collect data in the field.** Dooley (2002) points out that data collection in case study research is emergent. As Executive Director of the Department of Contract Administration the researcher is responsible for providing documentation for all

negotiations and contracts. The researcher always archives calendars, meeting notes, correspondence, and other documentation. In the summer of 2004 the researcher decided to stop the flow of data because all of the sources had been explored and saturated, there appeared to be consensus and regularities and so that monetary and graduation timelines could be met. This decision was based on Gall, Borg, & Gall (1996) and Lincoln & Guba (1985) who say that time and budgetary constraints as well as exhaustion of sources, saturation of categories, emergence of regularities, and overextension should be considered when deciding to halt data collection.

5. **Evaluate and analyze the data.** “Reflective analysis could be used in case studies to draw on other qualitative research traditions. Its use involves a decision by the researcher to rely on his or her own intuition and personal judgment to analyze data rather than on technical procedures” (Dooley, 2002). The researcher relied on his own intuition and judgment based on 15 years of experience to analyze data regarding copyright issues for distance education.
6. **Prepare the report.** Conventional organization utilizing introduction, literature review, methodology, data analysis and conclusions were chosen to present the case study.

CHAPTER IV

ANALYSIS OF DATA

Overview of Analysis

The catalyst for this case study began in the Fall Semester of 1999, when the Office of the Executive Vice President and Provost at Texas A&M University funded three professors to develop a Masters degree for delivery exclusively via technology-mediated instruction. This project was the first of its kind at Texas A&M University where the Provost Office funded the development of an online Masters degree. This project tested the limits of the copyright law, the principle of academic freedom with regard to copyright ownership and royalty distribution among the faculty and the university. The researcher was the Executive Director of the Department of Contract Administration and the University Contracts Officer at Texas A&M University, and was charged with the task of developing a contractual document between the University and its three faculty members that would sufficiently address the duties and obligations of each party, the period of performance, the delivery date, the payment schedule as well as ownership of copyrights, distribution rights and distribution of future royalties. Since this is an emerging field and the researcher's first project of this nature, I needed to become familiar with the copyright law, and key issues addressed in the literature. Additionally, I performed benchmarking by identifying peer institutions of higher education and researched their policies related to such issues.

For the development of the model used by the Department of Contract Administration at Texas A&M University, data was collected from multiple sources and

analyzed. Meetings were held between TAMU administrators and the faculty developing the online Masters degree.

Data Investigation

The initial stage of the project began with a meeting involving the mathematics faculty charged with the task of creating the online mathematics Masters degree. The focus of the initial meeting was to determine the scope of the project, the level of faculty involvement, the level of support staff involved, the level of financial commitment made by the institution, and the level of support from the mathematics department. The departmental support came from multiple sources that included financial support, computer and technical support, office space, and a reduction in teaching load. Each source of support later becomes a variable in the equation used to determine ownership and royalty distribution.

Following the meeting with the mathematics department, I began to identify institutions with active distance education programs that had well established copyright policies that would be worthy of using as a benchmark. Then I began to research each institution's program and associated policies to identify the key elements and characteristics of each established policy. The following institutions have copyright programs where I was able to garner invaluable information for creating a copyright model.

Columbia University

Columbia University's statement on copyright best summarizes the spirit of academia in a rapidly changing society,

The ongoing revolution in the use of information technology for the production and dissemination of knowledge enables members of the University community to create new forms or types of scholarly works, to communicate with current audiences with new types of materials, and to reach new audiences. The dramatic changes in information technologies and the ways in which they are employed provide an occasion to examine and clarify policy for copyright of works of scholarship produced at the University. This copyright policy statement delineates the rights and responsibilities of the University and its faculty, employees, students, and other members of the community. The use of new media technologies has changed the process of creation of intellectual works. Some of the resources (physical, financial, and human) needed to employ the new technologies are shared resources, provided by the University for the common benefit of all members of the University community. But, in many cases, the use of new media technologies requires increased involvement by the University in the form of financial support, expert services, equipment, and other facilities beyond the base level of support and common resources provided to faculty.

Columbia will hold rights in copyright to works of authorship that are created at the University by faculty, research staff, and others and that are supported by a direct allocation of University funds, are commissioned by the University, make substantial use of financial or logistical support from the University beyond the level of common resources provided to faculty, or are otherwise subject to

contractual obligations. In those instances in which the University holds rights, faculty members can use the works involved for noncommercial purposes.

This policy recognizes that ownership of intellectual property and the sharing of economic returns from the licensing or commercialization of that property are two related yet distinct matters. Even when intellectual property rights are held by the University, revenues from new digital media and other property should be shared among its creators, including individual faculty, researchers, departments, schools, and the larger University. A description of the precise mechanism for distribution of revenues received from the intellectual property is appended to the policy statement and follows guidelines that have worked effectively for the sharing of revenues from patents. (Preamble to the Columbia University Copyright Policy, 2005)

Columbia University's policy statement is particularly impressive because it acknowledges the significance of university resources committed for support.

Columbia's policy does a good job articulating the importance of protecting the institution's name and reputation when associated with scholarly works and clearly identifies the true owner of the university name, which is the institution and not an individual, department or college, thereby protecting the use of the name Columbia University.

This policy also is intended to strengthen current protection of the reputation of the University. Columbia's name deserves careful nurture and protection. As a general principle, the name of the University is not the property of any

individual, department, or School. When the University's name is associated with a work of scholarship or other educational materials such as courses, the interests of the University and its community of scholars is affected and the University must exercise quality control with respect to the use of its name. This is particularly true when intellectual property is created for use by other educational institutions or by for-profit organizations, including development of extensive courses to be offered on-line. Faculty members, deans, and other members of the University community who create courses or digitized content for other universities or for profit-making entities should be certain that all new collaborative agreements with outside entities receive approval of the University's President, who with regard to such agreements acts on behalf of the Trustees through the Offices of the Provost and Executive Vice Provost.

(Preamble to the Columbia University Copyright Policy)

Many universities have not updated their copyright policies to account for the advancement in technology, the Internet and distance education. However, I found that the Columbia University Copyright Policy was up-to-date and accounted for technological advances and the fact that no longer can faculty create scholarly works in a distance education format independently but require the assistance of support staff (Appendix C).

I. Copyright Ownership; Assertion of Rights

A. Traditional Faculty Authorship Rights - In keeping with longstanding academic custom, the University recognizes faculty ownership of copyright in

traditional works of authorship created by faculty such as textbooks, other works of nonfiction and novels, articles, or other creative works, such as poems, musical compositions and visual works of art, whether such works are disseminated in print or electronically.

B. Assertion of Rights by the University - The University asserts copyright ownership in any work of authorship that is: (i) created with substantial use of University resources, financial support or non-faculty University personnel beyond the level of common resources provided to faculty; (ii) created or commissioned for use by the University; or (iii) created under the terms of a sponsored project where the terms of the sponsored project require that copyright be in the name of the University. Additionally, any work created by an officer of administration (including a faculty member or officer of research only when acting in his or her capacity as an officer of administration), or by a support staff member acting within the scope of his or her employment generally constitutes a "work made for hire" as defined by federal law (see section on Copyright Ownership; Work for Hire, in Appendix A), and the University asserts copyright ownership in such works. However, as set forth under the Licensing and Revenue Sharing provisions below, certain categories of creators of works that constitute works for hire will share in revenues arising from their creation.

Ordinary use of resources such as the libraries, one's office, desktop computer and University computer infrastructure, secretarial staff and supplies, is

not considered to be substantial use of such resources for purposes of vesting the University with copyright ownership in a work.

Where the University owns the copyright in a work, it will acknowledge creators (including creators of works-for-hire) who have made a substantial creative contribution to the work, if the creators so request.

Independently of this Copyright Policy, the University may have rights in works subject to this Policy by virtue of other University policies, including the University's Patent Policy (titled "Statement of Policy on Proprietary Rights in the Intellectual Products of Faculty Activity" and set forth as an appendix to the Faculty Handbook).

C. Commercial Distribution of Creator-owned Works - A faculty member, or other creator, who owns the copyright in his or her works under this Policy, other than course content or courseware under paragraph I.E.2, may commercialize those works, without the authority or permission of the University, so long as the University's name is not used in connection with works so made available, other than to identify the faculty member as an instructor at the University.

D. Non-commercial Distribution of Creator-owned Works - A faculty member, or other creator, who owns the copyright in works under this Policy, other than course content or courseware under paragraph I.E.2, may make the work freely available on non-commercial terms (that is, without remuneration to the author), for free or commercial redistribution, without the authority or permission of the University, so long as the University's name is not used in

connection with works so made available, other than to identify the faculty member as an instructor at the University.

With respect to faculty-owned course content and courseware under paragraph I.E.2., a faculty member may make the work freely available for academic and scholarly use, without the authority or permission of the University (subject to the provisions of paragraph I.E.2(d)), to recipients who agree that they will not make commercial use of the material, so long as the University's name is not used in connection with works so made available, other than to identify the faculty member as an instructor at the University. (Columbia University Copyright Policy)

Harvard University

Harvard University's Statement of Policy in Regard to Inventions, Patents and Copyrights was first created in 1975 and amended in 1986 to accommodate changes in the copyright law (Appendix D). The 1986 version remained in effect until 1998 when Harvard released two amendments. Harvard's policy addresses copyright ownership from an academic freedom perspective and also recognizes technological advances influencing distance education.

Concern for the public interest in potential new products and processes resulting from discoveries or inventions made by members of the University in connection with and related to their University activities, and the growing application and use of communications media, educational technology, and computer programs in the work of the University raise new and complex problems relating to the

proper and equitable distribution of rewards and obligations. The production of such materials may involve the inventors or authors, the University, and outside sponsors. The situation is further complicated by evolving Federal policy and legislation in the area of both copyrights and patents. All of these considerations made it desirable for the University to reconsider its past policies in this area, and to develop and reduce to writing a policy which will be understandable to members of the Harvard community, and which will provide the basis for equitable adjudication between the various interests involved. (Harvard, 1998, accessed March 19, 2004)

Due the age of the policy, the TEACH Act is not addressed and lacks clear direction for new distance education programs to follow. “Since activities in the University are too diverse and are evolving too rapidly to permit a statement of a University-wide general policy which can be mechanically and unambiguously applied to every possible situation that might arise, it is felt necessary for detailed policy to evolve by the making of decisions on individual cases based on interpretation of the general policy and principles.” (Harvard, 1998)

Harvard has chosen not to amend its policy in favor of creating a standing University Committee on Patents and Copyrights. “This committee has representation from the principal faculties potentially affected by policies in this area and from the administration, and its chairman is a senior administrative officer of the University reporting directly to the President. It is charged with responsibility for interpreting and

applying University policy in individual cases and for recommending such changes in University policy as may from time to time be required.” (Harvard, 1998)

“While this policy places benefit to the public before financial gain, it recognizes that it is also appropriate and desirable for the University and individual inventors or authors to benefit financially from the sale of products based on their inventions or other creative works. In deciding how to proceed in regard to a particular invention or creative work, the University will consider the benefits and consequences for the public and the University, as well as the individual inventors or authors.” (Harvard, 1998)

When University support makes the enterprise possible or when it provides extra or special support, either with money, facilities, equipment or staff, for the development of ideas or the production of works, it is reasonable for the University to participate in the fruits of the enterprise and/or to be reimbursed for the University's extra or special costs, if such ideas or works are introduced commercially. (Harvard, 1998)

Like Columbia’s policy, Harvard places specific emphasis on protecting the institutional name and reputation. “The policy should protect the interests of the University and its members in the use of the Harvard names and insignias. The University has a responsibility to ensure that the use of its name to imply association with the institution is accurate and appropriate, and that it receives a fair share of any commercial fruits from the use of its names.” (Harvard, 1998)

The University of Texas

The objective of The University of Texas (UT) policy is to “encourage the development of inventions and other intellectual creations for the best interest of the public, the creator, and the research sponsor, if any, and to permit the timely protection and disclosure of such intellectual property whether by development and commercialization after securing available protection for the creation, by publication, or both.” (The University of Texas, 2004)

The University of Texas does not claim ownership interest in “scholarly or educational materials, artworks, musical compositions, and dramatic and non-dramatic literary works related to the author's academic or professional field, regardless of the medium of expression.” As a surprising act of generosity, The University of Texas applies this to statement to professional staff in addition to the traditional academic faculty, non-faculty researchers and students (Appendix E).

One of the country’s most quoted copyright law attorneys is Ms. Georgia Harper, Manager Intellectual Property Section, of The University of Texas System, Office of General Counsel. Ms. Harper created the online tutorial called the “Copyright Crash Course” to provide guidance to the UT community. Ms. Harper is known for generously making the tutorial freely accessible to other universities though the UT website. Ms. Harpers publications relating the copyright law and the TEACH Act provided a valuable resource during the creation of my model.

Ms. Harper conducts educational seminars regarding copyright issues. On April 18, 2001 Ms. Harper conducted a full day workshop, *Managing Intellectual Property*

Rights in a Digital Era, sponsored by the Office of the Vice President for Research for the Office of Distance Education and the Technology Licensing Office. In September of 2004, Ms. Harper presented a session for the Texas A&M University Library, *TEACH Act in Context*. I attended both sessions and was granted permission to use Ms. Harper as a reference.

Massachusetts Institute of Technology

Massachusetts Institute of Technology's (MIT) policy on intellectual property is very basic and only covers provisions such as work-for-hire, use of institutional facilities, sponsored agreements and student thesis (Appendix F). When faculty, staff, students or others participating in MIT programs develop intellectual property using a significant amount of funding or facilities owned by MIT the university will maintain ownership of the intellectual property. If the material is not covered under sponsored research or another agreement assigning third party rights, the issue of whether or not a significant use was made of MIT funds or facilities will be reviewed by the inventor's/author's laboratory director or department head. The department head will forward a recommendation to the Technology Licensing Office. The Vice President for Research will make the final determination on this issue and will settle any disputes or interpretations of policy regarding to Intellectual Property. Textbooks written in conjunction with class teaching are excluded from the "significant use" category and not considered "works-for-hire." The exception is if the textbooks were developed using MIT funds paid specifically for the support of textbook development. (MIT, 1999)

MIT does not have a thorough policy to serve as a road map to faculty and staff but instead relies on a university committee. Without a strong copyright policy, the institute lacks consistency in its decisions. At MIT, there are two offices and one committee that are responsible for addressing all Intellectual Property matters. The President empowers a Committee on Intellectual Property to develop Intellectual Property policies for the Institute. The committee is comprised of a variety of community members. The Vice President for Research is responsible for the implementation and administration of these policies and chairs this committee. (MIT, 1999)

MIT's policy mentions teaching materials but fails to address distance education course content and courseware. "In the case of copyrightable works developed by the Faculty, MIT's mission has generally been best served by allowing the individual faculty member to decide when, how, and in what form these works should be disseminated. Where significant Institute resources are involved in producing a work, or where there are contractual requirements, MIT and the faculty author share ownership of the work and responsibility for the decisions. Students should also be recognized as creators and authors of their own material. The academic and financial rights of students should be honored in the creation and dissemination of educational materials." (MIT, 1999)

Stanford University

The growing application and use of communications media, educational technology, and computer programs in the work of the University raise new and

complex problems relating to the proper and equitable distribution of rewards and obligations (Appendix G).

Stanford's policy objectives are: "to enable the University to foster the free and creative expression and exchange of ideas and comment; to preserve traditional University practices and privileges with respect to the publication of scholarly works; to establish principles and procedures for sharing income derived from copyrightable material produced at the University; and to protect the University's assets and imprimatur." (Stanford University, 1998)

Stanford's copyright policy is typical of an academic institution that recognizes the principles of academic freedom by granting faculty ownership of pedagogical endeavors unless significant institutional resources are utilized.

It is the policy of the University that all rights in copyright shall remain with the creator unless the work is a work-for-hire (and copyright vests in the University under copyright law), is supported by a direct allocation of funds through the University for the pursuit of a specific project, is commissioned by the University, makes significant use of University resources or personnel, or is otherwise subject to contractual obligations. In accord with academic tradition, except to the extent set forth in this policy, Stanford does not claim ownership to pedagogical, scholarly, or artistic works, regardless of their form of expression. Such works include those of students created in the course of their education, such as dissertations, papers and articles. The University claims no ownership of popular nonfiction, novels, textbooks, poems, musical compositions,

unpatentable software, or other works of artistic imagination which are not institutional works and did not make significant use of University resources or the services of University non-faculty employees working within the scope of their employment. The University shall retain ownership of works created as institutional works. Institutional works include works that are supported by a specific allocation of University funds or that are created at the direction of the University for a specific University purpose. Institutional works also include works whose authorship cannot be attributed to one or a discrete number of authors but rather result from simultaneous or sequential contributions over time by multiple faculty and students. (Stanford University, 1998)

University of Arizona

The University of Arizona Intellectual Property Policy was published August 31, 1993, and due to its age, is naive compared to modern standards (Appendix H). The University of Arizona policy addresses basic copyright ownership related to traditional scholarly writings but does not recognize common distance education protocol of today's society. The only novel aspect of the policy is its acknowledgement of circumstances warranting limited dissemination.

The University of Arizona academic systems serve to create and disseminate information for the benefit of all through research, teaching and public service. Information is communicated by members of the University community who publish and otherwise promulgate their knowledge in numerous ways. Information is transmitted by students who graduate and share their new

knowledge with colleagues in the public and private sectors. Finally, information is shared through various University extension programs. Sharing information depends fundamentally on open communication, and open communication in turn: is essential for creating and sharing verifiable scientific knowledge that can benefit the entire society; is a measure of the rate of scientific progress that depends on information and data developed by others; is a necessary condition for efficient and proper use of public and private resources; is a primary force in enhancing cultural, social and economic well-being; and is necessary for an informed citizenry and, as such, basic to the functioning of a democracy.

Under some circumstances, there are valid reasons for limiting the open dissemination of information. Such grounds include national security, the conduct of diplomacy, individual privacy, commercialization of intellectual property, and international competitiveness. In accommodating the last two interests, it sometimes will be necessary to strike a balance between openness and control. The Board believes that maintaining openness generally has a superior social claim over commercial concerns and that restrictions on openness should be approached as exceptions rather than norms. (University of Arizona, 1993)

Yale University

Yale University's copyright policy closely follows the copyright law specific to ownership based on employment status (Appendix I). This appears straight forward until section granting exceptions to university ownership to accommodate the principles

of academic freedom. Reading through this section helped me to recognize that I needed to provide clear easy to understand copyright guidelines regarding distance education.

Under the copyright law, the copyright to a work created by a person in the course of his or her employment belongs to the employer rather than to the individual creator. The law provides, therefore, that works created by faculty members in the course of their teaching and research, and works created by staff members in the course of their jobs, are the property of the University. It is traditional at Yale and other universities, however, for books, articles and other scholarly writings by a faculty member to be deemed the property of the writer, who is considered to be entitled to determine how the works are to be disseminated and to keep any income they produce. This tradition reflects the University's commitment to encourage members of the Yale community to write and to publish what they wish. In recognition of that longstanding practice, the University disclaims ownership of works by faculty, staff, postdoctoral fellows and postdoctoral associates and students, except in the following cases: *Assigned Tasks, Outside Agreements, Patentable Works, and Commitment of University Resources*. (Yale, 2001)

University of California

As a publicly funded institution of higher education, The University of California recognizes the importance of information dissemination (Appendix J). “The creation of copyrighted works is one of the ways the University fulfills its mission of contributing to the body of knowledge for the public good. The University encourages the creation of

original works of authorship and the free expression and exchange of ideas. This Policy is intended to embody the spirit of academic tradition, which provides copyright ownership to faculty for their scholarly and aesthetic copyrighted works, and is otherwise consistent with the United States Copyright Law, which provides the University ownership of its employment-related works.” (University of California, 1992)

The University of California policy, published August 19, 1992, provides a simplistic approach to delineating the basics of copyright law by dedicating space to definitions that relate to copyrights in the educational setting of a UC campus. These definitions include: *Copyright, Designated Academic Appointees, Independent Academic Effort, License, Originator(s), Permissible Consulting Activities, Royalties, Sponsor, University Facilities, University Funds, and Work*. Additionally, the policy detailed the various types of work that might be created on the University of California campus and the associated copyright ownership rights. Such works include: *Scholarly/Aesthetic Work, Personal Work, Student Work, Sponsored Work, Commissioned Work, Contracted Facilities Work, Institutional Work, and Work Acquired by Assignment or Will*.

Prior to the publication of the 1992 policy, the University of California maintained a policy on the Reproduction of Copyrighted Materials for Teaching and Research published in April 1986. Even though this policy is nearly twenty years old, it still provides clear guidelines for faculty and staff to follow when duplicating materials.

The purpose of these Guidelines is to provide direction on photocopying of copyrighted materials for teaching and research. Some kinds of works are not covered by copyright and therefore may be freely reproduced and distributed.

Under the "fair use" provision of the Copyright Act of 1976, you are permitted to photocopy and distribute portions of copyrighted works for educational use without securing permission from the owner or paying royalties. The law in this area is quite general, however, and it is important that certain conditions are met to insure that the copying does fall under this fair use exemption. The policy describes the explicit factors that you should take into consideration before reproducing and distributing copyrighted materials.

Situations may arise in which intended copying is not exempted under fair use. In such cases it is necessary to obtain written permission from the copyright owner before copying is done. The policy explains some kinds of circumstances that require you to obtain permission. Instructions for securing permission are contained in the policy. It is the policy of the University that users secure such permission whenever it is legally required. (University of California, 1992)

The major downfall to this policy is its need to address the technological advances of the Internet and digital media used in distance education.

Washington State University

The students, faculty and staff at Washington State University have access to the fundamentals of copyright law and WSU's guidelines for educational use of copyright materials at WSU's dedicated copyright website developed in 2002, <http://publishing.wsu.edu/copyright/> (Appendix K). The site contains detailed information from basic to advanced discussing what a copyright does and does not protect, how a copyright protects, public domain and duration of copyrights, the library

and copyrights and a chart indicating when a copyright enters the public domain. The detailed web based policy also covers the fair use guidelines and penalties for copyright infringement.

Washington State University's dedication to copyright protection is evident in the creation of a unique University Copyright Office. The mission of the Washington State University Copyright Office is to host the web site to educate the campus community about copyright law in higher education. The University Copyright Office was established to assist students, faculty and staff in copyright issues that arise in the pursuit and delivery of education. Workshops, lectures, and one-on-one consultations are available through the University Copyright Office.

While the WSU Copyright Office serves as a valuable resource, it depends on individuals to educate the campus community and lacks a clearly defined-straight forward model that can be used by faculty and staff at any stage of course development.

Indiana University – Purdue University at Indianapolis

The Copyright Management Center at IUPUI provides specific guidance not only Indiana University but to higher education in general through its Internet website <http://copyright.iupui.edu> (accessed March 19, 2004). Dr. Kenneth Crews, Director of the Copyright Management Center and Professor of Indiana University School of Law, is a published professor of law in copyright management. Dr. Crews has published a copyright guide covering basic information on protection, registration, ownership, rights, duration, fair use, and obtaining permission to use an individual's copyrighted information. Dr. Crews provides extensive information on the Fair Use Guidelines, the

TEACH Act and their impact on distance education. In 2004 I participated in a web-based seminar conducted by Dr. Crews regarding copyright issues in distance education.

University of North Carolina System

The University of North Carolina System created a supplemental guide to elaborate the UNC Copyright Use and Ownership Policy called the “Primer on Copyright Ownership.” The guide was easily written and educated the reader about copyright ownership issues (Appendix L). The guide clearly indicated its intent as a tutorial and that the policy took precedence over everything written in the primer. The primer provides a glimpse into the history of patents and copyrights from an academic perspective.

Universities have treated copyright and patent very differently. Traditionally, faculty have owned their copyrighted works while patents on faculty-developed inventions have been owned by the institution. The reasons for this are both historical and economic. Traditionally, faculty have authored books and other intellectual property with comparatively little institutional support. Additionally, while some faculty earned significant income from book royalties, most faculty-generated copyrighted works have produced little or no income. Patented inventions, on the other hand, have often been supported by university-secured funding, and some, in fact, have produced significant income from licensing. The adoption and use of technology to create copyrighted works and the potential for commercialization have caused universities across the country to examine the ownership issues. The Copyright Use and Ownership Policy of the University of

North Carolina are consistent with the traditional ownership model for most faculty-generated copyrighted works. It does provide for institutional ownership where certain conditions are met and for directed and sponsored works. Even for these works, though, a different ownership model may be negotiated. (University of North Carolina, 2003)

University of North Carolina System offers an entire section on distance learning that is paraphrased below. The increase of distance education has given copyright issues a high profile. It is possible to produce a course, reproduce it exactly, and disseminate it to learners at satellite or remote locations, in a speed that fits the students' individual needs. The digital process has created a new problem by allowing unauthorized duplication, alteration, and dissemination. Multiple authors to work together to create and present a course online and then sell the course for profit. Factors such as economic return on investment, technological teamwork, and benefits of on-line classes must be considered when developing copyright ownership agreements that are appropriate distance education courses. Traditional academic works belong to their creator. Distance education courses and related materials cause increased production costs, the possibility of multiple authors, and the potential for revenue, therefore, universities may require different approaches to copyright ownership. These policies are usually similar to those for technology transfer because the institution assumes responsibility for the costs of commercialization in exchange for assuming joint or complete ownership. Faculty members generally receive a share of commercial proceeds in exchange for transfer of ownership rights. The copyright policy and this primer created by University of North

Carolina System encourages all agreements about copyright ownership be put in writing. Verbal agreements are considered a way of the past and have no place in this day and age when dealing with distance education copyright issues. Open discussion and agreement forces all parties to have an understanding of who owns the work. The University of North Carolina System includes a sample agreement at the back of their copyright primer.

TEACH Act

After working with the mathematics program to establish copyright guidelines the TEACH Act was created and made law in 2002. The TEACH Act was meant to “establish a critical balance between the needs of educators and students on the one side and the rights of copyright holders on the other” (Gasaway, 2001, pp.82-83). “The law is a complete revision of the current Section 110(2) of the U.S. Copyright Act, and one of its fundamental objectives is to strike a balance between protecting copyrighted works, while permitting educators to use those materials in distance education” (Crews, 2003).

Crews discussed the new requirements that become the universities responsibility. As a policy maker at the university I knew the following regulations from Crews for policy makers needed to be incorporated into Texas A&M University’s copyright guidelines.

1. Only accredited nonprofit institutions or a government body are eligible for the benefits of the TEACH Act. Accreditation is in the case of post-secondary education, is "as determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United

States Department of Education." Most familiar educational institutions will meet this requirement, but many private entities-such as for-profit subsidiaries of nonprofit institutions-may not be duly "accredited." Texas A&M University is an accredited non profit institution.

2. It is the responsibility of each educational institution to institute policies regarding copyright. It can be a very cumbersome task for institutions requiring several levels of approval to create a formal process. Informal procedural standards that effectively guide relevant activities may well satisfy the statutory requirement. In any event, proper authorities within the educational institution need to take deliberate and concerted action. Texas A&M University is currently using informal guidelines I created to fulfill this requirement.

3. The institution must "provide informational materials" regarding copyright, and in this instance the language specifies that the materials must "accurately describe, and promote compliance with, the laws of United States relating to copyright." These materials must be provided to "faculty, students, and relevant staff members." Some of this language is identical to a statutory requirement that educational institutions might already meet regarding their potential liability as an "online service provider." In any event, the responsibility to prepare and disseminate copyright information is clear; institutions might consider developing websites, distributing printed materials, or tying the information to the distance-education program, among other possible strategies. I created an

online copyright tutorial that could be accessed through the Texas A&M University website.

4. In addition to the general distribution of informational materials, the statute further specifies that the institution must provide "notice to students that materials used in connection with the course may be subject to copyright protection." While the information materials described in the previous section appear to be more substantive resources detailing various aspects of copyright law, the "notice" to students may be a brief statement simply alerting the reader to copyright implications. The notice could be included on distribution materials in the class or perhaps on an opening frame of the distance-education course. Taking advantage of electronic delivery capabilities, the educational materials may include a brief "notice" about copyright, with an active link to more general information resources. Faculty members sometimes contact me for a copy to show to their students. I encourage departments to include copyright information on all syllabi.

5. The transmission of content must be made "solely for . . . students officially enrolled in the course for which the transmission is made." The information should not be used to promote the university or to edify the public (Crews, 2005). This information is included in the tutorial I created.

Crews outlines ways that Computer and Information Services (CIS), workers can assist in meeting the requirements of the TEACH Act.

1. CIS can limit access to certain areas of classroom information to enrolled students. Password protected areas and other technological safeguards are controlled by the CIS department at Texas A&M University.

2. While the transmission of distance education content may be conducted by diverse technological means, an institution deploying "digital transmissions" must apply technical measures to prevent "retention of the work in accessible form by recipients of the transmission . . . for longer than the class session."

WebCT and other classroom technology used at Texas A&M University has built in dates to prevent students from having unlimited access to information. These provisions specifically demand application of "technological measures" that would restrict uses of the content "in the ordinary course of their operations." In other words, when the restrictive controls are used in an "ordinary" manner, they will safeguard against unauthorized reproduction and dissemination. This language apparently protects the institution, should someone "hack" the controls and circumvent imperfect technology.

3. If the content transmitted through "digital transmissions" includes restrictive codes or other embedded "management systems" to regulate storage or dissemination of the works, the institution may not "engage in conduct that could reasonably be expected to interfere with [such] technological measures."

4. The statute explicitly exonerates educational institutions from liability that may result from most "transient or temporary storage of material." Moreover, the

institution may not store or maintain the material on a system or network where it may be accessed by anyone other than the "anticipated recipients."

5. Congress appears to have envisioned distance education as a process of installments, each requiring a specified time period, and the content may thereafter be placed in storage and outside the reach of students. The institution may, however, retrieve that content for future uses consistent with the new law. Educational institutions are still allowed to keep some copies, such as videotapes, of educational transmissions for a limited period of time (Crews, 2005).

Instructors have traditionally practiced academic freedom and are responsible for creating their coursework. The issue that instructors face is the selection of content from among copyrighted works that are allowed for use without permission from the copyright owner.

1. The TEACH Act explicitly permits:

- Performances of non-dramatic literary works;
- Performances of non-dramatic musical works;
- Performances of any other work, including dramatic works and audiovisual works, but only in "reasonable and limited portions"; and
- Displays of any work "in an amount comparable to that which is typically displayed in the course of a live classroom session."

2. The following materials are not permitted by the TEACH Act:

- Works that are marketed "primarily for performance or display as part of mediated instructional activities transmitted via digital networks"; and

- Performances or displays given by means of copies "not lawfully made and acquired" under the U.S. Copyright Act, if the educational institution "knew or had reason to believe" that they were not lawfully made and acquired.

The first of these limitations is clearly intended to protect the market for commercially available educational materials.

3. Instructor's seeking to use materials under the protection of the new statute must adhere to the following requirements:

- The performance or display "is made by, at the direction of, or under the actual supervision of an instructor";
- The materials are transmitted "as an integral part of a class session offered as a regular part of the systematic, mediated instructional activities" of the educational institution; and
- The copyrighted materials are "directly related and of material assistance to the teaching content of the transmission."

The objectives of these stipulations is to assure that the instructor is ultimately in charge of the uses of copyrighted works and that the materials serve educational pursuits and are not for entertainment or any other purpose.

4. The uses of materials in the program must be "an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting." In the same provision, the statute specifies that "mediated instructional activities" do not encompass uses of textbooks and other materials

"which are typically purchased or acquired by the students." The point of this language is to prevent an instructor from including, in a digital transmission, copies of materials that are specifically marketed for and meant to be used by students outside of the classroom in the traditional teaching model. For example, the law is attempting to prevent an instructor from scanning and uploading chapters from a textbook in lieu of having the students purchase that material for their own use. The provision is clearly intended to protect the market for materials designed to serve the educational marketplace.

5. The TEACH Act includes a prohibition against the conversion of materials from analog into digital formats, except under the following circumstances:

- The amount that may be converted is limited to the amount of appropriate works that may be performed or displayed, pursuant to the revised Section 110(2); and
- A digital version of the work is not "available to the institution," or a digital version is available, but it is secured behind technological protection measures that prevent its availability for performing or displaying in the distance-education program consistent with Section 110(2).

There is no actual mention of librarians in the TEACH Act yet at Texas A&M University the librarians work with faculty members to disseminate information for distance education courses. Distance education courses have created a greater need for reserve services and interlibrary loans in order to deliver information to students in various locations. At Texas A&M University the library works with me to negotiate licenses for databases and other materials; those licenses may grant or deny the

opportunity to permit access to students located across campus or around the world. The TEACH Act, may give librarians new opportunities to shape distance-education programs, such as:

- Librarians may participate in the development of copyright policy; including policies on fair use that long have been of central importance to library services.
- Librarians may take the lead in preparing and gathering copyright information materials for the university community. Those materials may range from a collection of books to an innovative website linking materials of direct relevance.
- Librarians may retain in the library collections copies of distance-education transmissions that the institution may make and hold consistent with the law. In turn, the librarians will need to develop collection policies, usage guidelines, and retention standards consistent with limits in the law.
- Many materials used in distance education will come from the library collections, and librarians may be called upon to locate and deliver to educators proper materials to include in the transmissions. Librarians may need to evaluate materials based on the allowable content limits under the law.
- Librarians often negotiate the licenses for acquisition of many materials. To the extent that the law imposes undesirable restrictions, the librarians are in a position to negotiate necessary terms of use at the time of making the acquisition.
- Librarians have many opportunities for offering alternative access to content that cannot be included lawfully in the distance-education programming. When materials may not be lawfully scanned and uploaded, the library may respond

with expanded reserve services, or enhanced database access, or simply purchasing alternative formats or multiple copies of needed works.

- Librarians long have recognized the importance of fair use and often have the best grasp of the doctrine. Librarians are usually best positioned to interpret and apply fair use to situations and needs not encompassed by the rigorous details of the TEACH Act.
- Librarians may research and track developments related to the TEACH Act, including policies, information resources, and operating procedures implemented at other educational institutions. That effort can allow one university to learn from others, in order to explore the meaning of the law and to consider options for compliance (Crews, 2005).

The introduction of the TEACH Act made it necessary to do further investigation to create the best model for Texas A&M University to use regarding distance education and copyright laws. Crews recognizes the need for a model that universities can apply to the structure of their distance education programs that can help alleviate possible problems regarding the development and implementation of distance education courses and possible infringement issues which result in costly litigation.

Analysis

The Distance Education Copyright Planning Wheel model (Figure 3) I created for Texas A&M University, is loosely based upon the planning models of Bryson and Caffarella, and the Theoretical Foundations of Human Resources Development model (Swanson & Holton, 2001, p.93). My first step in creating a model was to list all of the

components that needed to be incorporated into a model. The following is a list with brief explanations of each component and why it is important to the copyright model.

Communication

As I just discussed in the section above, there is more than one person involved with and affected by the TEACH Act. Policy makers include more than the contracts and compliance officers. The executive staff will ultimately be involved when the time comes to formalize and approve the copyright policy I created. Faculty members will play a key role because they are the ones actually creating and disseminating course content. The technology team at the CIS department will be charged with implementing many safeguards so their viewpoint must be considered. Librarians work with faculty members, students, CIS staff members and the contracts department to disseminate information and are a key player in assisting in the implementation of copyright guidelines. Students are involved because they are the ones trying to learn from distance education courses. It is imperative that there is open communication and understanding between all parties involved with copyright issues.

Ethics

Swanson added the mat of ethics after he first created the three legged stool for HRD theory. In talking with Swanson he stated that it was not really an oversight but that he made the assumption that HRD professionals would behave ethically. As a contract negotiator at Texas A&M University, I make it a point to always take the high road, so when creating copyright guidelines, ethics were a primary consideration. Naturally, it was a priority not to shortchange faculty members or the university.

Economics

When writing the copyright guidelines and creating a model it was important to develop a process that would be a winning situation for the university, students and faculty. Even though Texas A&M University is a non-profit organization they must be responsible with their resources and explore ways to generate additional income.

System

General system theory deals with inputs, outputs, processes, and feedback. Texas A&M University is a system with a variety of subsystems operating in an environmental system that is constantly changing so system theory should be at the core of the model.

Legal

The TEACH Act was signed into law by President George W. Bush on November 2, 2002. Since the model is dealing with a law it is imperative to have a legal component in the model.

Psychological

In strategic planning and particularly in academia it is important to understand the psychological underpinnings of your organization. The relationships and hierarchy of administration, faculty, staff, students and other interested parties must be understood so that no group feels overlooked or ignored. There are three main psychological theories that should be employed in the development of a copyright model. Gestalt psychology takes a holistic view of an organization and in creating a copyright model it is important to see the big picture in one look. Behaviorism is used because as an administrator I must set goals and use rewards and motivation to encourage faculty to create more

distance education programs to benefit the university and themselves. Cognitive theory addresses how people process information and is focused on self.

Strategic Planning

The TEACH Act specifies that it is the responsibility of each educational institution to institute policies regarding copyright. In order to insure that the policies are properly disseminated and implemented, the educational institute must use some form of strategic planning.

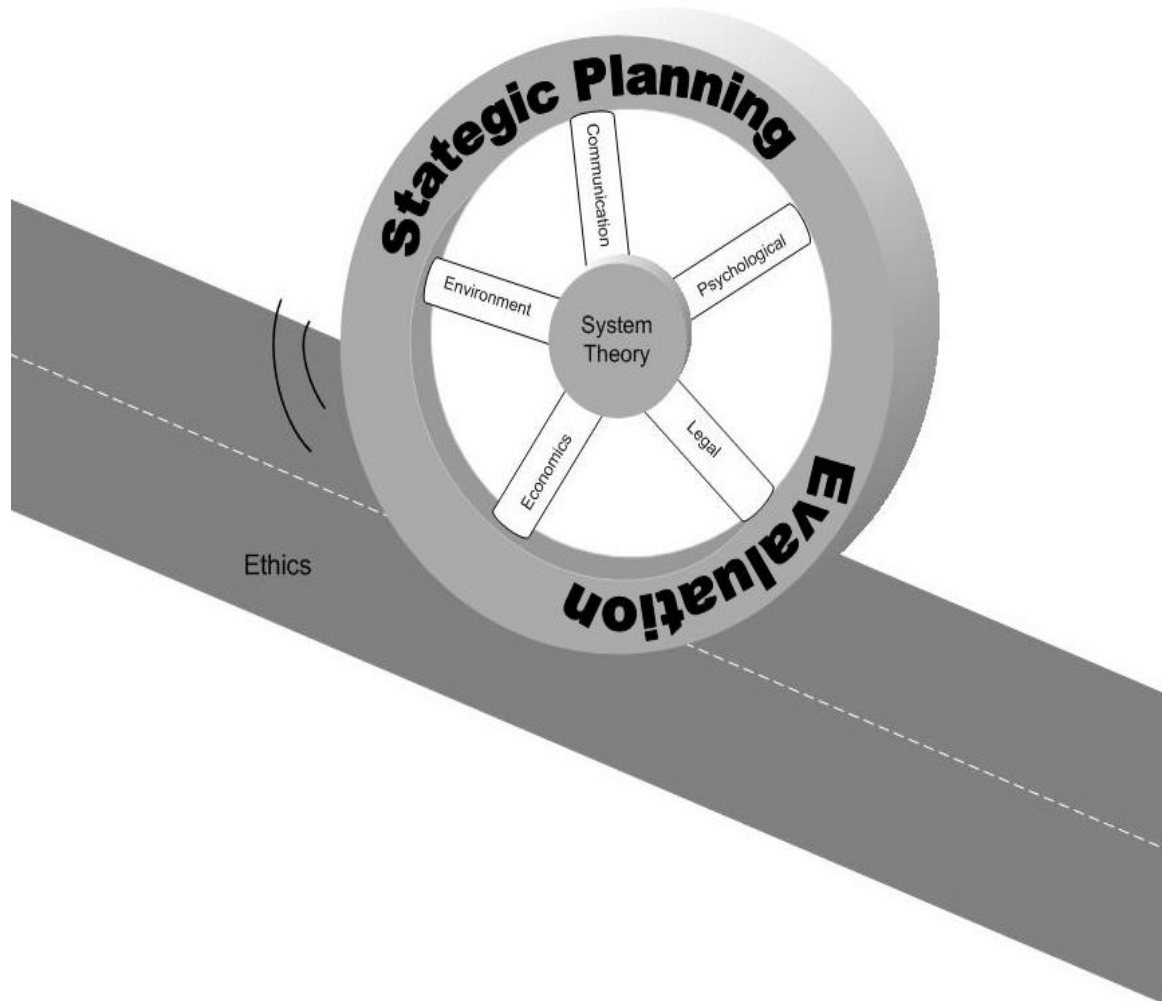
Evaluation

Evaluation should be built into every strategic plan. I chose to include this component because too many times evaluation is not given the consideration it needs when creating a strategic plan. Also with the constantly evolving nature of technology and distance education there must be continuous evaluation.

Environment

The internal and external environments must be considered when creating a model. It is important to be aware of what is happening internally and externally that could affect copyright issues.

Figure 3. Distance Education Copyright Planning Wheel



Power Point Presentation

In addition to creating the Distance Education Copyright Planning Wheel model (Figure 3), I felt it was important to create a vehicle that could be easily understood and accessed by all interested parties. This power point presentation has been placed online and has been disseminated via email and hard copy files. Each power point slide

contains an embedded audio file containing additional details of the copyright law and the Distance Education Copyright Planning Wheel model (Figure 3). The presentation is intended to be a training aid for any individual developing distance education curriculum or managing a distance education program. The presentation is included in this dissertation following the distance education copyright planning wheel model.

The following power point presentation includes easily understood explanations and answers for faculty, administration or any other parties interested in distance education copyright issues. The power point presentation has been reformatted to fit in a Microsoft Word document.

Slide One

Copyright Law Issues in Higher Education

Presented By: Mike Huddleston

Slide Two

Basics of Copyright Law

- When author produces an original work, a copyright protects that author and gives immediate ownership
- Section 106 gives owner the power of ownership
- © Symbol of a copyright
- 1989 amendment no longer requires © symbol

Legal aspects of the copyright law need to be addressed to ensure the individual understands the basic premise of copyrights.

Slide Three

Common Copyright Myths

- “The work I want to use doesn’t have a copyright notice on it, so it’s not copyrighted. I’m free to use it.”
- “I don’t need approval/license because I’m using only a small amount of the copyrighted work.” (Council on Governmental Relations, 1996)

Slide Four

Common Copyright Myths

- “Since I’m planning to give credit to all authors whose works I copy, I don’t need to get approval/license.”
- “My multimedia work will be a wonderful showcase for the copyright owner’s work, so I’m sure the owner will not object to my use of the work.” (Council on Governmental Relations, 1996)

Slides three and four provide an overview of environmental and communication aspects of the distance education planning wheel model. Today’s digital environment allows easier duplication of copyrighted work available on the Internet and the risk associated with such duplication needs to be communicated to the user of the model.

Slide Five

Potential Problems

- Instructors find themselves in unanticipated legal disputes over unintentional violations of the copyright law.
 - Development of original curricula and the question of ownership

- Copyright infringements as instructors pull from resources other than their own from the Internet
- The dissemination of course materials via computers

Slide Six

Potential Problems

- The 1989 amendment to the copyright law removed the requirement of creators of published material to include a copyright notice
- Much litigation has occurred from unintentional violation of copyright law due to use of material considered “free”
- Material considered “public domain” on the Internet is center of many disputes

Slides five and six provide discussion related to the psychological and economic aspects of the distance education copyright planning wheel model. The relationships and hierarchy of faculty, staff and students within higher education provide views from the three main psychological theories of Gestalt’s holistic view to behaviorism to individualism. The 1989 copyright law amendment removing the required © copyright symbol has created increased litigation due to unintentional infringement. This alone has placed an economic burden on some organizations.

Slide Seven

Employer-Employee Relationship

- Work-for-Hire
- Work simply as a byproduct of job

- Copyrightable works using funds, space, hardware or facilities owned by universities
- Works developed with grant or private gift shall be owned in accordance with grant or contract and shall be owned by university
- Textbooks, curriculum, videos, -- who owns them?

Slide Eight

Employer-Employee Relationship

- What about sales of these educational materials? Who will receive royalties? University or author?
- Universities may lose their uniqueness if curricula are sold to other universities who may adopt and teach identical curricula.

Slides seven and eight provide additional details related to the economic aspect of the distance education planning wheel model. Within higher education, the employee's status in the organization can decide the ownership rights of the individual. As discussed in other areas of this dissertation, the principle of academic freedom factors into the copyright ownership of faculty versus the work for hire principle for staff.

Slide Nine

Fair Use Guidelines

- Fair use guidelines – are administrators and professors complying? And how does it relate to copyright law?
 - What is the purpose of the use? (Is it for profit or nonprofit?)
 - What is the nature of the work itself?

- What is the amount or substantiality of the segment used in relation to the whole?
- What is the effect of the use on potential market for the work?

Slide Ten

Copyright Infringements

- Problem exist because instructors adopt material from the Internet that is not labeled as having a copyright
- The dissemination of course materials via the computer or televised transmission is illegal for two reasons:
 - Permission must be obtained from owner of copyright.
 - If use causes a lack of revenue, such as when an instructor supplying a group of poems to a class rather than having students purchase a book of poems, then instructor could be held liable.

Slide Eleven

Copyright Infringements

- Small graphics, photographs, lyrics to songs, clips from movies or films, any literary work or phrases, graphs, charts, or any piece of material that is used intentionally or unintentionally is liable. Unintentional use is not an excuse and is prosecuted equally.
- Permission is always necessary, even when copyright is not evident.

Slide Twelve

Suggestions for Prevention

- Have education readily available as well as host informal meetings for new faculty.
- Concise negotiations resulting in explicit contracts between universities and faculty.
- Universities work to alleviate these problems by incorporating specific details regarding ownership and royalty distribution.
- Documentation and concise details regarding case studies should be kept for reference.
- Contract and grants departments should keep abreast of all changes and trends regarding copyright issues.

CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Summary

The purpose of this study was to provide clear guidelines to educators regarding copyright issues in distance education. The study was also intended to provide a planning model for the researcher and others who will be developing distance education courses in the future so that proper and conscientious planning may occur, therefore preventing unnecessary cost in both financial and human resources. The researcher has been working with Texas A&M University to reduce and hopefully completely eliminate these types of problems by incorporating specific details regarding ownership and royalty distribution and concisely incorporating these into the workable model which can easily be used by faculty and administration to help guide them through the process of creating distance education courses while simultaneously establishing ownership, establishing what materials and elements can and cannot be used to teach the class, and addressing the question of whether curriculum for the course can be sold to other universities. The development of the researcher's unique model clarifies ownership and negates potential problems for the distance educator.

The first research question was, “What methods were used when developing the copyright guidelines for the distance education program at Texas A&M University?”

There were a variety of methods used to develop copyright guidelines. Research, benchmarking, and the TEACH Act were the primary sources used for developing copyright guidelines regarding distance education. The TEACH Act was the underlying guide because it details the legal aspects that must be followed. This new legislation completely revises the current section of the U.S. Copyright Act that deals with distance education. One of its fundamental objectives is to create a balance between protecting copyrighted works, while permitting educators to use those materials in distance education. Research was used to determine the differences between the old U.S. Copyright Act and the new TEACH Act. There was also the need to conduct research into the Texas A&M University policies to understand the current copyright guidelines in distance education. Further research in the form of informal discussions with faculty members was used to uncover what was actually being practiced at Texas A&M University regarding copyright issues in distance education. Benchmarking of several universities was completed to create a bank of information outlining the best practices regarding copyright issues in distance education. Stanford University, Indiana University, University of Texas, University of North Carolina System, and Columbia University copyright guidelines regarding distance education have provided the most valuable information for Texas A&M University.

The second research question was, “How congruent are these copyright guidelines with the current copyright literature and current law?” The literature provided a basis for the entire model. The researcher used copyright laws, literature, benchmarking, workshops and seminars, and the mathematics master’s program case to create the distance education copyright planning wheel.

The third research question was, “How can these copyright guidelines be presented in such a way as to provide a model for others wanting to develop copyrightable distance education coursework?” The best solution for creating a model is two-fold. The researcher provided a visual model, the Distance Education Copyright Planning Wheel (Figure 3), along with a power point presentation giving an overview of instructions that provides excerpts of the copyright laws needed to make informed decisions. The audio power point presentation is designed to provide only the distance education copyright information that is pertinent.

The fourth research question was, “How can this model prevent legal conflict for faculty who develop the distance education curriculum?” Faculty members are made aware of the complexity of copyright issues through the use of the copyright planning wheel. The distance education copyright planning wheel illustrates to faculty members the different components that they should consider when developing distance education programs. When faculty members use the distance education copyright planning wheel and follow the audio power point instructions regarding distance education copyright issues legal conflict can be avoided. The audio power point includes important excerpts of the law that faculty members can review for

assistance. The power point also provides additional resource sites for anyone needing further clarification.

The Distance Education Copyright Planning Wheel model (Figure 3) I created for Texas A&M University is loosely based upon the planning models of Bryson and Caffarella, and the Theoretical Foundations of Human Resources Development model (Swanson & Holton, 2001, p.93). My first step in creating a model was to list all of the components that needed to be incorporated into a model. The following is a list with brief explanations of each component and why it is important to the copyright model.

Communication

As I just discussed in the section above, there is more than one person involved with and affected by the TEACH Act. Policy makers include more than the contracts and compliance officers. The executive staff will ultimately be involved when the time comes to formalize and approve the copyright policy I created. Faculty members will play a key role because they are the ones actually creating and disseminating course content. The technology team at the CIS department will be charged with implementing many safeguards so their viewpoint must be considered. Librarians work with faculty members, students, CIS staff members and the contracts department to disseminate information and are a key player in assisting in the implementation of copyright guidelines. Students are involved because they are the ones trying to learn from distance education courses. It is imperative that there is open communication and understanding between all parties involved with copyright issues.

Ethics

Swanson added the mat of ethics after he first created the three legged stool for HRD theory. In talking with Swanson he stated that it was not really an oversight but that he made the assumption that HRD professionals would behave ethically. As a contract negotiator at Texas A&M University, I make it a point to always take the high road, so when creating copyright guidelines, ethics were a primary consideration. Naturally, it was a priority not to shortchange faculty members or the university.

Economics

When writing the copyright guidelines and creating a model it was important to develop a process that would be a winning situation for the university, students and faculty. Even though Texas A&M University is a non-profit organization they must be responsible with their resources and explore ways to generate additional income.

System

General system theory deals with inputs, outputs, processes, and feedback. Texas A&M University is a system with a variety of subsystems operating in an environmental system that is constantly changing so system theory should be at the core of the model.

Legal

The TEACH Act was signed into law by President George W. Bush on November 2, 2002. Since the model is dealing with a law it is imperative to have a legal component in the model.

Psychological

In strategic planning and particularly in academia it is important to understand the psychological underpinnings of your organization. The relationships and hierarchy of administration, faculty, staff, students and other interested parties must be understood so that no group feels overlooked or ignored. There are three main psychological theories that should be employed in the development of a copyright model. Gestalt psychology takes a holistic view of an organization and in creating a copyright model it is important to see the big picture in one look. Behaviorism is used because as an administrator I must set goals and use rewards and motivation to encourage faculty to create more distance education programs to benefit the university and themselves. Cognitive theory addresses how people process information and is focused on self.

Strategic Planning

The TEACH Act specifies that it is the responsibility of each educational institution to institute policies regarding copyright. In order to insure that the policies are properly disseminated and implemented, the educational institute must use some form of strategic planning.

Evaluation

Evaluation should be built into every strategic plan. I chose to include this component because too many times evaluation is not given the consideration it needs when creating a strategic plan. Also with the constantly evolving nature of technology and distance education there must be continuous evaluation.

Environment

The internal and external environments must be considered when creating a model. It is important to be aware of what is happening internally and externally that could affect copyright issues.

Conclusions

The researcher came to the following conclusions after analyzing the data regarding distance education copyright issues.

1. **Strategic planning is one of the key components needed to create a model for distance education copyright guidelines.** In reviewing the data from the mathematics master's program at Texas A&M University and researching a variety of other university distance education programs it was clear that without proper strategic planning it would be impossible to create or implement distance education copyright guidelines.
2. **The nature of constant change in distance education technology and copyright laws causes evaluation to become so important that it needs to be included as more than part of strategic planning.** Evaluation became an integral part of the distance education copyright planning wheel model and is

- constantly moving and encouraging updates.
3. **System theory belongs at the core of the model because it involves input, output, and feedback.** The system theory captures the essence of how the sum of the parts does not equal the whole. In putting together a model and guidelines for distance education copyright issues there are so many components, people and legalities involved that there needs to be some sort of process. The system theory helps provide understanding of processes.
 4. **The legal spoke of the distance education copyright planning wheel and quotes from the copyright law in the power point guidelines are essential and help prevent faculty members, universities or other parties involved in the distance education copyright issues from violating laws.** The TEACH Act requires universities to take a leadership role in dissemination of information to all interested parties. When faculty members use the distance education copyright planning wheel and follow the audio power point instructions regarding distance education copyright issues legal conflict can be avoided. The audio power point includes important excerpts of the law that faculty members can review for assistance. The audio power point also provides additional resource sites for anyone needing further clarification.
 5. **The psychological portion of the distance education copyright planning wheel is imperative because there are so many people involved in distance education copyright issues.** When people are involved there will always be some sort of psychology needed to understand the different personalities, wants, needs, motivations, and desires. In strategic planning and particularly in academia it is

important to understand the psychological underpinnings of your organization. The relationships and hierarchy of administration, faculty, staff, students and other interested parties must be understood so that no group feels overlooked or ignored. There are three main psychological theories that should be employed in the development of a copyright model. Gestalt psychology takes a holistic view of an organization and in creating a copyright model it is important to see the big picture in one look. Behaviorism is used because as an administrator I must set goals and use rewards and motivation to encourage faculty to create more distance education programs to benefit the university and themselves. Cognitive theory addresses how people process information and is focused on self.

- 6. There must be open communication between all parties incorporated in the distance education copyright planning wheel.** As discussed in the section above, there is more than one person involved with and affected by distance education copyright issues. Policy makers include more than the contracts and compliance officers. The executive staff will be involved when the time comes to formalize and approve the copyright policy. Faculty members are the ones creating and disseminating course content. The technology team at the CIS department will be charged with implementing safeguards so their viewpoint must be considered. Librarians work with faculty members, students, CIS staff members and the contracts department to disseminate information and are a key player in assisting in the implementation of copyright guidelines. Students are involved because they are the ones trying to learn from distance education

courses. It is imperative that there is open communication and understanding between all parties involved with copyright issues.

7. The environment spoke on the distance education copyright planning wheel represents the need to pay attention to internal and external environments.

There are constant changes internally and externally that may affect distance education copyright issues. Rapid growth of technology, decreasing funds for universities, increasing demand for distance education are just a few of the changes that must be considered when creating a model and guidelines for distance education copyright issues.

8. Economics must be included in any model or set of guidelines regarding distance education copyright issues. When writing copyright guidelines and creating a model it was important to develop a process that would be a winning situation for the university, students and faculty. Many universities are facing budget cuts and are looking at distance education as a way to offset these cuts. If the distance education copyright guidelines do not offer a big enough motivation to faculty to create new distance education programs there will be no extra income for universities. At the same time the universities must recognize a fair return on their investment.

9. The entire Distance Education Copyright Planning Wheel model (Figure 3) must be driving on a road of ethics. In creating distance education programs there are many ways where unethical behavior could damage the programs or the universities reputation. The university must take the lead and encourage ethical behavior from the top down. When working with faculty members the university

should offer equitable economic motivation. The university should provide distance education guidelines and offer additional assistance when needed. Ethical behavior from all interested parties will lead to smooth resolution of distance education copyright issues.

- 10. The distance education copyright planning wheel model and power point guidelines created by the researcher highlights the key components that are congruent with the literature review.** Using the models of Bryson, Caffarella and Swanson as a guide provide credibility for the distance education copyright planning wheel model. As stated above the model provides guidance and sets the tone for dealing with distance education copyright issues. The distance education audio power point presentation provides easily understood guidelines and offers contact information for anyone needing additional assistance.

Recommendations for Practice

The researcher created the following list of recommendations for distance education professionals which has the potential to greatly reduce costly litigation for all parties involved in distance education copyright issues. The implementation of these recommendations contributed to the success of Texas A&M University's distance education program and it provided a structure that proved to be a protection against litigation. It is imperative that distance education professionals be aware of and also plan and prepare for these recommendations prior to establishment of their respective programs if problems are to be avoided. Because copyright issues can often arise and catch instructors and administration by surprise, the importance of those professionals being knowledgeable and literate regarding copyright issues is paramount to a programs

success and annihilates the possibility of time consuming interruptions to correct problems. As a result of the TEACH Act there is more information included.

1. **Make all distance education parties aware of copyright issues in the planning stage.** Establishing a detailed and cohesive written strategic plan with an associated set of goals and objectives will provide the necessary structure for building a successful program. The elimination of problems begins with the creation of a plan that has been constructed by knowledgeable professionals who can anticipate problems and can implement hedges to discourage thus. This type of planning greatly increases success within a program and decreases stressful interactions and costly situations.
2. **Build continuous evaluation into the plan.** Providing a systematic evaluation of distance education copyright issues will prevent fatal mistakes that could lead to lawsuits. The evaluation system should allow for detecting the constant change in legal and environmental issues. As technology, information, and situations develop and change, the consistent and regulated evaluation system allows professionals to constantly assess and improve. A suggestion for such evaluation could include an aggressive designated team or individual to systematically keep abreast of developments within the legal system and report on a regular and timely basis to the planning committee.

3. **Encourage open communication for all parties involved in distance education**

planning. Open communication from internal sources such as faculty members, technology teams, librarians, administrators, staff and students will lead to better understanding of distance education copyright issues. Regularly scheduled seminars conducted in concise and well-instructed sessions to alert and inform professionals creating programs and curricula, as well as other chosen methods of informational reinforcement should be selected and implemented by the parties involved.

4. **Present your distance education copyright issues in more than one format.**

Providing a model, written power point and audio power point appeals to interested parties in a variety of ways so that each party can choose the easiest way to understand distance education copyright issues. Embracing various avenues of information dissemination aids in increasing the understanding of the presented material by appealing to individual's preferred, often inherent, choice of accepting and fully understanding the information. It allows the information to become more deeply established and simply better understood.

5. **Provide leadership and set expectations for ethical behavior regarding**

distance education copyright issues. The best way enforce ethical behavior is to take a tops down approach. Administrators and faculty must set the tone and encourage ethical behavior regarding distance education copyright issues by their own example, both verbally and by decisions made. Ethical behavior must first be verbally established, however actions and decisions must wholly support such declarations in order for subordinates to follow suit. It is of little surprise when

subordinates underestimate the importance of ethical choices when administrators and faculty do not communicate the imperative nature of such behavior by their own words and deeds.

6. **Remember the sum of the parts does not equal the whole.** There are a multitude of variables that ultimately impact distance education and copyright issues. Be prepared to deal with the changing environment, changing laws, economic needs, psychological aspects and communication components. Understand that this is a process and these variables may change through relationship synergies. Be alert and aggressive in acknowledging this fact and be flexible to change. The inflexibility to adjust to ever-surfacing ripples can culminate in more costly adjustments in both time and financial resources if not dealt with as the issues arise. Additionally, aspects of one entity, such as legal, may not align logically or systematically with another aspect, such as environmental, and such realities must be anticipated and dealt with strategically.

Recommendations for Further Research

There are a few areas that arose from this study where there are opportunities for further research. The following list outlines the areas where the researcher additional research would be most beneficial.

1. **Does the distance education copyright planning wheel accurately depict other distance education copyright planning initiatives?** The researcher would like to know if his research could be duplicated using the distance education copyright planning wheel model as a guide.

2. **Is there any way for the TEACH Act to be rewritten to provide uniform guidelines?** It would be very interesting to see if there could be one set of guidelines derived from the TEACH Act that could be used universally that would prevent universities from making their own interpretations of the law.
3. **Is there a better way to use the distance education copyright planning model or the power point presentations to prevent legal conflict for faculty members?** The researcher would be interested in determining if there is a better way to present guidelines to protect faculty members.
4. **Is there a better way to build constant change into the model?** There are so many variables involved in distance education copyright issues that are constantly changing. The researcher would be interesting in seeing other ways to build flexibility into the model.
5. **Would it be better for faculty members to control the planning process for distance education copyright guidelines?** The researcher entered this study with a bias toward administration taking the lead role in developing guidelines for distance education copyright issues. The researcher still believes that it is imperative that administration take the lead but would be interested in seeing if another study may say something else.

Closing Statement

The researcher has completed the case study and analyzed the data regarding the copyright issues in distance education. A new model, the Distance Education Copyright Planning Wheel model (Figure 3) has been created that provides insight to the researcher and possibly other contract administrators or faculty members. Recommendations and conclusions have been provided that will be beneficial to Texas A&M University and others embarking on distance education programs. The case study provides a detailed story that the researcher encourages faculty members, and university administrators to read in order to become more informed about copyright issues in distance education.

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APPENDIX A
TEACH ACT OF 2001

Calendar No. 66

107TH CONGRESS }
1st Session }

SENATE

{ REPORT
{ 107-31TECHNOLOGY, EDUCATION AND COPYRIGHT
HARMONIZATION ACT OF 2001

JUNE 5, 2001.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany S. 487]

The Committee on the Judiciary, to which was referred the bill (S. 487) to amend chapter 1 of title 17, United States Code, relating to the exemption of certain performances or displays for educational uses from copyright infringement provisions, to provide that the making of a single copy of such performances or displays is not an infringement, and for other purposes, having considered the same reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

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The bill, as amended, is as follows:

SECTION 1. EDUCATIONAL USE COPYRIGHT EXEMPTION.

(a) **SHORT TITLE.**—This Act may be cited as the “Technology, Education, and Copyright Harmonization Act of 2001”.

(b) **EXEMPTION OF CERTAIN PERFORMANCES AND DISPLAYS FOR EDUCATIONAL USES.**—Section 110 of title 17, United States Code, is amended—

(1) by striking paragraph (2) and inserting the following:

“(2) except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks, or a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the

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transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired, the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission, if—

“(A) the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution;

“(B) the performance or display is directly related and of material assistance to the teaching content of the transmission;

“(C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to—

“(i) students officially enrolled in the course for which the transmission is made; or

“(ii) officers or employees of governmental bodies as a part of their official duties or employment; and

“(D) the transmitting body or institution—

“(i) institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and provides notice to students that materials used in connection with the course may be subject to copyright protection; and

“(ii) in the case of digital transmissions—

“(I) applies technological measures that, in the ordinary course of their operations, prevent—

“(aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and

“(bb) unauthorized further dissemination of the work in accessible form by such recipients to others; and

“(II) does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination;” and

(2) by adding at the end the following:

“In paragraph (2), the term ‘mediated instructional activities’ with respect to the performance or display of a work by digital transmission under this section refers to activities that use such work as an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting. The term does not refer to activities that use, in 1 or more class sessions of a single course, such works as textbooks, course packs, or other material in any media, copies or phonorecords of which are typically purchased or acquired by the students in higher education for their independent use and retention or are typically purchased or acquired for elementary and secondary students for their possession and independent use.

“For purposes of paragraph (2), accreditation—

“(A) with respect to an institution providing post-secondary education, shall be as determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education; and

“(B) with respect to an institution providing elementary or secondary education, shall be as recognized by the applicable state certification or licensing procedures.

“For purposes of paragraph (2), no governmental body or accredited nonprofit educational institution shall be liable for infringement by reason of the transient or temporary storage of material carried out through the automatic technical process of a digital transmission of the performance or display of that material as authorized under paragraph (2). No such material stored on the system or network controlled or operated by the transmitting body or institution under this paragraph shall be maintained on such system or network in a manner ordinarily accessible to anyone other than anticipated recipients. No such copy shall be maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary to facilitate the transmissions for which it was made.”.

(c) EPHEMERAL RECORDINGS.—

(1) IN GENERAL.—Section 112 of title 17, United States Code, is amended—

(A) by redesignating subsection (f) as subsection (g); and

(B) by inserting after subsection (e) the following:

“(f)(1) Notwithstanding the provisions of section 106, and without limiting the application of subsection (b), it is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled under section 110(2) to transmit a performance or display to make copies or phonorecords of a work that is in digital form and, solely to the extent permitted in paragraph (2), of a work that is in analog form, embodying the performance or display to be used for making transmissions authorized under section 110(2), if—

“(A) such copies or phonorecords are retained and used solely by the body or institution that made them, and no further copies or phonorecords are reproduced from them, except as authorized under section 110(2); and

“(B) such copies or phonorecords are used solely for transmissions authorized under section 110(2).

“(2) This subsection does not authorize the conversion of print or other analog versions of works into digital formats, except that such conversion is permitted hereunder, only with respect to the amount of such works authorized to be performed or displayed under section 110(2), if—

“(A) no digital version of the work is available to the institution; or

“(B) the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use for section 110(2).”

(2) TECHNICAL AND CONFORMING AMENDMENT.—Section 802(c) of title 17, United States Code, is amended in the third sentence by striking “section 112(f)” and inserting “section 112(g)”.

(d) PATENT AND TRADEMARK OFFICE REPORT.—

(1) IN GENERAL.—Not later than 180 days after the date of enactment of this Act and after a period for public comment, the Undersecretary of Commerce for Intellectual Property, after consultation with the Register of Copyrights, shall submit to the Committees on the Judiciary of the Senate and the House of Representatives a report describing technological protection systems that have been implemented, are available for implementation, or are proposed to be developed to protect digitized copyrighted works and prevent infringement, including upgradeable and self-repairing systems, and systems that have been developed, are being developed, or are proposed to be developed in private voluntary industry-led entities through an open broad based consensus process. The report submitted to the Committees shall not include any recommendations, comparisons, or comparative assessments of any commercially available products that may be mentioned in the report.

(2) LIMITATIONS.—The report under this subsection—

(A) is intended solely to provide information to Congress; and

(B) shall not be construed to affect in any way, either directly or by implication, any provision of title 17, United States Code, including the requirements of clause (ii) of section 110(2)(D) of that title (as added by this Act), or the interpretation or application of any such provision, including evaluation of the compliance with that clause by any governmental body or nonprofit educational institution.

I. PURPOSE

S. 487, the “Technology, Education And Copyright Harmonization Act of 2001,” or the “TEACH Act,” updates the distance education provisions of the Copyright Act for the 21st Century. The Act allows students and teachers to benefit from deployment in education of advanced digital transmission technologies like the Internet, while introducing safeguards to limit the additional risks to copyright owners that are inherent in exploiting works in a digital format. This legislation has been crafted in a process that has ensured a broad consensus of affected parties.

Education is the means by which we develop our nation’s human resources. In this information age, marked by both cooperation and competition on a global scale, the ability of the United States to meet its domestic and international challenges and responsibilities is directly dependent on its educational capacity. That capacity in

turn will be determined by the quality of our educational programs and their reach to all sectors of the public. For our nation to maintain its competitive edge, it will need to extend education beyond children and young adults to lifelong learning for working adults, and to reach all students of all income levels, in cities and rural settings, in schools and on campuses, in the workplace, at home, and at times selected by students to meet their needs.

Digital distance education helps make this possible, whether in the traditional sense, when instructor and student are separated in place and perhaps time, or in new hybrids of traditional classroom education combined with online components. Increasingly, college students can submit class assignments by email and participate in discussions that connect students in a classroom with students beyond the classroom. Similarly, K–12 students can learn about the customs and cultures of other countries through real-time audiovisual conversations with pen pals from those countries; they can learn science in new ways by having scientific demonstrations and actual experiments conducted at distant locations brought to them in real time via the Internet. The National Science Foundation, the National Academy of Sciences, and other scientific societies and educational organizations are working hard to improve our nation’s science and mathematics education; other groups are developing new ways to bring humanities and the arts to students and the broader public. Many of these new educational efforts draw on advances in information technology and digital networks.

The TEACH Act amends sections 110(2) and 112 of the Copyright Act to facilitate the growth and development of digital distance education. The Act expands the exempted copyright rights, the types of transmissions, and the categories of works that the exemption covers beyond those that are covered by the existing exemption for performances and displays of certain copyrighted works in the course of instructional transmissions. Thus, for example, it allows transmissions to locations other than a physical classroom, and allows for performances of reasonable and limited portions of audiovisual works, sound recordings, and other works within the scope of the exemption. At the same time, it maintains and clarifies the concept of “mediated instructional activities” to which the exemption applies, and includes safeguards such as obligations to implement technological protection measures and limitations on the amounts of certain types of works that may be performed or displayed. The Act also amends section 112 of the Copyright Act to permit storage of copyrighted material on servers in order to permit the performances and displays authorized by section 110(2) to be made asynchronously in distance education courses.

II. LEGISLATIVE HISTORY

Section 110(2) of the Copyright Act was enacted in 1976¹ on the basis of a policy determination that certain performances and displays of copyrighted works in connection with systematic instruction using then-known forms of distance education should be permitted without a need to obtain a license or rely on fair use. The technological characteristics of digital transmissions have rendered the language of section 110(2) inapplicable to the most advanced

¹ Act of Oct. 19, 1976, Pub. L. No. 94–553, 90 Stat. 2549 (1976).

delivery methods for instruction. Without an amendment to accommodate these new technologies, the policy behind the 1976 Act would be increasingly diminished.

At the same time, two factors recommend some recalibrating of the policy balance struck in 1976. The characteristics of digital transmission technologies present new educational opportunities, such as the ability to provide a media-rich, interactive educational experience to students unable to attend classes at the physical location of the institution. On the other hand, the ability of digital transmission technologies to disseminate rapidly and without control virtually infinite numbers of high quality copies, create new risks for the owners of copyrighted works used in distance education.

In the five years leading up to the passage of the Digital Millennium Copyright Act (DMCA) in 1998,² the application of copyright law to distance education using digital technologies was the subject of public debate and attention in the United States. Extensive discussions concerning the issue were conducted during Congress' consideration of the DMCA, but no conclusion was reached. Therefore, in section 403 of the DMCA, Congress directed the Copyright Office to consult with representatives of copyright owners, non-profit educational institutions, and non-profit libraries and archives, and thereafter to submit to Congress "recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works."³ The recommendations were to include any legislation the Register of Copyrights considered appropriate to achieve that objective. The Copyright Office was specifically directed to consider the following issues: the need for a new exemption, the categories of works to be included in any exemption, the appropriate quantitative limitations on the portions of works that may be used under any exemption, which parties should be eligible for any exemption, which parties should be eligible recipients of distance education material under any exemption, the extent to which technological protection measures should be mandated as a condition of eligibility for any exemption, the extent to which the availability of licenses should be considered in assessing the eligibility for any exemption, and other issues the Office considered appropriate.

The Copyright Office conducted an extensive and intensive process of identifying stakeholders, holding public hearings, soliciting comments, conducting research, and consulting with experts in various fields. On May 10, 1999, the Register of Copyrights formally presented the findings and recommendations of the Copyright Office to the Senate Judiciary Committee.⁴ Among other things, the Copyright Office recommended the following changes: elimination of the requirement of a physical classroom, clarification that the term "transmission" covers digital transmissions, expanding the rights covered by the exemption to include those needed to accomplish network transmissions, expanding the categories of works exempted from the performance rights beyond the current coverage

² Act of Oct. 28, 1998, Pub. L. No. 105-304, 112 Stat. 2877 (1998).

³ *Id.*

⁴ Register of Copyrights, Report on Copyright and Digital Distance Education (1999).

of non-dramatic literary and musical works, and creating new safeguards to counteract the risks imposed by digital transmissions.⁵

Following careful review and consideration of the Copyright Office's findings and recommendations, the Chairman, Senator Hatch, joined by the Ranking Member, Senator Leahy, introduced S. 487, the "Technology, Education and Copyright Harmonization Act of 2001," or the "TEACH Act,"⁶ on March 7, 2001, to implement many of the Copyright Office recommendations.

On May 13, 2001, the Judiciary Committee held a hearing that focused on amendments to the copyright law proposed by the "TEACH Act." The Register of Copyrights, Ms. Marybeth Peters, testified on behalf of the Copyright Office. The Committee also heard testimony from Mr. Gerald A. Heeger, President of the University of Maryland College Park; Mr. Allan Adler, Vice President for Legal & Governmental Affairs for the Association of American Publishers; Mr. Richard Siddoway, Principal of the Utah Electronic High School; Mr. Paul LeBlanc, President of Malboro College, Vermont; and Mr. Gary Carpenter, Adjunct Professor of Law at American University, Washington, DC.

On March 17, 2001, the Judiciary Committee met in executive session to consider S. 487. An amendment in the nature of a substitute was offered by the Chairman, Senator Hatch, together with the Ranking Member, Senator Leahy, which had been developed to implement the purposes of the TEACH Act, following extensive discussions with the education and copyright owner communities, and with further assistance from the Copyright Office. The substitute amendment was adopted by unanimous consent and the bill, as amended, was then ordered to be favorably reported to the full Senate by unanimous consent.

III. VOTE OF THE COMMITTEE

The Senate Committee on the Judiciary, with a quorum present, met on Thursday, May 17, 2001, at 10:00 a.m., to consider the Technology, Education and Copyright Harmonization Act of 2001. The Committee considered and accepted by unanimous consent an amendment in the nature of a substitute offered by the Chairman (for himself and Mr. Leahy). The Committee then ordered the Technology, Education and Copyright Harmonization Act of 2001 to be reported favorably to the Senate, as amended, by unanimous consent, with a recommendation that the bill do pass.

IV. SECTION-BY-SECTION ANALYSIS

Subsection (a): Short Title

This section provides that this Act may be cited as the "Technology, Education and Copyright Harmonization Act of 2001."

⁵ Id.

⁶ S. 487, 107th Cong., 1st Sess. (2001). See 2000 Cong. Rec. S 2008–2009 (daily ed. Mar. 7, 2001).

Subsection (b): Exemption of Certain Performances and Displays for Educational Uses

Summary

Section 1(b) of the TEACH Act amends section 110(2) of the Copyright Act to encompass performances and displays of copyrighted works in digital distance education under appropriate circumstances. The section expands the scope of works to which the amended section 110(2) exemption applies to include performances of reasonable and limited portions of works other than nondramatic literary and musical works (which are currently covered by the exemption), while also limiting the amount of any work that may be displayed under the exemption to what is typically displayed in the course of a live classroom session. At the same time, section 1(b) removes the concept of the physical classroom, while maintaining and clarifying the requirement of mediated instructional activity and limiting the availability of the exemption to mediated instructional activities of governmental bodies and “accredited” non-profit educational institutions. This section of the Act also limits the amended exemption to exclude performances and displays given by means of a copy or phonorecord that is not lawfully made and acquired, which the transmitting body or institution knew or had reason to believe was not lawfully made and acquired. In addition, section 1(b) requires the transmitting institution to apply certain technological protection measures to protect against retention of the work and further downstream dissemination. The section also clarifies that participants in authorized digital distance education transmissions will not be liable for any infringement by reason of transient or temporary reproductions that may occur through the automatic technical process of a digital transmission for the purpose of a performance or display permitted under the section. Obviously, with respect to such reproductions, the distribution right would not be infringed. Throughout the Act, the term “transmission” is intended to include transmissions by digital, as well as analog means.

Works subject to the exemption and applicable portions

The TEACH Act expands the scope of the section 110(2) exemption to apply to performances and displays of all categories of copyrighted works, subject to specific exclusions for works “produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks” and performance or displays “given by means of a copy or phonorecord that is not lawfully made and acquired,” which the transmitting body or institution “knew or had reason to believe was not lawfully made and acquired.”

Unlike the current section 110(2), which applies only to public performances of nondramatic literary or musical works, the amendment would apply to public performances of any type of work, subject to certain exclusions set forth in section 110(2), as amended. The performance of works other than non-dramatic literary or musical works is limited, however, to “reasonable and limited portions” of less than the entire work. What constitutes a “reasonable and limited” portion should take into account both the nature of

the market for that type of work and the pedagogical purposes of the performance.

In addition, because “display” of certain types of works, such as literary works using an “e-book” reader, could substitute for traditional purchases of the work (e.g., a text book), the display exemption is limited to “an amount comparable to that which is typically displayed in the course of a live classroom setting.” This limitation is a further implementation of the “mediated instructional activity” concept described below, and recognizes that a “display” may have a different meaning and impact in the digital environment than in the analog environment to which section 110(2) has previously applied. The “limited portion” formulation used in conjunction with the performance right exemption is not used in connection with the display right exemption, because, for certain works, display of the entire work could be appropriate and consistent with displays typically made in a live classroom setting (e.g., short poems or essays, or images of pictorial, graphic, or sculptural works, etc.).

The exclusion for works “produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks” is intended to prevent the exemption from undermining the primary market for (and, therefore, impairing the incentive to create, modify or distribute) those materials whose primary market would otherwise fall within the scope of the exemption. The concept of “performance or display as part of mediated instructional activities” is discussed in greater detail below, in connection with the scope of the exemption. It is intended to have the same meaning and application here, so that works produced or marketed primarily for activities covered by the exemption would be excluded from the exemption. The exclusion is not intended to apply generally to all educational materials or to all materials having educational value. The exclusion is limited to materials whose primary market is “mediated instructional activities,” i.e., materials performed or displayed as an integral part of the class experience, analogous to the type of performance or display that would take place in a live classroom setting. At the same time, the reference to “digital networks” is intended to limit the exclusion to materials whose primary market is the digital network environment, not instructional materials developed and marketed for use in the physical classroom.

The exclusion of performances or displays “given by means of a copy or phonorecord that is not lawfully made and acquired” under title 17 is based on a similar exclusion in the current language of section 110(1) for the performance or display of an audiovisual work in the classroom. Unlike the provision in section 110(1), the exclusion here applies to the performance or display of any work. But, as in section 110(1), the exclusion applies only where the transmitting body or institution “knew or had reason to believe” that the copy or phonorecord was not lawfully made and acquired. As noted in the Register’s Report, the purpose of the exclusion is to reduce the likelihood that an exemption intended to cover only the equivalent of traditional concepts of performance and display would result in the proliferation or exploitation of unauthorized copies.⁷ An educator would typically purchase, license, rent, make

⁷ Report on Copyright and Digital Distance Education at 159.

a fair use copy, or otherwise lawfully acquire the copy to be used, and works not yet made available in the market (whether by distribution, performance or display) would, as a practical matter, be rendered ineligible for use under the exemption.

Eligible transmitting entities

As under the current section 110(2), the exemption, as amended, is limited to government bodies and non-profit educational institutions. However, due to the fact that, as the Register's Report points out, "nonprofit educational institutions" are no longer a closed and familiar group, and the ease with which anyone can transmit educational material over the Internet, the amendment would require non-profit educational institutions to be "accredited" in order to provide further assurances that the institution is a bona fide educational institution. It is not otherwise intended to alter the eligibility criteria. Nor is it intended to limit or affect any other provision of the Copyright Act that relates to non-profit educational institutions or to imply that non-accredited educational institutions are necessarily not bona fide.

"Accreditation" is defined in section 1(b)(2) of the TEACH Act in terms of the qualification of the educational institution. It is not defined in terms of particular courses or programs. Thus, an accredited nonprofit educational institution qualifies for the exemption with respect to its courses whether or not the courses are part of a degree or certificate-granting program.

Qualifying performances and displays; mediated instructional activities

Subparagraph (2)(A) of the amended exemption provides that the exemption applies to a performance or display made "by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of * * * systematic mediated instructional activity." The subparagraph includes several requirements, all of which are intended to make clear that the transmission must be part of mediated instructional activity. First, the performance or display must be made by, under the direction of, or under the actual supervision of an instructor. The performance or display may be initiated by the instructor. It may also be initiated by a person enrolled in the class as long as it is done either at the direction, or under the actual supervision, of the instructor. "Actual" supervision is intended to require that the instructor is, in fact, supervising the class activities, and that supervision is not in name or theory only. It is not intended to require either constant, real-time supervision by the instructor or pre-approval by the instructor for the performance or display. Asynchronous learning, at the pace of the student, is a significant and beneficial characteristic of digital distance education, and the concept of control and supervision is not intended to limit the qualification of such asynchronous activities for this exemption.

The performance or display must also be made as an "integral part" of a class session, so it must be part of a class itself, rather than ancillary to it. Further, it must fall within the concept of "mediated instructional activities" as described in section 1(b)(2) of the TEACH Act. This latter concept is intended to require the performance or display to be analogous to the type of performance or dis-

play that would take place in a live classroom setting. Thus, although it is possible to display an entire textbook or extensive course-pack material through an e-book reader or similar device or computer application, this type of use of such materials as supplemental reading would not be analogous to the type of display that would take place in the classroom, and therefore would not be authorized under the exemption.

The amended exemption is not intended to address other uses of copyrighted works in the course of digital distance education, including student use of supplemental or research materials in digital form, such as electronic course packs, e-reserves, and digital library resources. Such activities do not involve uses analogous to the performances and displays currently addressed in section 110(2).

The “mediated instructional activity” requirement is thus intended to prevent the exemption provided by the TEACH Act from displacing textbooks, course packs or other material in any media, copies of phonorecords of which are typically purchased or acquired by students for their independent use and retention (in most post-secondary and some elementary and secondary contexts). The Committee notes that in many secondary and elementary school contexts, such copies of such materials are not purchased or acquired directly by the students, but rather are provided for the students’ independent use and possession (for the duration of the course) by the institution.

The limitation of the exemption to systematic “mediated instructional activities” in subparagraph (2)(A) of the amended exemption operates together with the exclusion in the opening clause of section 110(2) for works “produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks” to place boundaries on the exemption. The former relates to the nature of the exempt activity; the latter limits the relevant materials by excluding those primarily produced or marketed for the exempt activity.

One example of the interaction of the two provisions is the application of the exemption to textbooks. Pursuant to subparagraph (2)(A), which limits the exemption to “mediated instructional activities,” the display of material from a textbook that would typically be purchased by students in the local classroom environment, in lieu of purchase by the students, would not fall within the exemption. Conversely, because textbooks typically are not primarily produced or marketed for performance or display in a manner analogous to performances or display in the live classroom setting, they would not per se be excluded from the exemption under the exclusion in the opening clause. Thus, an instructor would not be precluded from using a chart or table or other short excerpt from a textbook different from the one assigned for the course, or from emphasizing such an excerpt from the assigned textbook that had been purchased by the students.

The requirement of subparagraph (2)(B), that the performance or display must be directly related and of material assistance to the teaching content of the transmission, is found in current law, and has been retained in its current form. As noted in the Register’s

Report,⁸ this test of relevance and materiality connects the copyrighted work to the curriculum, and it means that the portion performed or displayed may not be performed or displayed for the mere entertainment of the students, or as unrelated background material.

Limitations on receipt of transmissions

Unlike current section 110(2), the TEACH Act amendment removes the requirement that transmissions be received in classrooms or similar places devoted to instruction unless the recipient is an officer or employee of a government body or is prevented by disability or special circumstances from attending a classroom or similar place of instruction. One of the great potential benefits of digital distance education is its ability to reach beyond the physical classroom, to provide quality educational experiences to all students of all income levels, in cities and rural settings, in schools and on campuses, in the workplace, at home, and at times selected by students to meet their needs.

In its place, the Act substitutes the requirement in subparagraph (2)(C) that the transmission be made solely for, and to the extent technologically feasible, the reception is limited to students officially enrolled in the course for which the transmissions is made or governmental employees as part of their official duties or employment. This requirement is not intended to impose a general requirement of network security. Rather, it is intended to require only that the students or employees authorized to be recipients of the transmission should be identified, and the transmission should be technologically limited to such identified authorized recipients through systems such as password access or other similar measures.

Additional safeguards to counteract new risks

The digital transmission of works to students poses greater risks to copyright owners than transmissions through analog broadcasts. Digital technologies make possible the creation of multiple copies, and their rapid and widespread dissemination around the world. Accordingly, the TEACH Act includes several safeguards not currently present in section 110(2).

First, a transmitting body or institution seeking to invoke the exemption is required to institute policies regarding copyright and to provide information to faculty, students and relevant staff members that accurately describe and promote compliance with copyright law. Further, the transmitting organization must provide notice to recipients that materials used in connection with the course may be subject to copyright protection. These requirements are intended to promote an environment of compliance with the law, inform recipients of their responsibilities under copyright law, and decrease the likelihood of unintentional and uninformed acts of infringement.

Second, in the case of a digital transmission, the transmitting body or institution is required to apply technological measures to prevent (i) retention of the work in accessible form by recipients to which it sends the work for longer than the class session, and (ii)

⁸Id. at 80.

unauthorized further dissemination of the work in accessible form by such recipients. Measures intended to limit access to authorized recipients of transmissions from the transmitting body or institution are not addressed in this subparagraph (2)(D). Rather, they are the subjects of subparagraphs (2)(C).

The requirement that technological measures be applied to limit retention for no longer than the “class session” refers back to the requirement that the performance be made as an “integral part of a class session.” The duration of a “class session” in asynchronous distance education would generally be that period during which a student is logged on to the server of the institution or governmental body making the display or performance, but is likely to vary with the needs of the student and with the design of the particular course. It does not mean the duration of a particular course (i.e., a semester or term), but rather is intended to describe the equivalent of an actual single face-to-face mediated class session (although it may be asynchronous and one student may remain online or retain access to the performance or display for longer than another student as needed to complete the class session). Although flexibility is necessary to accomplish the pedagogical goals of distance education, the Committee expects that a common sense construction will be applied so that a copy or phonorecord displayed or performed in the course of a distance education program would not remain in the possession of the recipient in a way that could substitute for acquisition or for uses other than use in the particular class session. Conversely, the technological protection measure in subparagraph (2)(D)(ii) refers only to retention of a copy or phonorecord in the computer of the recipient of a transmission. The material to be performed or displayed may, under the amendments made by the Act to section 112 and with certain limitations set forth therein, remain on the server of the institution or government body for the duration of its use in one or more courses, and may be accessed by a student each time the student logs on to participate in the particular class session of the course in which the display or performance is made. The reference to “accessible form” recognizes that certain technological protection measures that could be used to comply with subparagraph (d)(D)(ii) do not cause the destruction or prevent the making of a digital file; rather they work by encrypting the work and limiting access to the keys and the period in which such file may be accessed. On the other hand, an encrypted file would still be considered to be in “accessible form” if the body or institution provides the recipient with a key for use beyond the class session.

Paragraph (2)(D)(ii) provides, as a condition of eligibility for the exemption, that a transmitting body or institution apply technological measures that reasonably prevent both retention of the work in accessible form for longer than the class session and further dissemination of the work.

Transient and temporary copies

Section 1(b)(2) of the TEACH Act implements the Register’s recommendation that liability not be imposed upon those who participate in digitally transmitted performances and displays authorized under this subsection by reason of copies or phonorecords made through the automatic technical process of such transmission, or

any distribution resulting therefrom. Certain modifications have been made to the Register's recommendations to accommodate instances where the recommendation was either too broad or not sufficiently broad to cover the appropriate activities.

The third paragraph added to the amended exemption under section 1(b)(2) of the TEACH Act recognizes that transmitting organizations should not be responsible for copies or phonorecords made by third parties, beyond the control of the transmitting organization. However, consistent with the Register's concern that the exemptions should not be transformed into a mechanism for obtaining copies,⁹ the paragraph also requires that such transient or temporary copies stored on the system or network controlled or operated by the transmitting body or institution shall not be maintained on such system or network "in a manner ordinarily accessible to anyone other than anticipated recipients" or "in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary to facilitate the transmissions" for which they are made.

The liability of intermediary service providers remains governed by section 512, but, subject to section 512(d) and section 512(e), section 512 will not affect the legal obligations of a transmitting body or institution when it selects material to be used in teaching a course, and determines how it will be used and to whom it will be transmitted as a provider of content.

The paragraph refers to "transient" and "temporary" copies consistent with the terminology used in section 512, including transient copies made in the transmission path by conduits and temporary copies, such as caches, made by the originating institution, by service providers or by recipients. Organizations providing digital distance education will, in many cases, provide material from source servers that create additional temporary or transient copies or phonorecords of the material in storage known as "caches" in other servers in order to facilitate the transmission. In addition, transient or temporary copies or phonorecords may occur in the transmission stream, or in the computer of the recipient of the transmission. Thus, by way of example, where content is protected by a digital rights management system, the recipient's browser may create a cache copy of an encrypted file on the recipient's hard disk, and another copy may be created in the recipient's random access memory at the time the content is perceived. The third paragraph added to the amended exemption by section 1(b)(2) of the TEACH Act is intended to make clear that those authorized to participate in digitally transmitted performances and displays as authorized under section 110(2) are not liable for infringement as a result of such copies created as part of the automatic technical process of the transmission if the requirements of that language are met. The paragraph is not intended to create any implication that such participants would be liable for copyright infringement in the absence of the paragraph.

Subsection (c): Ephemeral Recordings

One way in which digitally transmitted distance education will expand America's educational capacity and effectiveness is through

⁹Id. at 151.

the use of asynchronous education, where students can take a class when it is convenient for them, not at a specific hour designated by the body or institution. This benefit is likely to be particularly valuable for working adults. Asynchronous education also has the benefit of proceeding at the student's own pace, and freeing the instructor from the obligation to be in the classroom or on call at all hours of the day or night.

In order for asynchronous distance education to proceed, organizations providing distance education transmissions must be able to load material that will be displayed or performed on their servers, for transmission at the request of students. The TEACH Act's amendment to section 112 makes that possible.

Under new subsection 112(f)(1), transmitting organizations authorized to transmit performances or displays under section 110(2) may load on their servers copies or phonorecords of the performance or display authorized to be transmitted under section 110(2) to be used for making such transmissions. The subsection recognizes that it often is necessary to make more than one ephemeral recording in order to efficiently carry out digital transmissions, and authorizes the making of such copies or phonorecords.

Subsection 112(f) imposes several limitations on the authorized ephemeral recordings. First, they may be retained and used solely by the government body or educational institution that made them. No further copies or phonorecords may be made from them, except for copies or phonorecords that are authorized by subsection 110(2), such as the copies that fall within the scope of the third paragraph added to the amended exemption under section 1(b)(2) of the TEACH Act. The authorized ephemeral recordings must be used solely for transmissions authorized under section 110(2).

The Register's Report notes the sensitivity of copyright owners to the digitization of works that have not been digitized by the copyright owner. As a general matter, subsection 112(f) requires the use of works that are already in digital form. However, the Committee recognizes that some works may not be available for use in distance education, either because no digital version of the work is available to the institution, or because available digital versions are subject to technological protection measures that prevent their use for the performances and displays authorized by section 110(2). In those circumstances where no digital version is available to the institution or the digital version that is available is subject to technological measures that prevent its use for distance education under the exemption, section 112(f)(2) authorizes the conversion from an analog version, but only conversion of the portion or amount of such works that are authorized to be performed or displayed under section 110(2). It should be emphasized that subsection 112(f)(2) does not provide any authorization to convert print or other analog versions of works into digital format except as permitted in section 112(f)(2).

Relationship to fair use and contractual obligations

As the Register's Report makes clear "critical to [its conclusion and recommendations] is the continued availability of the fair use doctrine."¹⁰ Nothing in this Act is intended to limit or otherwise

¹⁰Id. at xvi.

to alter the scope of the fair use doctrine. As the Register's Report explains:

Fair use is a critical part of the distance education landscape. Not only instructional performances and displays, but also other educational uses of works, such as the provision of supplementary materials or student downloading of course materials, will continue to be subject to the fair use doctrine. Fair use could apply as well to instructional transmissions not covered by the changes to section 110(2) recommended above. Thus, for example, the performance of more than a limited portion of a dramatic work in a distance education program might qualify as fair use in appropriate circumstances.¹¹

The Register's Report also recommends that the legislative history of legislation implementing its distance education requirements make certain points about fair use. Specifically, this legislation is enacted in recognition of the following:

- a. the fair use doctrine is technologically neutral and applies to activities in the digital environment; and
- b. the lack of established guidelines for any particular type of use does not mean that fair use is inapplicable.¹²

While the Register's Report also examined and discussed a variety of licensing issues with respect to educational uses not covered by exemptions or fair use, these issues were not included in the Report's legislative recommendations that formed the basis for the TEACH Act. It is the view of the Committee that nothing in this Act is intended to affect in any way the relationship between express copyright exemptions and license restrictions.

Nonapplicability to secure tests

The Committee is aware and deeply concerned about the phenomenon of school officials who are entrusted with copies of secure test forms solely for use in actual test administrations and using those forms for a completely unauthorized purpose, namely helping students to study the very questions they will be asked on the real test. The Committee does not in any way intend to change current law with respect to application of the Copyright Act or to undermine or lessen in any way the protection afforded to secure tests under the Copyright Act. Specifically, this section would not authorize a secure test acquired solely for use in an actual test administration to be used for any other purpose.

Subsection (d): PTO Report

The report requested in subsection (d) requests information about technological protection systems to protect digitized copyrighted works and prevent infringement. The report is intended for the information of Congress and shall not be construed to have any effect whatsoever on the meaning, applicability, or effect of any provision of the Copyright Act in general or the TEACH Act in particular.

¹¹ Id. at 161–162.

¹² Id.

V. COST ESTIMATE

U.S. CONGRESS,
 CONGRESSIONAL BUDGET OFFICE,
 Washington, DC, May 29, 2001.

Hon. ORRIN G. HATCH,
 Chairman, Committee on the Judiciary,
 U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 487, the Technology, Education, and Copyright Harmonization Act of 2001.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Ken Johnson (for federal costs) and Paige Piper/Bach (for the private-sector impact).

Sincerely,

BARRY B. ANDERSON
 (For Dan L. Crippen, Director).

Enclosure.

S. 487—Technology, Education, and Copyright Harmonization Act of 2001

S. 487 would exempt from copyright laws the digital transmission of literature, music, and other material in educational settings, if certain conditions are met. Copyright laws are administered by the Copyright Office. The bill also would require the Patent and Trademark Office (PTO) to report to the Congress within six months of enactment on the range of technologies that are available to protect the copyrights of material that is accessible in digital form.

Based on information from the Copyright Office and the PTO, CBO estimates that implementing S. 487 would have a negligible on the operating budgets of those agencies. The bill would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply.

S. 487 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments. However, the bill would impose a private-sector mandate as defined by UMRA on copyright owners. S. 487 would limit the right of copyright owners to collect compensation under copyright law for use of certain secondary materials by educators in long distance classes over the Internet. The bill would clarify existing law to exempt such materials used in digital distance learning from copyright control. According to information from the Copyright Office and industry sources, compensation currently received by copyright owners from the use of those materials is minimal. CBO estimates, therefore, that the direct cost of the mandate would fall well below the annual threshold established by UMRA for private-sector mandates (\$113 million in 2001, adjusted annually for inflation).

The CBO staff contacts for this estimate are Ken Johnson (for federal costs) and Paige Piper/Bach (for the private-sector impact). This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VI. REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b)(1), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that S. 487 will not have significant regulatory impact.

VII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 487, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * *

TITLE 17—COPYRIGHTS

* * * * *

CHAPTER 1—SUBJECT MATTER AND SCOPE OF
COPYRIGHT

Sec.

101. Definitions.

* * * * *

§ 110. Limitations on exclusive rights: Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance * * *

[(2) performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission, if—]

(2) except with respect to a work produced primarily for instructional use or a performance or display that is given by means of a copy that is not lawfully made and acquired under this title, and the transmitting governmental body or nonprofit educational institutional knew or had reason to believe was not lawfully made and acquired, the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work, by or in the course of a transmission, reproduction of such work in transient copies or phonorecords created as a part of the automatic technical process of a digital transmission, and distribution of such copies of phonorecords in the course of such transmission, to the extent technologically necessary to transmit the performance or display, if—

(A) [the performance or display is a regular] the performance or display is made by or at the direction of an instructor as an integral part of a class session offered as a regular part of the systematic instructional activities of a

governmental body or a nonprofit educational institution;
and

* * * * *

[(C) the transmission is made primarily for—

[(i) reception in classrooms or similar places normally devoted to instruction, or

[(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

[(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment;]

(C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to—

(i) students officially enrolled in the course for which the transmission is made; or

(ii) officers or employees of governmental bodies as part of their official duties or employment; and

(D) any transient copies are retained for no longer than reasonably necessary to complete the transmission; and

(E) the transmitting body or institution—

(i) institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and provides notice to students that materials used in connection with the course may be subject to copyright protection; and

(ii) in the case of digital transmissions, applies technological measures that reasonably prevent unauthorized access to and dissemination of the work, and does not intentionally interfere with technological measures used by the copyright owner to protect the work.

* * * * *

§ 112. Limitations on exclusive rights: Ephemeral recordings

(a) Notwithstanding * * *

* * * * *

(e) STATUTORY LICENSE.—(1) A transmitting * * *

* * * * *

(10) Nothing in this subsection annuls, limits, impairs, or otherwise affects in any way the existence or value of any of the exclusive rights of the copyright owners in a sound recording, except as otherwise provided in this subsection, or in a musical work, including the exclusive rights to reproduce and distribute a sound recording or musical work, including by means of a digital phonorecord delivery, under sections 106(1), 106(3), and 115, and the right to perform publicly a sound recording or musical work, including by means of a digital audio transmission, under sections 106(4) and 106(6).

(f) Notwithstanding the provisions of section 106, and without limiting the application of subsection (b), it is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled to transmit a performance or display of a work that is in digital form under section 110(2) to make copies or phonorecords embodying the performance or display to be used for making transmissions authorized under section 110(2), if—

(1) such copies or phonorecords are retained and used solely by the body or institution that made them, and no further copies or phonorecords are reproduced from them, except as authorized under section 110(2);

(2) such copies or phonorecords are used solely for transmissions authorized under section 110(2); and

(3) the body or institution does not intentionally interfere with technological measures used by the copyright owner to protect the work.

[(f)] (g) The transmission program embodied in a copy or phonorecord made under this section is not subject to protection as a derivative work under this title except with the express consent of the owners of copyright in the preexisting works employed in the program.

* * * * *

§ 802. Membership and proceedings of copyright arbitration royalty panels

(a) COMPOSITION OF COPYRIGHT ARBITRATION ROYALTY PANELS.—A copyright arbitration royalty panel shall consist of 3 arbitrators selected by the Librarian of Congress pursuant to subsection (b).

* * * * *

(c) ARBITRATION PROCEEDINGS.—Copyright arbitration royalty panels shall conduct arbitration proceedings, subject to subchapter II of chapter 5 of title 5, for the purpose of making their determinations in carrying out the purposes set forth in section 801. The arbitration panels shall act on the basis of a fully documented written record, prior decisions of the Copyright Royalty tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under section 801(c). Any copyright owner who claims to be entitled to royalties under section 111, 112, 114, 116, or 119, any transmitting organization entitled to a statutory license under **[section 112(f)] section 112(g)**, any person entitled to a statutory license under section 114(d), any person entitled to a compulsory license under section 115, or any interested copyright party who claims to be entitled to royalties under section 1006, may submit relevant information and proposals to the arbitration panels in proceedings applicable to such copyright owner or interested copyright party, and any other person participating in arbitration proceedings may submit such relevant information and proposals to the arbitration panel conducting the proceedings. In ratemaking proceedings, the parties to the proceedings shall bear the entire cost thereof in such manner and proportion as the arbitration pan-

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els shall direct. In distribution proceedings, the parties shall bear the cost in direct proportion to their share of the distribution.

* * * * *

APPENDIX B

TEXAS A&M UNIVERSITY POLICY

17.02.01.M1 - Intellectual Property, Patents, Copyrights, Information Technology, and Classified Proprietary Research

Approved November 7, 2000
Supplements System Policy 17.02,
and System Regulations 17.02.01 and 17.02.02

1. GENERAL

1.1 Texas A&M University supports the full and rapid dissemination of the creative and scholarly works of its faculty, staff, and students in order to provide timely benefits to the citizens of the State and the nation.

1.2 The process whereby Texas A&M University's creative and scholarly works may be put to public use and/or commercial application (i.e., "technology transfer") must be effected within the framework of an individual's obligations to the University. Actions which serve personal interests to the detriment of University interests must be avoided.

1.3 Intellectual property typically results from the conduct of research projects. See Rule 15.01.01.M3, Research Administration, and section 1.1, Ownership of Program Results and Data under System Regulation 15.01.01: Administration of Sponsored Research Agreements.

2. INVENTIONS, PATENTS, LICENSING, AND COPYRIGHT POLICY

2.1 All University researchers have a duty to disclose any intellectual property through their department head, dean, and the Office of Sponsored Projects, to the System Technology Licensing Office (TLO). The TLO is the technology transfer agency of the Texas A&M University System (TAMUS). The TLO licenses inventions, discoveries and other System-owned intellectual property to private industry for public benefit.

OFFICE OF RESPONSIBILITY: Office of the Vice President for Research

17.02.02.M1 - Technology Mediated Materials and Instruction

Approved January 8, 2001

Supplements System Policy 17.02 and System Regulation 17.02.02

1. General

1.1. Texas A&M University recognizes the essential role intellectual creativity plays in furthering its interests. With rapidly changing technologies in telecommunications, visualization, and pedagogy, the higher education community as a whole is moving into distance learning and all forms of technology mediated instruction. Texas A&M University is dedicated to supporting the creation, health, and continued growth of distance education in a meaningful, effective way. Texas A&M University encourages its faculty and staff to develop Technology Mediated Instruction and Technology Mediated Materials.

2. APPLICATION

2.1. This Rule is applicable only to copyrightable materials that are Technology-Mediated Materials developed to facilitate and support Technology-Mediated Instruction. TAMUS Regulation 17.02.01: Management of Intellectual Property, shall be applicable to copyrightable materials. This regulation shall be interpreted in conjunction with System Policy 07.01: Ethics Policy, TAMUS Employees, and with System Regulation 31.05.01: Faculty Consulting, Outside Professional Employment, and Conflicts of Interest, which relate to participation in private consulting and professional employment by faculty members and their counterparts in the research and extension agencies. System Regulation 17.02.01: Management of Intellectual Property, and System Regulation 33.04.01: Use of System Resources for Outside Professional Activities shall not be construed to prohibit the use of University resources to create TMI, regardless of the level of University resources utilized.

3. COVERAGE

3.1. This Rule shall cover any faculty or staff member employed by TAMU or with an appointment in any college, department or unit of Texas A&M University, including the TAMU portion of the appointment of the faculty members with joint appointments with the various other components of the Texas A&M University System.

4. DEFINITIONS

4.1. Copyrightable Work(s): An original work of authorship which has been fixed in any tangible medium of expression from which it can be perceived, reproduced, or otherwise communicated either directly or with the aid of a machine or device (such as books, journals, software, computer programs, musical works, dramatic works, videos, multimedia products, sound recording, pictorial and graphical works, etc.). A Copyrightable work may be the product of a single author or a group of authors who have collaborated on a project. (See TAMUS Policy 17.02.01: subsection 1.2, Management of Intellectual Property).

4.2. Substantial Support for Copyrightable Works (Substantial Support):

4.2.1. For the purposes of this Rule substantial support is defined as: the essential, integral or significant use of funds, space, hardware, or facilities of the University for the creation of copyrightable works that are not institutional works-for-hire. Incidental use of University resources is not considered to be substantial support. The University will not construe the provision of offices, personal computers and other computer equipment normally made available as a provision of the creator's office, or library facilities as constituting substantial use of University resources. Examples of substantial support are:

4.2.1.1 Instances where University resources were furnished specifically to support the development of copyrightable works,

4.2.1.2 University equipment, materials, or staff services, from other than the home department or unit (or the Faculty Learning Technology Support Facility), used in the development of the copyrightable work at no expense to the author,

4.2.1.3 Support for the development of copyrightable works in the form of University supported salary in excess of normal teaching salary; reduced teaching load to less than is customarily given; or a grant of funds from a department, college, or any unit of the University for the purpose of developing copyrightable work, or

4.2.1.4 Copyrightable works developed in the course of, or resulting from, research or other sponsored activity supported by external funding (a grant or contract funded by an external sponsor such as a federal or state agency, a nonprofit or for-profit entity, or a private gift or grant to the University).

4.3. Creator: The author of copyrightable work.

4.4. Technology-Mediated Instruction (TMI): The use of technological innovation for the development or delivery of course content to students whether in a traditional setting or through distance education.

4.5. Technology-Mediated Materials (TMM): Copyrightable materials developed to facilitate and support the instructional delivery of course content through Technology-Mediated Instruction. Examples of Technology-Mediated Materials may include, but are not limited to:

4.5.1. video or audio recordings

4.5.2. Motion pictures

4.5.3. Programmed instructional materials

4.5.4. Live video and audio transmissions

4.5.5. Computer programs

4.5.6. Combinations of the items listed in sections 4.5.1 thru 4.5.5, multimedia, and other types of materials or instructional packages.

4.6. Institutional Works-For-Hire: Copyrightable Works created as a part of an employee's job for the institution's use. (Example: An employee hired to specifically develop an electronic version of a laboratory manual for use by the University.)

4.7. Parties: The creator of TMI, the creator's department head, dean, and The Office of the Vice President for Research are jointly referred to as "Parties".

5. GUIDELINES

5.1. Technology Mediated Material (TMM): Technology Mediated Material development falls into two classes: That developed with the benefit of substantial support from Texas A&M University, and TMM created without substantial support.

5.2. Ownership:

5.2.1 If substantial support was provided in the creation of copyrightable materials Texas A&M University may, at its discretion, relinquish its rights to ownership, all or in part. Any party may initiate a request to the University for release of University owned copyrights in accordance with Section 9 of System Regulation 17.02.01. Requests to relinquish University ownership should be routed through the creator's department head, through the appropriate dean, to the Vice President for Research for approval.

5.2.2 In cases where copyrightable works resulted from externally funded substantial support (see section 4.2.1.4 of this Rule) ownership shall be determined in accordance with the terms of the sponsored grant, contract or gift.

5.2.3 The creator(s) of works developed without the benefit of substantial support, without the constraints imposed by grants or sponsored research, or not as works-for hire shall retain ownership of all intellectual property associated with any TMM product.

5.2.4 In cases where TAMU is part owner of copyrightable materials any revisions or distribution of revised materials by the University, either in part or whole, will include discussion with the author at the initial stages of proposed revision.

5.3. TAMU Access: In all cases where Technology-Mediated Materials are deemed owned by faculty, in whole or in part, the University shall retain a perpetual, non-exclusive royalty free license to use the Technology-Mediated Material for its own educational purposes.

5.4 Income Distribution: When substantial support has not contributed to the creation of copyrightable work all income derived from the sale of a TMI product shall go to the creator(s). When substantial support has been provided, income distribution will be in accordance with a distribution scheme negotiated by the Parties. While the distribution of income will vary with the level of TAMU commitment, the creator is to receive no less than 50% of the income received at the University level. The remainder of the income will be returned to TAMU for distribution in accordance with Section 6 of System Regulation 17.02.01: Management of Intellectual Property. Income shall include license fees, royalties, equity interests, and dividends or any other tangible income received for the sale of TMI, less cost of obtaining legal protection.

5.5 Appeals Process: Any irresolvable disagreements associated with the determination of substantial support, the division of income or any other aspect of the TMM development process will be resolved through an appeals process coordinated by the Executive Vice President and Provost or designee.

5.6 Third Party Participation: When third party organizations support the development of TMI, it is the creator's responsibility to ensure that outside employment rules are followed or a contract is negotiated through the Office of Sponsored Programs.

5.7 Exceptions: Exceptions to this rule must be included in a memorandum of agreement signed by both the creator(s) and the participating organizations within TAMU.

6. CONFLICT OF INTEREST

6.1 It is the responsibility of the creator to notify the University of any conflicts of interest that may arise after the standard TMM agreement has been signed.

6.2 The release of the University's claims to ownership rights does not preclude the parties from disclosing existing or potential conflicts of interest in accord with System policies or regulations, and University rules.

OFFICE OF RESPONSIBILITY: Office of the Vice President for Research

17.02.02.M1.01 - Procedures for Technology Mediated Instructional Material

Standard Administrative Procedure

Approved October 23, 2001

Supplements System Policy 17.02, System Regulation 17.02.02, and University Rule 17.02.02.M1

1. INITIATION OF INSTRUCTIONAL MATERIAL PROJECTS

1.1. The creator and the department head shall determine if the TMM to be developed or already developed involved Substantial Support from the University. If it is determined that there is no Substantial Support, the creator and the department head shall sign a memorandum stating such agreement. The memorandum will be sent to the dean for approval. Upon the dean's approval a copy of the memorandum will be forwarded to the Vice President for Research.

1.2. If it is determined that there is Substantial Support from the University then it shall be the responsibility of the creator(s) to complete an Instructional Material Development Proposal form. This document will include the following material:

1.2.1. Names of creators;

1.2.2. Description of the TMM to be created;

1.2.3. Purpose of the TMM; anticipated use of the product by the author or institution;

1.2.4. Description of resources to be used in development of material;

1.2.5. Ownership rights if applicable, such as in works-for-hire;

1.2.6. Allocation of income between the University and the creator(s) derived from the work products based on substantial use;

1.2.7. Handling of revisions to the original work;

1.2.8. Consideration given to the creator of the courseware if the institution assigns another faculty or staff member teaching responsibilities using the courseware; and

1.2.9. Terms specifying which parties have rights to prepare derivative works.

1.3. The proposal will be routed to the appropriate officials for approval before development starts. Appropriate officials should include but are not limited to:

1.3.1. Department head;

1.3.2. The person controlling the account that will support development of the proposed TMM;

1.3.3. Dean; and

1.3.4. Vice President for Research.

2. PRODUCT ESTABLISHMENT

2.1. Once development of TMM has begun, the creator(s) should contact the head of his or her unit to initiate official recognition of the effort and to determine the existence, if any, of substantial support by TAMU.

2.2. The creator(s) of TMM should first meet with her/his department head or dean, director, or vice president to determine the category to which the TMM will be assigned (creator and department head or dean, etc., hereafter referred to as "parties"). The parties shall disclose and discuss any existing and potential conflicts of interest and disagreements and incorporate the resolution or means to resolution into the standard TMM agreement form.

2.3. If the creator(s) of the TMM have opportunities for commercial ventures with the TMM, the creator(s) will disclose these opportunities to their academic department and college. Division of the income earned will reflect whatever substantial use of TAMU facilities and resources were used in developing the TMM.

2.4. It is the responsibility of the TAMU unit providing the substantial support to establish documentation of such support. A memorandum of agreement stating expectations should accompany any support provided by TAMU for this effort.

2.5. Upon implementation of the rule associated with this Standard Administrative Procedure, a transition period of six months will exist. During this period the university may retroactively establish substantial support for any funds provided during the two years prior to the initiation date of the rule associated with this Standard Administrative Procedure. Funds provided more than two years prior to the initiation of the rule associated with this Standard Administrative Procedure cannot be used to establish substantial support.

3. SUBSTANTIAL SUPPORT DETERMINATION

3.1. If it is determined that no substantial TAMU support exists then TAMU relinquishes all rights of ownership and all rights to income from the TMM products developed.

3.2. If it is determined that substantial TAMU support exists, then TAMU and the creator(s) must establish the level of ownership and income distribution from the sale of this product outside of TAMU.

4. APPEALS PROCESS

4.1. If the parties are unable to agree to the terms of the project, they shall collectively notify in writing the Executive Vice President and Provost or designee of the proposed project and issues of disagreement. The Executive Vice President and Provost will thereafter forward the issue to a three-person standing or ad hoc committee whose charge will be to review the project proposal and make recommendations for reasonable resolution to the parties.

4.2. Upon agreement with the committee's recommendation, the parties will modify the agreement and provide a copy of the modified agreement to the committee chair and to the Executive Vice President and Provost.

4.3. If the parties cannot agree with the committee's recommendations or a derivation thereof, any member of the party may appeal the committee's recommendations to the Executive Vice President and Provost. The Executive Vice President and Provost shall have the final authority to approve the terms of the agreement if the proposed project is to go forward. If the Executive Vice President and Provost's decision is unacceptable to the creator, the creator may propose a counter resolution or abandon the project.

OFFICE OF RESPONSIBILITY: Office of the Vice President for Research

17.99.99.M1 - Distance Education Credit Courses and Programs

Approved October 26, 2001

1. GENERAL

1.1. The educational mission of Texas A&M University can be achieved in part by offering programs and courses of instruction away from the main campus of the University via distance education. The responsibility for maintaining the quality of individual distance education programs resides with the faculty and administrative officers who offer and administer the same programs on the main campus. In addition to support provided for off-campus face to face courses, the Office of Distance Education assists faculty in planning distance education programs using varying forms of technology including the Internet, video conferencing, and satellites. The Office of Distance Education also ensures that all courses meet state guidelines, System policies and regulations, and University rules.

1.2. All rules and regulations of Texas A&M University and the University System that pertain to instructional programs on the main campus apply equally to distance education offerings. This Rule extends to the requirements for admission of students, courses to be offered, the assignment of faculty to such courses, provisions for adequate facilities, library resources, and student services. Policies established by The Texas Higher Education Coordinating Board Rules, Chapter 5: Program Development, Subchapter H: Approval of Distance and Off-Campus Instruction for Public Colleges and Universities (hereafter referred to as Subchapter H) and associated policies, must also be followed in approving, conducting, and maintaining the quality of courses and programs. Subchapter H and related documents can be accessed at <http://www.theccb.state.tx.us/distanceded/>.

1.3. Distance education credit courses, for which the University receives formula funding from the state, are considered part of the regular assigned teaching load of the faculty members.

2. APPROVAL OF DISTANCE EDUCATION COURSES

2.1. Approval for scheduling distance education credit courses must be obtained from the Executive Vice President and Provost. Approval of all distance education credit courses, programs, and standards for these courses and programs must conform to the requirements established under Subchapter H and related documents, and the requirements of the Southern Association of Colleges and Schools (SACS).

The establishment of distance education courses may result from, but are not restricted to the following circumstances:

2.1.1. A request from an institution or agency of business, government, education, or similar organization.

2.1.2. When the site away from campus provides unusual and unique resources not available on the main campus.

2.1.3. On the basis of an assessment which establishes an unmet need for the course or program to be offered and where students needing the instruction cannot attend resident classes in College Station.

3. PROGRAM ADMINISTRATION

3.1. Program Coordination and Reporting

All distance education courses must be coordinated and approved through the Director of Distance Education before courses are offered.

3.2. Scheduling Distance Education Credit Courses

Scheduling of all distance education courses must conform to the requirements outlined in Subchapter H and related documents. For off-campus, face-to-face courses, Subchapter H and related documents require concurrence by Texas institutions located in the area in which these courses will be delivered. These institutions must be consulted by the college or department through which the course would be offered. Distance courses delivered by technology do not require concurrence, but are reported to the Coordinating Board by the Office of Distance Education. The Coordinating Board monitors all Distance Education programs offered in the State but has no regulatory control on out-of-state distance education courses.

3.3. Admission and Registration of Students

Distance education students are admitted under the same procedures that apply to resident students. Registration procedures shall comply with the requirements of the Office of the Registrar at Texas A&M University. In some cases departments may be responsible for registering students for distance education courses. In this situation the department must work with the Registrar's office to preserve continuity in the registration process.

With the approval of the Registrar, the first day of classes for off-campus courses may be scheduled without regard for continuity with the scheduling of similar courses offered on the main campus and the University calendar.

3.4. Financial Support Required for Distance Education Courses

Members of the faculty who teach distance education courses normally do so as a part of their regular departmental assignment and receive no additional salary for such service. The department provides, from its budget allocation (or from grants, projects, or contracts), the budget support required.

Members of the faculty who teach off-campus face-to-face courses for resident credit are entitled to receive reimbursement for travel and per diem expenses in accordance with University Rule 25.02.01.M2: Travel Rules. The form used to request authorization to teach an off-campus face-to-face credit course shall indicate the source of funds for travel and per diem purposes. Funds for this purpose come from one or more of the following sources:

3.4.1 In the event the class to be offered is sponsored by a cooperating institution or agency (such as a unit of government, a business or industrial organization, or a project grantor), such institution or agency may make a grant or payment to the University.

3.4.2 An allocation from the Office of the Executive Vice President and Provost.

3.4.3 Operating expenses of the department offering the courses.

4. TUITION AND FEES FOR DISTANCE EDUCATION

4.1. For in-state students enrolled in formula funded distance education courses, tuition charges shall be the same as those for students on the main campus during a regular academic semester. Out of state students will pay a tuition replacement fee.

4.2. A distance education fee rate is established by the University Student Fee Committee. Fee rates for non-subvention generating students are established by the Distance Education Fiscal Advisory Committee.

4.3. Students classified as in absentia, study abroad, cooperative education or TAMU graduate students taking courses at the Galveston campus will be exempt from the distance education fee. All other TAMU students enrolled as distance education students, taught via technology or off-campus, will be assessed the distance education fee.

4.4. The complete fee structure for the student classifications noted in section 4.3 will vary. Distance education program fees may vary. Distance education students and faculty should consult the Office of Distance Education, to determine which fees will be levied.

5. PHYSICAL FACILITIES, INSTRUCTIONAL MATERIALS AND STUDENT SERVICES

5.1. As required by Subchapter H, faculty will be responsible for determining the distance delivery method that is appropriate for each course and program. Faculty will also be responsible for monitoring the effectiveness of this technology.

5.2. TAMU will provide distance education students with appropriate access to library and other learning resources comparable to those available to students on campus. Each department offering distance education credit courses shall determine in advance any computing, laboratory, or other specific equipment for which students are responsible. Departments will ensure that students are aware of these requirements. If specific on-site equipment is required, the department must certify that this equipment is available. This certification will constitute part of the request for authorization to offer the off-campus course for resident credit.

5.3. TAMU will provide distance education students with reasonable and adequate access to a range of appropriate student services. Examples of such services include financial aid, academic skills enhancement, problem resolution assistance and advisement.

5.4. All required materials for distance education courses will be acquired by the students at no cost to the University.

6. FINANCIAL PROCEDURES

6.1. All fee collection, and when appropriate tuition, relating to Distance Education courses shall be processed through Student Financial Services.

6.2. Distance Education programs vary by delivery mechanisms and fee structures. The Office of Distance Education should be consulted regarding related charges to students and outside entities.

7. SUPPORT FOR DISTANCE EDUCATION FACULTY

7.1. Like other contributions to teaching and scholarship, contributions to distance education, as part of assigned responsibilities, will be a factor in promotion and tenure decisions and merit increase decisions. A distance education course should be counted in the workload report in the same manner the course would be counted if taught by conventional methods. Preparation to teach a course by distance for the first time, or adapting a course for delivery by distance for the first time, should be credited for workload report purposes just as preparation to teach any other new course would be credited and should follow Faculty Workload Report Guidelines, Table 2, Instructions for Completing the Faculty Workload Compliance Report, sections A7, A8 or A9.

APPENDIX C

COLUMBIA UNIVERSITY POLICY

The central mission of Columbia University is to create, preserve, and disseminate knowledge through teaching and research. The community of scholars at Columbia has determined and established norms and values for the conduct of scholarly and scientific work that have evolved over the long history of the University.

Faculty at the University must be free to choose and pursue areas of study and concentration without interference, to share the results of their intellectual efforts with colleagues and students, to use and disseminate their own creations, and to take their created works with them should they leave the University.¹

This copyright policy is intended to maintain those traditional norms and values that foster, in various ways, the open and free exchange of ideas and opinions. In this regard the policy formulated here follows a basic tenet of the 1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors:

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

The ongoing revolution in the use of information technology for the production and dissemination of knowledge enables members of the University community to create new forms or types of scholarly works, to communicate with current audiences with new types of materials, and to reach new audiences. The dramatic changes in information technologies and the ways in which they are employed provide an occasion to examine and clarify policy for copyright of works of scholarship produced at the University. This copyright policy statement delineates the rights and responsibilities of the University and its faculty, employees, students, and other members of the community.

By longstanding custom, faculty members hold copyright for books, monographs, articles, and similar works as delineated in the policy statement, whether distributed in print or electronically. This pattern will not change. This copyright policy retains and reasserts those rights.

The use of new media technologies has changed the process of creation of intellectual works. Some of the resources (physical, financial, and human) needed to employ the new technologies are shared resources, provided by the University for the common benefit of all members of the University community. But, in many cases, the use of new media technologies requires increased involvement by the University in the form of financial support, expert services, equipment, and other facilities beyond the base level of support and common resources provided to faculty.

Columbia will hold rights in copyright to works of authorship that are created at the University by faculty, research staff, and others and that are supported by a direct allocation of University funds, are commissioned by the University, make substantial use of financial or logistical support from the University beyond the level of common resources provided to faculty, or are otherwise subject to contractual obligations. In

those instances in which the University holds rights, faculty members can use the works involved for noncommercial purposes.

This policy recognizes that ownership of intellectual property and the sharing of economic returns from the licensing or commercialization of that property are two related yet distinct matters. Even when intellectual property rights are held by the University, revenues from new digital media and other property should be shared among its creators, including individual faculty, researchers, departments, schools, and the larger University. A description of the precise mechanism for distribution of revenues received from the intellectual property is appended to the policy statement and follows guidelines that have worked effectively for the sharing of revenues from patents.

Any beneficial returns to the University should be used for the common good in furtherance of its mission. Any share of revenues from intellectual property returned to the University should be invested visibly in the teaching and research enterprise of the University to seed new initiatives, enhance quality, and support quality academic programs including those that are not capable of reaping significant returns from their own created works.

This policy also is intended to strengthen current protection of the reputation of the University. Columbia's name deserves careful nurture and protection. As a general principle, the name of the University is not the property of any individual, department, or School. When the University's name is associated with a work of scholarship or other educational materials such as courses, the interests of the University and its community of scholars are affected and the University must exercise quality control with respect to the use of its name. This is particularly true when intellectual property is created for use by other educational institutions or by for-profit organizations, including development of extensive courses to be offered on-line. Faculty members, deans, and other members of the University community who create courses or digitized content for other universities or for profit-making entities should be certain that all new collaborative agreements with outside entities receive approval of the University's President, who with regard to such agreements acts on behalf of the Trustees through the Offices of the Provost and Executive Vice Provost.

This copyright policy contains elements that intersect with other, existing policies at the University, most notably those that address conflict of interest, conflict of commitment, and disclosure of activities by members of the University community. The copyright policy does not replace those existing policies; rather it is meant to complement them.

It is inevitable that this copyright policy and its implementation will require interpretation and review. A standing committee, appointed by the Provost and including members of the University faculty and administration and a student officer, will be formed to provide such oversight and adjudicate disputes. Certain officers of research at the University share in these rights as well.

COLUMBIA UNIVERSITY COPYRIGHT POLICY

This Copyright Policy sets forth the rights and responsibilities of the University; its faculty; other employees; students with student officer appointments or other students or postdoctoral fellows who are collaborating with faculty members or researchers; and consultants. Copyright law protects the expression contained in works of authorship such as books, articles, memoranda, texts, computer programs, musical works, dramatic works, pictorial works, motion pictures and other audiovisual works, multimedia works, web pages and sound recordings.

Section I of the Policy describes the various categories of such works of authorship and addresses issues of ownership and assertion of rights in connection with those works. Section II sets forth how the Policy will be administered and provides for the creation of a Copyright Policy Standing Committee made up of faculty members, a student officer, and academic administrators (with the majority consisting of faculty members who do not also have administrative appointments at the University) to address issues concerning the proper interpretation of the Policy and to adjudicate disputes between creators and the University on issues of copyright ownership.

Section II also provides for a disclosure mechanism for works covered by this Policy and describes the procedures for licensing of works subject to University ownership or control under this Policy. When the works are licensed commercially, revenues from such commercialization will be shared among creators, their research accounts, departments, schools and the central University in accordance with Section II and a Distribution Policy attached as Appendix B to this Policy.

I. Copyright Ownership; Assertion of Rights

A. Traditional Faculty Authorship Rights - In keeping with longstanding academic custom, the University recognizes faculty ownership of copyright in traditional works of authorship created by faculty such as textbooks, other works of nonfiction and novels, articles, or other creative works, such as poems, musical compositions and visual works of art, whether such works are disseminated in print or electronically.

B. Assertion of Rights by the University - The University asserts copyright ownership in any work of authorship that is: (i) created with substantial use of University resources, financial support or non-faculty University personnel beyond the level of common resources provided to faculty; (ii) created or commissioned for use by the University; or (iii) created under the terms of a sponsored project where the terms of the sponsored project require that copyright be in the name of the University. Additionally, any work created by an officer of administration (including a faculty member or officer of research only when acting in his or her capacity as an officer of administration), or by a support staff member acting within the scope of his or her employment generally constitutes a "work made for hire" as defined by federal law (see section on Copyright Ownership; Work for Hire, in Appendix A), and the University asserts copyright ownership in such works. However, as set forth under the Licensing and Revenue Sharing provisions

below, certain categories of creators of works that constitute works for hire will share in revenues arising from their creation.

Ordinary use of resources such as the libraries, one's office, desktop computer and University computer infrastructure, secretarial staff and supplies, is not considered to be substantial use of such resources for purposes of vesting the University with copyright ownership in a work.

Where the University owns the copyright in a work, it will acknowledge creators (including creators of works-for-hire) who have made a substantial creative contribution to the work, if the creators so request.

Independently of this Copyright Policy, the University may have rights in works subject to this Policy by virtue of other University policies, including the University's Patent Policy (titled "Statement of Policy on Proprietary Rights in the Intellectual Products of Faculty Activity" and set forth as an appendix to the Faculty Handbook).

C. Commercial Distribution of Creator-owned Works - A faculty member, or other creator, who owns the copyright in his or her works under this Policy, other than course content or courseware under paragraph I.E.2, may commercialize those works, without the authority or permission of the University, so long as the University's name is not used in connection with works so made available, other than to identify the faculty member as an instructor at the University.

D. Non-commercial Distribution of Creator-owned Works - A faculty member, or other creator, who owns the copyright in works under this Policy, other than course content or courseware under paragraph I.E.2, may make the work freely available on non-commercial terms (that is, without remuneration to the author), for free or commercial redistribution, without the authority or permission of the University, so long as the University's name is not used in connection with works so made available, other than to identify the faculty member as an instructor at the University.

With respect to faculty-owned course content and courseware under paragraph I.E.2., a faculty member may make the work freely available for academic and scholarly use, without the authority or permission of the University (subject to the provisions of paragraph I.E.2(d)), to recipients who agree that they will not make commercial use of the material, so long as the University's name is not used in connection with works so made available, other than to identify the faculty member as an instructor at the University.

E. Categories of Works - The following description of various categories of works indicates which works would generally fall into the categories of works in which the University would assert copyright ownership.

1. **Institutional Works**

Copyright in Institutional Works is owned by the University.

(a) Examples of Institutional Works are journals, periodicals, yearbooks, compendia, anthologies and films published by divisions of the University (even if the individual components do not constitute Institutional Works), and works created for a specific University use. Works created by employees at the direction of the University for University purposes, such as materials for administrative use and computer software created by non-faculty University programmers for use by the University, are works for hire as defined by federal copyright law, and the University owns the copyright in such works.

(b) Institutional Works also include some works produced as a collaborative effort under the aegis of a school or department, for example, works created in a project initiated by a school or department, or works that are created and then developed and improved over time by a series of individuals, where authorship cannot be attributed to any one individual or group of individuals. An example of the latter would be certain kinds of software which are developed and then improved and updated over time by multiple creators.

However, not all works that are created as a result of a collaborative effort among a number of individuals would necessarily be considered Institutional Works. As with other kinds of copyrightable works, the facts and circumstances of each case must be reviewed in order to determine whether the University would claim copyright ownership in accordance with this Policy.

2. Course Content and Courseware

(a) *General policy* - Copyright ownership rights and control of course content and courseware are governed by general copyright law and University copyright policy, as well as by the University's conflict of interest and conflict of commitment policies and policies governing use of the University name. "Courseware" is the set of tools and technologies used to present course content, and is independent of the content itself. "Course content" is the intellectual content of the course, as taught at or through the University. The University asserts copyright in course content and/or courseware which may be created under the aegis of a school or department of the University ("institutional courses").

The University recognizes faculty copyright ownership in non-institutional course content and courseware created by individual instructors (subject to certain restrictions on licensing set forth in subsections (d), (e) and (f) of this Section and in Section IIA below). However, University policies on conflict of commitment, conflict of interest and use of the University name, as more fully described in subsection (d) of this Section and Section I.E.3 below, limit the faculty member's ability unilaterally to commercialize non-institutional course content and courseware. The University will assert copyright ownership in such course content and courseware if there is an independent basis for the University's assertion of such rights (*e.g.*, the course content or courseware is created with substantial use of University resources, financial support or non-faculty personnel or pursuant to the terms of a sponsored project which require University copyright ownership).

(b) *Videotapes and recordings* - The University claims ownership rights in videotapes or other recordings of all courses, and the parts thereof, that are made at University

expense. Ownership of the videotape or recording itself does not mean that the University claims rights in the intellectual content presented on the tape or recording. Copyright ownership in the content is governed by the principles set forth above.

(c) *Use of course content and courseware at Columbia* - Independently of copyright ownership, a faculty member has the right to use all course content and courseware he or she develops or creates in the normal course of teaching or research at Columbia. This right includes the right to make changes to the works and the right to distribute such works to Columbia students, faculty and other University personnel for teaching, research and other noncommercial University purposes.

(d) *Use of course content and courseware outside of Columbia: teaching and creation of course content and courseware* - Independently of copyright ownership, a full-time faculty member may teach courses and create courseware at other academic institutions as part of ordinary scholarly exchanges, including visiting professorships and guest lectures, as long as these activities remain consistent with the terms set forth in the University's policies on conflict of interest and conflict of commitment (including the provisions that require approval by the Provost and the appropriate dean or department head), and as long as these activities do not include or allow the commercialization of any course content, courseware or other teaching or research-related activities created or conducted at another institution. A faculty member may not teach any course or create any course or courseware for a commercial enterprise without the approval of the appropriate dean and the Provost.

(e) *Use of Columbia course content and courseware outside of Columbia: commercialization* - Also consistent with the University's policies on conflict of interest, conflict of commitment, and use of the University name, a faculty member, notwithstanding copyright ownership, may not commercialize course content or courseware created or taught at the University, without the approval of his or her respective dean and the Provost. The University will not commercialize either institutional or non-institutional course content and courseware, without the agreement of the faculty member or members who created the course content or courseware in question.

(f) *Use of Columbia course content and courseware after departure from Columbia* - If a faculty member leaves the University, he or she may continue to use at another academic or not-for-profit research institution for teaching, research and other noncommercial purposes, all course content and courseware he or she created or taught at Columbia, including both institutional and non-institutional course content and courseware, provided the Columbia name is not used in connection with the course content or courseware. A former faculty member may not commercialize any institutional course content or courseware. A former faculty member is free to make commercial use of non-institutional course content and courseware that he or she developed or created at Columbia and create new courses based thereon, provided that (i) there is no independent basis for the University's claiming rights (e.g., created with substantial use of University resources, created or commissioned for use by Columbia, or created under the terms of a sponsored project where the terms of the project require that copyright be owned by the University); and (ii) the Columbia name is not used in connection with the

course. The former faculty member who owns the copyright in course content or courseware accords the University the irrevocable nonexclusive right to continue using, as part of its noncommercial educational activities, all non-institutional course content and courseware that has been made available by the faculty member, *e.g.* the syllabus and material given to students. This right includes the nonexclusive right to incorporate such course content and courseware into institutional courses.

3. Works that Use the University Name

Use of the University's name in connection with a work, other than by way of identification of the creator as a faculty member, researcher, other employee or student at Columbia, is itself use of a significant University resource, thus triggering an interest on the part of the University. Additionally, use of the University's name can affect the reputation and academic standing of the institution. Consistent with the University's general use of name policy (see the 2000 Faculty Handbook, pages xx-xx), faculty members, researchers, other employees (as well as their respective departments and schools), and students may not participate in the creation or use of works that might give the impression of University sponsorship where there is none. Any use of the University name (other than to identify the creator by his or her title at Columbia) in connection with a work created by a faculty member, researcher or other employee must be approved in advance by the Provost.

Similarly, if the name of the University is to be used in connection with any works created under collaborative agreements with outside entities (other than to identify the creator by his or her title at Columbia), such agreements must be approved in advance by the Provost.

4. Software

In accordance with the University's Patent Policy, the University claims rights in inventions or discoveries, including computer software "that are or may be patentable as well as to the technology associated with them." If the software is not covered by the Patent Policy, the University will not claim copyright ownership unless there is an independent basis for asserting such rights, as set forth in Section I.B

5. Work Arising out of Consulting Agreements and Other Outside Activities

As set forth in the University's policy on faculty consulting, faculty members are permitted to engage in outside activities for an average of no more than one day a week during the period in which a faculty member is expected to provide services to the University.³ An employee other than a faculty member is not permitted to undertake any outside consulting activities or other employment without permission from his or her department head or supervisor. No use of University resources, financial support or other University personnel may be made in the course of permitted outside activities. All consulting must be consistent with the University's policies on conflict of interest, conflict of commitment and use of the University name.

Consistent with the University policy on faculty consulting, if a creator does not make any use of University resources in the course of his or her outside activities and complies with other applicable University policies, including those on conflict of interest, conflict of commitment and use of University name, the University does not

assert rights in works resulting from such activities. The University's policies on outside employment can be found in the 2000 Faculty Handbook.

6. Works by Non-Employees

The University claims ownership of works prepared for the University by non-employees, such as consultants or subcontractors retained by the University. However, under the Copyright Act, copyright in such works is owned by the creator unless there is a written agreement to the contrary. Accordingly, the University requires that there be a written agreement with any non-employee retained to do work for the University providing that ownership of any copyrightable works created by the non-employee shall be owned by the University.

II. Administration of Policy

A. Licensing and Revenue Sharing - The University, through an appropriate technology transfer and licensing office and with the assistance of the Office of the General Counsel and other offices as needed, will provide appropriate services, including legal services, to commercialize works covered by these licensing and revenue sharing provisions. Any decisions concerning commercialization of the work will be made in consultation with the creator. The creator and the University will bring to the other's attention any licensing or other commercialization possibilities of which either becomes aware.

Works covered by these licensing and revenue-sharing provisions include (i) works made with substantial use of University resources, financial support or non-faculty personnel, (ii) works created under terms of a sponsored project that require University copyright ownership, and (iii) Columbia institutional and non-institutional course content and courseware. With regard to Institutional Works (as defined in Paragraph I.E.1) and works that would be considered works-for-hire under federal copyright law, the University will determine on a case-by-case basis whether it is appropriate for the creators of such works to share any revenues arising from commercialization of such works. Works for hire consist of works created by an officer of administration (including a faculty member or officer of research acting in his or her capacity as an officer of administration), or by a support staff member acting within the scope of his or her employment.

Special provisions apply to the commercialization of course content and courseware. As with other works subject to this Policy, the commercialization of course content and courseware taught at Columbia (whether or not such course content or courseware is contained in Institutional courses) will be undertaken under the auspices of the University; however, the University will not undertake any such commercialization without the agreement of the faculty in question.

The University will ensure that any revenue arising from commercialization under this Policy will be shared among the creators, creators' research accounts, schools, departments and the central University in accordance with the Distribution Policy set forth in Appendix B.

The licensing of books, articles and other non-institutional works described in Section I.A above is under the control of the faculty members creating such works. However, if any article or other such work is to be published, the creator shall seek to reserve the right to provide the University with a royalty-free right to use a reasonable portion of the published work within the University for teaching, research and other non-commercial University purposes. If the creator is successful in retaining such right, the creator shall grant such right to the University.

B. Responsibilities of Creators - In order to ensure that a proper determination of ownership is made, creators will promptly disclose to the University all copyrightable works in which the University may claim or assert rights under this Policy. Part of the disclosure by creators shall include a disclosure of the circumstances under which the work was created, a description of any University resources that were used, and any financial or other relationship with a third party that might affect the University's rights in the work (for example, any consulting agreements or third party funding agreements pursuant to which a work was created).

If the creator is uncertain whether the University would claim copyright ownership in a work, the work should be disclosed.

Creators will cooperate with the University in protecting ownership and other proprietary rights in the works (for example, executing assignments to the University and any other necessary documents).

C. Copyright Agreement - This Policy constitutes an understanding that is binding on the University, and on its faculty, other employees, and other covered individuals as a condition of their participating in University research, educational and other programs or their use of University facilities or resources. The University may require formal copyright agreements to implement the Policy as appropriate, but the absence of such executed agreements shall not invalidate the applicability of the Policy.

Nothing in this Policy shall constitute a waiver by the University of any rights that the University has under any other University policy, including the Patent Policy.

D. Transfer of Intellectual Property to the Inventor or Creator - If the University has determined that a work subject to University copyright ownership under this Policy has no likely commercial value, and subject to the terms of any applicable agreements with third parties under which the work was created, the University will consider a request by the creator to transfer copyright ownership in the work to the creator, subject to an irrevocable royalty-free license to the University to use the work for its own non-commercial purposes. Such a request must be approved by the Provost, and will be conditioned upon reimbursement of the University by the creator for out-of-pocket expenses the University has incurred in connection with the work, including legal and marketing expenses (if any). The University will act as expeditiously as reasonably possible in considering such requests by creators.

E. Making University-Owned Works Freely Available to the Public - If a creator of a work whose copyright is owned by the University, including a creator of a work-for-hire, wishes to make a work freely available to the public, through noncommercial licensing or other means, the University, subject to the terms of any applicable agreements with third parties under which the work was created, will accommodate such wishes as long as it determines that the benefits to the public of making such works freely available outweigh any advantages that might be derived from commercialization. The University will act as expeditiously as reasonably possible in making such determination.

F. Copyright Policy Standing Committee - A Copyright Policy Standing Committee, made up of faculty members, a student officer and academic administrators, with the majority of the Committee consisting of faculty members who do not hold administrative positions, shall be formed by the Provost to address any issues concerning the proper interpretation of this Policy and to resolve any disputes between creators and the University concerning ownership of works and what constitutes substantial use of University resources. Members of the University community may obtain advice from this Committee. A representative of the General Counsel's Office shall serve as an *ex officio* member of the Committee. The creator of a work may appeal the decision of the Committee to the President. The decision of the President will be final. Decisions of the Standing Committee and the President will be publicly available.

G. Review of Copyright Policy - Three years after the effective date of this Policy, the Provost shall appoint a committee consisting of a majority of faculty members and broadly representative of the various schools and divisions of the University, to review this Policy and its implementation, and if appropriate, to recommend revisions to the Policy, including whether to conduct a subsequent review at any time thereafter.

Appendix A: Definition of Copyright and Related Terms

Copyright - Works of Authorship - The Copyright Law of the United States protects original works of authorship that are fixed in any tangible medium of expression. Originality, in the context of copyright law, means simply that the work has not been copied, i.e., it is an independent creation. A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

Subject Matter of Copyright - The categories of copyrightable works of authorship include:

- 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
 Architectural works

Literary works are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, computer programs, tapes, disks, or cards in which they are embodied.

Copyright protection does not extend to ideas, procedures, processes, or useful articles. While ideas are not protectible, the original manner in which those ideas are expressed is.

Scope of Copyright Protection - Subject to various exceptions set forth in the law, the Copyright Act grants the copyright owner five exclusive rights:

- To reproduce (make copies of) the work
- To make derivative works based on the work
- To distribute copies to the public
- To perform the work publicly
- To display the work publicly.

These rights can be separately licensed by the copyright owner or bundled together. Copyright ownership in a work is separate from ownership of the tangible object in which the work is contained. For example, purchase of a book or videotape in a store does not grant the purchaser copyright ownership in the book or videotape.

Copyright Ownership; Work for Hire - Copyright ownership initially vests in the creator of the work. The only exception to this rule is where the work is a work for hire. "Work for hire" generally refers to a work that is prepared by an employee within the scope of his or her employment. Certain specially ordered or commissioned works can also be considered works for hire, but only if they fall into certain categories of works that are enumerated in the Copyright Act and there is a written agreement between the creator and the party commissioning the work that the work will be considered a work for hire. "Work for hire" status means that the employer is considered the author of the work. Works subject to faculty ownership under this Policy are not treated as works for hire.

Commissioned Works - For purposes of paragraph I.B.ii, works of authorship are considered commissioned by the University if their creation is specifically directed by the University for its own use. Works are not commissioned if their creation is merely encouraged or casually rewarded, or if the works once created at a faculty member's own initiative are later adopted or employed by the University.

Software - "Software" means computer programs. A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

Appendix B: Distribution of the Proceeds Received from Works Subject to this Policy

Applicability

Allocations are calculated for each innovation/creation and are not affected by changes in the licensee(s) for any particular innovation/creation. The decision to license multiple, related innovations/creations as if they were one innovation/creation will be made by the University in consultation with the creators of the works. If there are multiple developers/creators and more than one innovation/creation covered by a single license agreement, the majority of the developers/creators will determine the weight that each innovation/creation should be given in order to calculate the developer's/creator's share. The results of this calculation will also be used to distribute the other shares. A net accumulation will be calculated for each innovation/creation but accumulation limits (see below) apply to the multiple, related innovations/creations as if they were one innovation/creation.

Decisions about whether licenses shall be exclusive or non-exclusive shall be made by the University in consultation with the creator(s).

The Provost may reallocate central university funds and must approve any exceptions to the policy. The Provost will resolve disagreements about matters of definition and the applicability of distribution policy.

If the University seeks patent protection for a work subject to this Policy, proceeds will be distributed in accordance with the Patent Policy rather than this Policy. There are two distribution models. The first follows the current practice for intellectual property policy distribution that has been followed with respect to software and applies to software/new media that will not be further enhanced within the University. The second applies to software/new media that will require additional development efforts within the University. Expenditures for continuing development may be subject to limitations imposed by external entities with whose support innovations/creations were conceived.

Distribution of License Income from Software/New Media that will not be Further Enhanced within the University

Net income is defined as 80% of gross income; 20% of gross income is used for pooled legal and administrative expenses and internally reinvested funds. The University reserves the right to deduct additional sums for extraordinary expenses. After the 20% is deducted, the distribution is:

Cum Net Income < 100K Cum Net Income > 100K Developer/Creator 50%/25%
 Developer's Research and Innovation Account 25%/25% Department 0%/8.5%
 School 0%/8.5% Central University 25%/33%

Accumulation limits apply and are specified below.

Distribution of License Income from Software/New Media that will be Further Enhanced by the Developer within the University

This distribution formula for software/new media that requires continuing development or enhancement is different from the distribution formula set forth above because of differences in the costs involved in marketing, distributing and/or maintaining such innovations/creations within the University. In the formula, additional

resources are made available to the developer's research and innovation account to permit continuing development. After 20% is deducted to reach net income, the distribution is:

Cum Net Income < 100K Cum Net Income > 100K Developer/Creator 50%/25%
 Developer's Research and Innovation Account 30%/38% Department 0%/8.5%
 School 0%/8.5% Central University 20%/20%

Developers/creators are required to provide annual verification to Columbia Media Enterprises that enhancements are proceeding.

If new versions of software/new media are significantly different from previous versions, the new versions will be considered separate innovations/creations for the purpose of determining revenue distributions.

Accumulation limits apply and are specified below.

Share for the Developer/Creator

The developer/creator can be a person or persons or a center, department, school or the Central University. Developers/creators can also be a mix of more than one of these categories.⁴

Developers/creators determine allocations of this share among themselves; the Provost will resolve disagreements.

In those cases in which the developer/creator is an individual, his/her share will not be altered when affiliation with the University is terminated. In the event of his/her death, his/her share shall inure to his/her estate.

Share for the Developer's Research and Innovation Account

The developer's research and innovation account can be controlled by a person or persons or by a center, department, school or the Central University. The account can also involve a mix of more than one of these categories.

The developer's research and innovation account may be used only for University research, innovation, or educational purposes designated by the developers/creators.

Any excess over \$500,000 received in a given year reverts to a strategic initiative fund maintained by the Provost and used for internal funding of research, teaching, and innovation projects.

In those cases in which the developer/creator is a person whose affiliation with the University is terminated, the developer's research and innovation account will be transferred to the Central University. For these purposes, Professor emeritus status is considered as continuing affiliation with the University.

If there is more than one developer/creator, the same allocation percentages that govern the developer's/creator's share will be used for internal allocations of the developer's research and innovation account. Graduate students with no innovative areas of their own will not receive a portion of the developer's research and innovation account.

If there is more than one developer/creator and one of them leaves, the developer's research and innovation account will be reallocated among the remaining developer/creators. New allocation percentages are based upon original ratios. Example:

original = 50/25/25; developer/creator with 25% leaves; new = 67/33. If all developers/creators leave, the developer's research and innovation account share reverts to the Central University to be reallocated.

Share for the Department

The department share may be used only for University research, innovation, or educational purposes designated by the department(s).

Any excess over \$1,000,000 received in a given year reverts to a strategic initiative fund maintained by the Provost and used for internal funding of research, teaching, and innovation projects.

If a developer/creator belongs to more than one department, the unit(s) within which the innovation/creation arose receive(s) the department share. Allocations among departments are determined by the departments according to the contribution each department made to the development of the innovation/creation; the Provost will resolve disagreements.

If the innovation/creation involves several developers/creators from different departments, allocation of the department share will follow the allocation percentages used for the developer's/creator's share.

The department share is unaffected when a developer's/creator's affiliation with the University is terminated.

Share for the School

The school share may be used only for University research, innovation, or educational purposes designated by the dean of the faculty. Any excess over \$5,000,000 received in a given year reverts to a strategic initiative fund maintained by the Provost and used for internal funding of research, teaching, and innovation projects.

If a developer/creator belongs to more than one faculty, the unit(s) within which the innovation/creation arose receive(s) the school share. Allocations among schools are determined by the schools according to the contribution each school made to the development of the innovation/creation; the Provost will resolve disagreements.

If the innovation/creation involves several developers/creators from different schools, allocation of the school share will follow the allocation percentages used for the developer's/creator's share.

The school share is unaffected when a developer's/creator's affiliation with the University is terminated.

Share for the Central University

Expenditure of the Central University share for research, teaching, and innovation projects requires approval of the Provost's Office.

This Policy was approved by the Trustees of the University at their June 3, 2000 meeting and is effective as of that date.

Definitions of copyright, copyrightable work, work for hire and related terms used in this Policy are set forth in Appendix A to this Policy.

An exception to the one-day-a-week policy is in the case of participants in private practice plans in the Health Sciences whose outside activities are determined by those plans.

Under the distribution formulas presented in this Appendix, in the event that the developer/creator is a department the license income shares for the department, the developer's research and innovation account, and the developer/creator are allocated to the department. Similarly, if the developer/creator is a School, shares for the School, the department, the developer's research and innovation account and the developer/creator are allocated to the School. If the developer/creator is the Central University, all shares are allocated to the University.

Answers to Some Frequently Asked Questions About the Columbia University Copyright Policy April 19, 2000

This document is intended to clarify or explain elements of the Columbia University Copyright Policy that have prompted questions from members of the Columbia community. It will be augmented and revised over time to reflect experience with the implementation of the policy.

1. Can I place works that I create in the public domain?

If, under the policy, you hold the copyright, you may place your work in the public domain. [Section I.D] The only restriction is for faculty-owned course content and courseware; works of this type may be made freely available for academic and scholarly use to recipients who agree that they will not make commercial use of the material. [Section I.D]

If, under the policy, the University holds copyright, the University will, at the request of the creator of the work, make the work freely available to the public if it determines that the benefits to the public of making such work freely available outweigh any advantages that might be derived from commercialization. [Section II.E] The University recognizes that both the University and the public have derived substantial benefits in the past from the University's participation in the General Public License free software program and similar programs and the University encourages continued participation in such programs.

2. Does "course content" as used in the policy include pre-existing textbooks or scholarly articles that I use as teaching materials in class?

No. "Course content" is not meant to include pre-existing works that are read, discussed, or otherwise used in class. [Section I.E.2.(a)]

3. Is a book that grows out of a course that I teach at Columbia considered "course content" for the purposes of the policy?

While "course content" includes works that are created specifically for use in or as part of a course, it does not include books and similar works subsequently developed from course content that the faculty member seeks to make available

commercially or non-commercially. [Section I.E.2.(a)] Furthermore, the policy explicitly recognizes the traditional authorship rights of faculty in books and similar works. [Section I.A]

4. Is any course taught by more than a single person considered an “institutional course” for purposes of the policy?

A: No. The policy notes that the mere fact that a course is taught by a number of individuals does not mean that the course is an “institutional course.” [Section I.E.1(b)]

5. Do I need permission from the University to teach a course elsewhere in a subject unrelated to the subjects of the courses I teach at Columbia (such as a course in a hobby of mine)?

You are not required to obtain permission from the University to teach a course outside the University in a subject unrelated to the subjects of courses you teach at Columbia. Restrictions on courses taught elsewhere, if any, are covered by the University’s conflict of interest and conflict of commitment policies. The copyright policy is intended to be consistent with all other relevant policies of the University. [Section I.E.2.(d)]

6. Does the policy prohibit my teaching one-day short courses at other academic or commercial institutions?

No, that is not the intent of the policy. University policies on conflict of commitment, conflict of interest, and use of the University’s name do apply in this case and faculty should consult with the appropriate dean before teaching such courses.

7. Is any work created under a grant processed by the University considered to have been created with substantial use of University resources beyond the common level provided to faculty?

No. However, if the terms of the grant require that the University hold copyright, the University would assert ownership under. [Section I.B]

8. Don’t all federal grants require that the University hold copyright?

No. In fact, most federal grants do not require that the University hold copyright in works created as a result of the grant. In this regard, copyright differs from patents. Under federal statute, most federal grants do require that patents resulting from inventions arising from work under the grants be held by the University.

9. The policy requires me to seek to reserve the right to provide the University with a royalty-free right to use articles and related works within the University. How do I do this?

When assigning rights to the publisher, you should insert language in the agreement that is consistent with, or identical to, the language that appears in [Section I.A] of the policy: the creator “reserves the right to provide the University with a royalty-free right to use a reasonable portion of the published work within the University for teaching, research, and other non-commercial University purposes.” Experience at other universities at which faculty and other creators have requested such a right indicates that most publishers accept the language and that inserting the language has not led to delays in publication.

APPENDIX D

HARVARD UNIVERSITY POLICY

Statement of Policy in Regard to Inventions, Patents and Copyrights

Adopted by the President and Fellows of Harvard College on November 3, 1975 and amended on March 17, 1986, February 9, 1998 and August 10, 1998

Introduction

Concern for the public interest in potential new products and processes resulting from discoveries or inventions made by members of the University in connection with and related to their University activities, and the growing application and use of communications media, educational technology, and computer programs in the work of the University raise new and complex problems relating to the proper and equitable distribution of rewards and obligations. The production of such materials may involve the inventors or authors, the University, and outside sponsors. The situation is further complicated by evolving Federal policy and legislation in the area of both copyrights and patents. All of these considerations made it desirable for the University to reconsider its past policies in this area, and to develop and reduce to writing a policy which will be understandable to members of the Harvard community, and which will provide the basis for equitable adjudication between the various interests involved.

In November 1975, the University adopted a patent and copyright policy to codify existing practices and to replace the 1934 policy regarding patents in the field of health and therapeutics. The present document incorporates three subsequent revisions to the 1975 policy: (1) amendments of 1986, which clarify the terms in regard to inventions or discoveries for which patents are not sought, such as many biological materials, and in regard to copyrightable works made for hire by non-teaching staff; and (2) two amendments of 1998, which specify further principles and procedures to cover University involvement in the creation of intellectual property, including information technology products, and the use of the Harvard names and insignias. Since activities in the University are too diverse and are evolving too rapidly to permit a statement of a University-wide general policy which can be mechanically and unambiguously applied to every possible situation that might arise, it is felt necessary for detailed policy to evolve by the making of decisions on individual cases based on interpretation of the general policy and principles enunciated below.

Therefore, a standing University Committee on Patents and Copyrights was created in 1975. This committee has representation from the principal faculties potentially affected by policies in this area and from the administration, and its chairman is a senior administrative officer of the University reporting directly to the President. It is charged with responsibility for interpreting and applying University policy in individual cases, and for recommending such changes in University policy as may from time to time be required.

The following principles govern the development and application of the University's policy for inventions (including certain tangible results of research, such as biological materials, devices, and certain software), patents and copyrights.

First, the policy should encourage the notion that ideas or creative works produced at the University should be used for the greatest possible public benefit. This would normally mean the widest possible dissemination and use of such ideas or materials. Thus, every reasonable incentive should be provided for the dissemination into use of ideas, and the production and introduction into use of creative works or educational materials generated within the Harvard community. While this policy places benefit to the public before financial gain, it recognizes that it is also appropriate and desirable for the University and individual inventors or authors to benefit financially from the sale of products based on their inventions or other creative works. In deciding how to proceed in regard to a particular invention or creative work, the University will consider the benefits and consequences for the public and the University, as well as the individual inventors or authors.

Second, the policy should protect the traditional rights of scholars with respect to the products of their intellectual endeavors. For example, the policy should not interfere with the right of a scholar to decide to publish a book or an article and, if so, when and under what circumstances. With respect to works in which the University takes ownership or has any form of control, the person(s) who created the intellectual property shall be consulted in the determination of how it is to be made public, developed, modified, and/or commercialized.

Third, when University support makes the enterprise possible or when it provides extra or special support, either with money, facilities, equipment or staff, for the development of ideas or the production of works, it is reasonable for the University to participate in the fruits of the enterprise and/or to be reimbursed for the University's extra or special costs, if such ideas or works are introduced commercially.

Fourth, the policy should ensure that the privacy rights of staff, students, and faculty are protected. For example, the voices and images of identifiable students and staff should be used in works to which this policy applies only with the consent of the individuals involved and with the approval of a responsible Dean or other independent University official.

Fifth, the policy should protect the interests of the University and its members in the use of the Harvard names and insignias, as described in Appendix B. The University has a responsibility to ensure that the use of its name to imply association with the institution is accurate and appropriate, and that it receive a fair share of any commercial fruits from the use of its names.

The following general policy is applicable to all members of the University, including students, in connection with their University work.

Inventions and Patents

1. A member of the University is expected to notify and to disclose to the University in a manner stipulated by the Committee on Patents and Copyrights ("the Committee") any discovery or invention the individual has made and has reason to believe might be useful, patentable, or otherwise protectable, including potentially useful biological materials, devices, and certain software, even if not patentable ("Inventions"). Except in cases of Inventions primarily concerned with medical diagnostics/therapeutics or public health - such determinations to be made in each case by the Committee - an individual may elect to pursue the patenting and/or commercial introduction of potential Inventions without assistance from the University.¹

The University must be notified of such election and the individual's plans must be briefly described in writing at the time of disclosure. The inventor then shall have the right to pursue the patenting or commercial introduction of the Invention, subject to the diligent prosecution of same. (The University may require a showing from time to time that the Invention is indeed being pursued. If the University is convinced that the inventor is not diligently pursuing the introduction of the Invention into public use, it may require submission of a further disclosure in a form prescribed by it for processing by the University.) An individual who obtains a patent or introduces an Invention into public use without assistance from the University, and without substantial University involvement as described in Section 7 below, shall be entitled to all royalties or other income resulting therefrom. It is expected that in pursuing the introduction of an Invention into public use, individuals will make arrangements that best serve the public interest, and the Committee will be available to advise individuals on this question.

2. If a member of the University elects not to pursue or fails to pursue a patent and/or the introduction of an Invention into public use, and in any case arising in regard to Inventions primarily concerned with medical diagnostics/therapeutics or the public health, the University has the sole right to determine whether title shall vest in the University. If title is to vest in the University, the University shall have the right, either directly or through an outside agent, to evaluate and seek patent or other protection of the Invention, and to undertake efforts to introduce the Invention into public use. The individual is then expected to cooperate in every necessary way (but at no expense to the individual) with the University and/or the outside agent, including assigning to the University any ownership rights the individual may have in order to permit the University or the outside agent to evaluate the Invention, to seek a patent, and/or otherwise to introduce the Invention into public use. Royalties or other income resulting from the Invention will be shared among the inventor, the University and the outside agent (if any) in accordance with the University's policy and any relevant terms of any agreement between the agent and the University. The University's arrangements with an outside agent and/or a licensee for handling Inventions should reflect the importance of serving the public interest in these matters.

3. Notwithstanding paragraphs 1 and 2, whenever research or a related activity is subject to an agreement between an external sponsor and the University that contains restrictions as to disposition of Inventions, any such Inventions shall be handled in accordance with such agreement. As at present, all participants in externally sponsored research will continue to be required to accept the conditions in the agreement between the University and the sponsor before being permitted to participate in the sponsored research. In negotiating with sponsors, project directors and other representatives of the University should strive to advance and protect the public interest as well as to obtain the greatest latitude and rights for the individual inventor and the University consistent with the public interest and this policy.

Copyright

4. Except as qualified below, a member of the University is entitled to ownership of copyright and royalties or other income derived from works, including books, films, cassettes, software, works of art, or other materials. It is expected that when entering into agreements for the publication and distribution of copyrighted materials individuals will make arrangements that best serve the public interest.

5. Notwithstanding paragraph 4, whenever research or a related activity is subject to an agreement between a sponsor and the University that contains restrictions concerning copyright or the use of copyrighted materials, all materials shall be handled in accordance with such agreement. In negotiating with sponsors, project directors and the University should strive to protect and advance the public interest as well as to obtain the greatest latitude and rights for the individual author and the University consistent with the public interest and this policy.

6. Notwithstanding paragraph 4, whenever a copyrightable work is created by a member of the non-teaching staff as part of the individual's University responsibilities, the work shall be treated as a work-for-hire under the terms of the Copyright Act of 1976, and ownership will ordinarily be retained by the University.

General Provisions (applicable to Inventions, Patents and Copyrights)

7. In circumstances in which there is substantial University involvement in the creation of an intellectual product, the foregoing provisions concerning rights to obtain a patent or copyright or the rights to royalties or other income, or both, may be varied in favor of the University by explicit agreement between the creator(s) and the University. These circumstances include: 1) substantial University financial, staff or other assistance; 2) extensive use of special or rare University holdings, such as museum collections; 3) significant use of voice or image of students or staff in a product, or substantial creative contribution by staff or students to the preparation of the product; or 4) use of the name or insignia of the University or any of its units (other than for purposes of identification of individual faculty members) to identify or to promote the distribution of a product, or

other identification or promotion that implies the approval or endorsement by the University or one of its units.

8. When the responsible Dean (in the case of Schools) or administrative director (in the case of independent units) determines that any of the circumstances described in Section 7 obtain, the individual creator(s) shall enter into an explicit agreement with the University.

The Dean or administrative director normally concludes the agreement with the creator(s) on behalf of the University, in consultation with the Office for Technology and Trademark Licensing. The Director of the Office for Technology and Trademark Licensing shall report such agreements to the Committee on Patents and Copyrights.

Any such agreement should protect the appropriate ownership rights of the creator(s) and establish the University's share of any royalties or other income derived from the product. For Inventions or copyrightable works to which the University has taken title, royalties or other income shall be allocated in accordance with Appendix A. For all other works, allocation of the creator(s)' share of royalties or other income shall be determined by agreement between the creator(s) and the Dean or administrative director, and allocation of the President and Fellows' share shall be determined by agreement between the Provost and the Dean or administrative director. In all cases covered by the preceding sentence, the schedule in Appendix A shall normally govern unless the parties agree on a different allocation within a reasonable time. Any such agreement shall also assure the University's right to use the product in its own non-profit educational activities on a royalty-free or reduced-royalty basis. In the case of copyrightable products that do not bear Harvard's name or insignia in the title, the creator(s) shall normally retain ownership.

9. Individual Faculties may adopt different procedures and policies regarding ownership, disposition, and royalties or other income of the products that are subject to the agreements described in paragraph 8, provided those procedures and policies are consistent with the principles stated in this document, and are approved by the Corporation upon the recommendation of the Committee on Patents and Copyrights.

10. In the case of sponsored works, the agreement with the sponsor shall provide either that the sponsor reimburse the University for reasonable expenses and/or that the University shall have the right to recover its reasonable expenses, including charges for special equipment used and the cost of obtaining patent protection out of royalty income, unless the University, in exceptional cases, specifically agrees in advance to waive a portion or all of such expenses for reasons of public policy, e.g., in the case of educational materials for disadvantaged children.

11. In the past, inventors and authors who have derived substantial income from their Inventions or works have seen fit to make a gift to the University, in some cases in recognition of the contribution made by the availability of University facilities. It is the

hope that this practice will continue, and even become more widespread, but the matter should be left to the judgement and good will of individual inventors and authors, without any expectation on the University's part.

12. The University Committee on Patents and Copyrights, appointed by the President, shall have the responsibility for interpreting these policies, resolving disputes concerning the interpretation and application of these policies, and recommending changes to the President and Governing Boards from time to time as experience suggests the desirability of such changes. Inventors or creators may submit appeals to the Provost regarding the University's handling of Inventions, Patents or Copyrights assigned to the University under this policy.

**Appendix A:
Harvard University
Royalty Sharing Policy for Intellectual Property**

Amended, January 2001, further amended, March 2003, effective August 10, 1998, the table set forth below shall govern the division of all Net Income (gross royalties and other income minus administrative, licensing, legal and other related expenses as well as payments to other entities as may be required by the University's agreements with those entities) resulting from Inventions or copyrightable works to which the University has elected to take title under the Statement of Policy in Regard to Inventions, Patents and Copyrights:

Cumulative Amounts Received First \$50,000 _____	Above \$50,000 _____
_____ Creator(s) 35%/25%, Creator(s)' Department (<i>The creator(s) may direct the use of half of the department's share so long as he/she/they remain at Harvard.</i>)	30%/40% School (Dean's Office or Vice President) 20%/20% President and Fellows of Harvard College 15% _____ 15% _____
Total 100%/100%	

Explanatory notes:

Definition of "Creator". As used in this appendix, "Creator" means (a) for a patentable work, the legal inventor(s) of the work under the patent laws; and (b) for a copyrightable work or an unpatentable Invention, the person(s) who have made substantial creative or authorship contributions. Persons whose work product is owned by the University as work-for-hire under the Copyright Law generally are not entitled to royalties under this policy, but may be given a share of royalties if the Dean (in the case of Schools) or administrative director (in the case of independent units) determines that they have made an unusually significant creative contribution to the work.

Definition of Royalties and Other Income. The determination of what constitutes "royalties" and "other income" within the meaning of this policy rests within the discretion of the University. For example, equipment or funding for support of research received by the University shall not constitute "royalties" or "other income" under this policy. The net proceeds from the sale of equity shall be considered "other income" and shall be treated as if those proceeds were received at the time the license or option was executed.

Recovery of Institutional Development Costs. Where it is anticipated that application of the formula set forth above would not result in the recovery of development costs advanced by the University, a School, or an independent unit, the Creator(s)' share may be reduced, and the University's, School's, or independent unit's share may be increased, to assure reimbursement of such costs.

Use of School's Share; Capitalization of Income. The School's share will be used to support the **School's** technology transfer efforts, research (including construction or renovation of laboratories or other research facilities), and/or innovative teaching programs. In cases of large sums of income, Schools and Departments are encouraged to consider capitalizing their shares to create an endowment fund for support of the School or Department.

Use of President and Fellows' Share. The President and Fellows' share will be used to support the **University's** technology transfer program and/or to establish a fund which will provide support for research and innovative teaching programs at the University. Before distributions for research and teaching programs are made from this fund, the criteria for allocation will be made public.

Allocation and Distribution of Income.

Distribution of Departmental Share. Upon approval of the Dean (or Vice President) and the Committee on Patents and Copyrights, the distribution of the Departmental share may be altered to fit the particular organizational structure of a School (e.g., where the School does not have departments) or Central Administration department, or a particular Invention/creation situation (e.g., when two or more schools are involved).

Allocation Among Creator(s). For Inventions, the creator(s)' share will normally be divided equally among all creators unless they agree otherwise. For copyrightable works, the Dean or administrative director shall allocate the creators' share among creators, having due regard for the value and substantiality of their respective contributions.

Retention of Creator(s)' Share by University. Creator(s) may always arrange for his/her/their personal share(s) to be retained by the University, e.g., to support his/her/their research.

Payments After Creator(s) Leave University. The creator(s)' share will continue even though the individual(s) may have left the University.

Disposition of Share Allocated to Creator(s)' Laboratory If Creator(s) Relocate. If a portion of the Department's share under the creator(s)' control is allocated to the creator(s)' laboratory or similar facility, that portion will normally follow the creator if he/she transfers to another part of the University. However, it will not follow the creator if he/she leaves the University.

Disposition of Department's Share if Creator(s) Relocate. The Department's share not allocated to the creator(s)' laboratory or similar facility will ordinarily continue to be paid to the Department where the creation was made even if the creator has moved to another Department or to another institution. However, the Dean may recommend alternate treatment if it is warranted.

Allocation of Central Administration Income. In Central Administration, the appropriate Vice President shall determine how the Departmental and "School" shares will be allocated.

Harvard University
Supplement to the Royalty Sharing Policy for Intellectual Property

Adopted by the University Committee on Patents and Copyrights, January 19, 2001, and amended March 2003.

Usual Distribution Methods for License Income

Harvard's standard royalty distribution policy states that for the first \$50,000 of net income, the inventors as a group receive 35%, the inventor's department receives 30%, the Dean of the inventor's School receives 20%, and the University receives 15%. Generally, half the departmental share is placed in a special account under the control of the inventor(s). There is a slightly different formula applied to cumulative net income over \$50,000 - the inventors as a group receive 25% and the inventor's department receives 40%, but the rest of the distribution remains the same.

The following standard procedures shall be followed for income received for a single invention/case:

Each inventor receives equal shares of the inventor(s)' portion, unless all inventors agree otherwise. A deviation from the policy of equal sharing requires a written agreement of all inventors.

If multiple patent applications and patents deal with a single invention/case, each inventor's share shall be determined by a weighted distribution based on the number of US patents/applications on which each inventor appears (only the US patents/applications that are active on the date payment is due are considered). Because new patent applications may be filed over several years or applications may be abandoned and thus inventors may be added or deleted, each inventor's share may change over time. If it is determined that one or more additional individuals are inventors on a patent application for which distributions have already been made, the other inventor(s) on that patent application will not receive further distributions until the individuals newly determined to be inventors have been made whole.

If there are Harvard inventors from different schools or departments, then each School's share is divided equally among the Schools and the departmental share is divided equally among the departments, irrespective of the number of inventors in each School or department.

If several inventors work in the same laboratory, the head of the laboratory controls the "laboratory share" (i.e., the half of the departmental share under the control of the inventors). If there are two laboratories involved, that share is split equally, irrespective of the number of inventors in each laboratory.

If an inventor(s) leaves the originating laboratory and establishes his/her(their) own laboratory within Harvard, he/she(they) may request that a portion of the laboratory share be made available to the inventor(s)' new laboratory. Decisions on such requests will be made on a case-by-case basis by the originating Dean or Dean's designee with input from the laboratory head, department chair and OTL/OTTL.

If an inventor who heads a laboratory moves his/her laboratory to a new department or School but retains a Harvard appointment, the laboratory share may, upon request to OTL/OTTL, be reallocated to his/her new department and School. However, the balance of the departmental share and the School share will remain with the original department and School.

If all inventors leave Harvard, the "laboratory share" reverts to the originating department - it does not follow the inventors to a new institution. An inventor may waive his/her personal share and direct the money to his/her laboratory for support of research, provided IRS requirements are met. An inventor may assign some or all of his/her personal share to other individuals or organizations, provided IRS requirements are met.

If there are no "inventors" - i.e., the invention is a work-for-hire or the result of a project in which there is prior agreement that contributors will not receive any personal share of income - the inventors' share is added to the laboratory share.

NOTE: If the inventors disagree regarding the sharing among inventors, any one of the inventors may request that the Director of OTTL (or OTL in the case of inventions with only Faculty of Medicine inventors) work with the inventors to "broker" an agreement. If that fails and any inventor wishes, he/she may appeal to the Committee on Patents and Copyrights. Any such appeal shall only apply to as yet undistributed income and future income.

The following variation to the above shall apply when more than one invention/case is included in a license agreement:

Ordinarily each invention/case included in a license shall be considered of equal value. Absent any objection from the inventors prior to the distribution of income, license income not specifically linked to an invention/case will be equally divided among all inventions/cases included in the license.

If OTTL and/or OTL determines (either as the result of its own evaluation or as the result of input from a licensee or the inventors) that the inventions/cases should have unequal value, they will notify those individuals identified as inventors at that point in time. Absent any objection from the inventors prior to the distribution of income, license income not specifically linked to an invention/case will be divided among the inventions/cases according to that determination.

If all the inventors of all the inventions/cases included in a license agree upon the relative value of those inventions/cases, income from that license will be allocated according to that valuation.

At such time as income is clearly attributable to individual inventions/cases (e.g., when the product being sold only uses one invention), income shall be allocated to the inventions/cases actually generating the income.

NOTE: If any of the inventors of an invention/case disagree with the above determinations, he/she may appeal to the Committee on Patents and Copyrights. Any such appeal shall only apply to allocation of income received after the appeal unless the appeal is made within thirty days of the inventors being notified of the license agreement and the planned valuation of the inventions/cases.

The above procedures supplement the Royalty Sharing Policy for Intellectual Property. For situations not specifically covered in the Policy or these procedures, OTTL and OTL shall use their best judgement and may consult with department heads, Deans, the Provost's office, or the Committee on Patents and Copyrights as they deem necessary. As additional procedures are adopted, they will be reported on a periodic basis to the Committee and added to this document.

Appendix B: Use of Name Policy

Harvard University Policy on the Use of Harvard Names and Insignias

Harvard by any other name would perhaps thrive as well, but some uses of Harvard's name by others may not always promote the purposes of the University. All members of the University and the institution as a whole benefit when its name is well used, and suffer when it is ill used.

The University takes a legitimate interest in the use of its name and insignia for at least three reasons:

The University and its members have a responsibility to ensure that any implied association with the University is accurate

Attaching a Harvard name to an event, project or publication implies a close connection with the University, usually sponsorship or endorsement. For example, such forms as the "Harvard Project on..." or the "Harvard University Guide to..." should be used only when they refer to activities for which the University itself or one of its delegated authorities is accountable. Involvement by individual Harvard faculty, students or staff members is not, by itself, a sufficient basis to title an activity as "Harvard" sponsored. Rather the activity must be one for which the University takes institutional responsibility.

The University and its members have a responsibility to ensure that the activities with which it is accurately associated maintain standards consistent with its educational purposes

In academic endeavors under the supervision and control of University departments, centers, or programs, adherence to these standards is assured through the normal processes of review. In other activities, relevant standards of quality and appropriateness should be established and maintained. Even some projects that satisfy the standards of quality may not appropriately use the University name (for example, partisan political activities or outside ventures carried on by individual faculty, students, or staff members).

The University and its members have a responsibility to protect its assets by seeking a fair share of the economic value that the use of the Harvard name produces

"Harvard University" is one of the most widely known and respected trademarks of any kind. The commercial fruits of this fortunate reputation are largely attributable to the contributions of many generations of faculty, students and staff, and therefore should be

allocated for the benefit of the University as a whole. Any use of the Harvard name that may depreciate its long-term value should be avoided.

In accord with these responsibilities, the following standards regulate the use of the Harvard name by schools, units, and individuals within the University², and their use by individuals and institutions outside the University, as authorized.

The use regulated by this policy refers to the identification, statement, or display of Harvard's name in any way that may reasonably be interpreted as implying endorsement, approval or sponsorship by the University or one of its units. Nothing in this policy is intended to discourage fair use of Harvard's name to comment on activities of the University or any of its units.

I. Standards for Schools and Other University Units

This Part contains the standards for the use of the Harvard name by the University and its Schools and units. Part II contains the standards for the use of the Harvard name by individual members of the University community.

A name that refers to the University as a whole may be used to identify an activity only with the approval of officials representing the University as a whole. Specifically, schools and units may themselves use, or authorize outside individuals or entities to use, the name of the University as a whole - e.g., "Harvard," "Harvard University," "President and Fellows of Harvard College," the Veritas shield, or their equivalent - only with the prior written approval of the Provost, except as described in subparagraph 1(b).3.

Approval under subparagraph 1(a) is not required for the following activities:

- Stationery, business cards, and other materials used by the Schools or other units in the ordinary course of business;

- Official publications of the University (e.g., catalogues and related materials of the University and its various Schools and units, "home pages" on the World Wide Web, and similar electronic publications issued by Schools and other units, and the Harvard Alumni Directory);

- Journals in printed or digital form published by the University or any of its Schools or units where the University, School or unit involved retains sole editorial control (e.g., the Harvard Business Review and the Harvard Educational Review); and

- Materials prepared specifically for use in connection with courses conducted by the University (e.g., Harvard Business School Cases).

A name that refers to individual Schools or units may be used to identify an activity only with the approval of the responsible authority of the individual School or unit and, in certain cases, the Provost. Specifically, a school or unit may use, and may authorize outside individuals or entities to use, its own name (e.g., "Harvard Law School") only with the approval of the responsible officer (the Dean in the case of Schools or the Provost in the case of other units), except as described in subparagraph 2(b). All activities in which outside individuals and entities are authorized to use the name of a School or unit should be reported to the Office for Technology and Trademark Licensing.

In addition to the approval required under subparagraph 2(a), prior written approval by the Provost is required for the use of the name of any School or unit by any outside individual or entity where the activity involves:

The sale or distribution, for financial consideration, of a product or service;

A financial payment to the University or to any of its Schools or other units; or

A fundraising, advertising or promotional effort for any entity other than Harvard University or one or more of its Schools or other units.

A School or unit should take due care to ensure that its activities do not use names that adversely affect other Schools or units. For example, a project conducted by a School or unit should not bear a name that is confusingly similar to a project carried on by another School or unit.

University officials should consider the general criteria of accuracy, appropriateness, and fair value when authorizing the use of the Harvard names under any of the foregoing rules. Specifically, officials should consider the following factors: whether the association between the University and the activity, product, or publication is accurately represented; whether the activity, product, or publication, and the manner in which it is associated with Harvard's name, are appropriate to the University's educational mission; and whether satisfactory arrangements have been made concerning the interest (if any) to be held by the University in intellectual property and income resulting from the proposed activity.

II. Standards for Faculty, Staff and Students

This Part contains the standards for the use of the Harvard name by members of the University community acting in their individual capacities. The standards for use of the Harvard name by the University and its Schools and units are contained in Part I. Faculty members, staff, and students may use or authorize the use of the Harvard name (alone or in conjunction with the name of a specific School or unit) to identify any activity, individual, entity, or publication only with the approval of their Dean or the Provost, except as described below.

Faculty members and staff may use the Harvard name to identify themselves (e.g., "Jane Doe, Professor of Economics, Harvard University"). In using or authorizing use of the Harvard name to identify themselves in connection with activities conducted with outside individuals and entities (e.g., authoring a book), faculty and staff members should assure that the Harvard name is used in a manner that does not imply University endorsement or responsibility for the particular activity, product, or publication involved.

Students are permitted to use the name of a School or unit only with the approval of the responsible official of each School or unit or, in the case of the use of the name on merchandise, the Office for Technology and Trademark Licensing.

III. Additional Provisions

Supplemental Rules. Schools and units may adopt supplemental rules, consistent with this policy, to govern their own activities. Any such rules should be reported promptly to the Provost.

Blanket Permissions. In appropriate cases, permission for ongoing activities requiring approval under this policy may be given by category.

Copyright Notices. No approval is necessary to include the terms "President and Fellows of Harvard College" or "Harvard University," in a copyright notice on a work for which copyright is owned by the University. Copyright notices may include either of these terms, but should not include the names of individual Schools or units, since the University as a whole is the legal proprietor of copyright in University-owned works.

Trademark Registration. No one may register or authorize the registration of any trade or service mark of Harvard University in the United States or any foreign country without the prior written permission of the Office for Technology and Trademark Licensing. This requirement applies to both marks of the University as a whole (e.g., "Harvard" and the Veritas shield) and marks of individual Schools and units (e.g., "Harvard Law School" and the Harvard Law School shield), whether or not the mark includes the word "Harvard" (e.g., "Veritas" and "Evening With Champions").

Licensing for Merchandise. Any individual, School, or unit that wishes to grant or receive a license for the Harvard name for use on merchandise (such as T-shirts, mugs, calendars, and jewelry) must obtain the prior approval of the Office for Technology and Trademark Licensing.

Use of Harvard Name in Television and Films. Requests from outside entities to include references to Harvard in films, television programs, and similar programs should be referred to the Harvard News Office.

Policy On Unauthorized Use by Third Parties. The Office for Technology and Trademark Licensing and the Office of the General Counsel represent the University's interests in connection with unauthorized uses of Harvard's name by third parties, and will be guided in their actions by the standards embodied in this policy and principles of trademark law.

Questions of Interpretation. Questions concerning the interpretation of this policy should be referred to the Provost.

NOTES

1 This policy uses the term "name" to encompass insignias as well as names, and to refer (unless otherwise indicated) to names and insignias of both the University as a whole (e.g., "Harvard University") and its constituent parts (e.g., "Dumbarton Oaks" and "Harvard School of Public Health").

2 This policy applies to Harvard University, its affiliates and subsidiaries, and to the faculty members, staff members, and students of these entities. As used in this policy, the term "unit" means any department or organization that is part of the University (or one of its affiliates or subsidiaries) but is not part of any School. Examples of "units" include the Harvard University Health Services, the Harvard Institute for International Development, and the Arnold Arboretum.

3This provision does not apply when "Harvard" is used to describe parts of Harvard College or student organizations of Harvard College or the Graduate School or Arts and Sciences (e.g., "The Harvard Foundation" or "Harvard Women's Ice Hockey").

Footnotes

1The individual may elect to propose to the Committee that the patenting and/or commercial introduction of the Invention be pursued by the University.

2The references in Paragraph 7(a) to "substantial University financial, staff, or other assistance" and in Paragraph 7(b) to "special or rare University holdings, such as museum collections" mean the use of University funds, facilities, equipment, or other resources significantly in excess of the norm for educational and research purposes in the department or unit in which the creator holds his or her primary appointment. The University does not regard the provision of academic year salary, office, usual library resources, usual facilities and office staff, or personal computers as constituting "substantial University financial, staff, or other assistance" or "special or rare University . . . holdings" unless such resources were made available specifically to support the development of certain materials to be acquired by the University.

3The reference in Paragraph 7(c) to "substantial creative contribution by staff or students" means providing original ideas or new techniques that are essential to the creation of the product or significantly improve its value. For example, devising a new way to test one of the major hypotheses in a study would normally count as such a contribution, but providing ordinary research assistance or conducting standard data analysis would not.

4"Independent unit" means any department or organization that is part of the University (or one of its affiliates or subsidiaries) but not part of any School. Examples of such units include the Harvard University Health Services, the Harvard Institute for International Development, the Harvard University Art Museums, and the Arnold Arboretum.

APPENDIX E**THE UNIVERSITY OF TEXAS SYSTEM POLICY****Rules and Regulations of the Board of Regents****Series: 90101****1. Title**

General Rules for Intellectual Property

2. Rule and Regulation

Sec. 1 Philosophy. It is the objective of this policy to encourage the development of inventions and other intellectual creations for the best interest of the public, the creator, and the research sponsor, if any, and to permit the timely protection and disclosure of such intellectual property whether by development and commercialization after securing available protection for the creation, by publication, or both. The policy is further intended to protect the respective interests of all concerned by ensuring that the benefits of such property accrue to the public, to the inventor, to the U. T. System, and to sponsors of specific research in varying degrees of protection, monetary return and recognition, as circumstances justify or require.

Sec. 2 Individuals Subject to the Policy. The intellectual property policy applies to all persons employed by the U. T. System or any of its institutions including, but not limited to, full and part-time faculty and staff and visiting faculty members and researchers, to anyone using the facilities of the U. T. System or any of its institutions, and to undergraduate students, to candidates for master's and doctoral degrees, and to postdoctoral and predoctoral fellows.

Sec. 3 Types of Intellectual Property Included. Except as set forth in Sections 4 and 5 below and Series 90102 of the Regents' *Rules and Regulations*, this policy shall apply to intellectual property of all types, including but not limited to any invention, discovery, trade secret, technology, scientific or technological development, research data and computer software regardless of whether subject to protection under patent, trademark, copyright or other laws.

Sec. 4 Board May Not Assert Interest in Certain Copyrights. The Board of Regents shall not assert its interest in scholarly or educational materials, artworks, musical compositions, and dramatic and non-dramatic literary works related to the author's academic or

professional field, regardless of the medium of expression. This applies to works authored by students, professionals, faculty and non-faculty researchers. The Board of Regents encourages these creators to manage their copyrights in accordance with the guidelines concerning management and marketing of copyrighted works.

- Sec. 5 Board May Not Assert Interest in Certain Software. The Board of Regents normally asserts ownership in software as an invention; however, original software that is content covered by Section 4 above or that is integral to the presentation of such content shall be owned in accordance with Section 4 above.
- Sec. 6 Works for Hire. Notwithstanding the provisions of Sections 4 and 5 above, the Board of Regents shall have sole ownership of all intellectual property created by an employee who was hired specifically or required to produce it or commissioned by the U. T. System or any of its institutions. Except as may be provided otherwise in a written agreement approved by the president of the institution, the provisions of the Regents' *Rules and Regulations* Series 90102, Number 2, Section 2.5 relating to division of royalties shall not apply to intellectual property owned solely by the Board of Regents pursuant to this Section 6.
- Sec. 7 Role of Creator. Any person subject to this policy who creates intellectual property other than on government or other sponsored research projects where the grant agreements provide otherwise, should have a major role in the ultimate determination of how it is to be published; however, the president may, in his or her sole discretion, decide whether to develop and commercialize an invention after securing available protection for the creation, if necessary.
- Sec. 8 Service of Public Interest. It is a basic policy of the U. T. System or any of its institutions that intellectual property be developed primarily to serve the public interest. This objective usually will require development and commercialization by exclusive or nonexclusive licensing.
- Sec. 9 Use of Facilities and Resources. Neither the facilities nor the resources of the U. T. System or any of its institutions may be used (i) to create, develop, or commercialize intellectual properties outside the area of expertise for which the individual was hired (See Regents' *Rules and Regulations* Series 90102, Number 2, Section 1); or (ii) to further develop or commercialize intellectual properties that have been released to an inventor (See Regents' *Rules and Regulations*

Series 90102, Number 2, Section 2.2) except as the institution's president may approve where the U. T. System retains an interest under the terms of the release.

Sec. 10 Creation of Data. Data created by an employee is owned by the Board of Regents and the creator shall have a nonexclusive license to use such data for nonprofit educational, research, and scholarly purposes within the scope of the employee's employment, subject to adherence to other provisions of this policy.

3. Definitions

None

4. Relevant Federal and State Statutes

None

5. Relevant System Policies, Procedures, and Forms

Regents' *Rules and Regulations* [Series 90102](#) – Property Rights and Obligations

6. Who Should Know

Administrators
Faculty
Staff
Students

7. System Administration Office(s) Responsible for Rule

Office of General Counsel

8. Dates Approved or Amended

December 10, 2004

9. Contact Information

Questions or comments regarding this rule should be directed to:

- bor@utsystem.edu

The University of Texas System
Rules and Regulations of the Board of Regents

Series: 90102

1. Title

Property Rights and Obligations

2. Rule and Regulation

Sec. 1 Intellectual Property Owned by the Creator. For all individuals subject to this policy, intellectual property outside the area of expertise for which the individual was hired that is developed on his/her own time and without the support of the U. T. System or any of its institutions or use of their facilities is the exclusive property of the creator.

Sec. 2 Intellectual Property Owned by U. T. System. Intellectual property either related to the area of expertise for which an individual was hired or resulting from activities performed on U. T. System time, or with support by State funds, or from using facilities owned by the U. T. System or any of its institutions is subject to ownership by the Board of Regents.

2.1 Determination of U. T. System's Interest. Before intellectual property subject to ownership by the Board of Regents is disclosed to any party outside the U. T. System, to the public generally, or for commercial purposes, and before publishing same, the creator shall submit a reasonably complete and detailed disclosure of such intellectual property to the president of the creator's institution for determination of the U. T. System's interest.

2.2 Election Not to Assert Interest. If the institution's president elects not to assert and exploit U. T. System's interest, the Office of General Counsel and the creator shall be notified within 30 days after a decision is made not to assert ownership rights that the invention will be released to the creator. Thereafter, he or she will be free to obtain and exploit a patent or other intellectual property protection in his or her own right and the U. T. System and its institutions shall not have any further rights, obligations, or duties with respect thereto except that, in appropriate circumstances, the institution's president may elect to impose certain limitations or obligations or retain income rights.

- 2.3 Later Release of Invention. The institution's president may elect to release an invention to its creator at any time after asserting U. T. System's interest, with notice to the Office of General Counsel; however, such a release shall include provisions for the recovery of patent and licensing expenses, if any, as well as the retention of income rights.
- 2.4 Protection of Intellectual Property. With respect to intellectual property in which the U. T. System or any of its institutions asserts an interest, the institution's president shall decide how, when, and where the intellectual property is to be protected. Outside counsel services may be contracted with the consent of the Vice Chancellor and General Counsel and, if required by law, the approval of the Attorney General. It shall be mandatory for all persons subject to this policy to assign the rights to intellectual property and patents to the Board of Regents when such creations fall within Number 2, Section 2 of this Series.
- 2.5 Reimbursement of Licensing Costs and Allocation of Income. In those instances where the U. T. System or any of its institutions licenses rights in intellectual property to third parties, the costs of licensing, including, but not limited to, the costs to operate and support a technology transfer office and the costs of obtaining a patent or other protection for the property on behalf of the Board of Regents must first be recaptured from any royalties or other license payments received by the U. T. System or any of its institutions before the remainder of such income (including but not limited to license fees, prepaid royalties, minimum royalties, running royalties, milestone payments, and sublicense payments) shall be divided as follows:

50% to creator
50% to System.

With the prior approval of the Board as an agenda item, an institution may adjust the allocation of royalties set forth herein for all its creators, but in no event shall the creator receive more than 50% or less than 25% of such proceeds. Any other deviation from this rule in individual cases requires the prior approval of the Board.

- Sec. 3 Intellectual Property Involving Sponsored Research. Intellectual property resulting from research supported by a grant or contract with the federal government, or an agency thereof, with a nonprofit or for profit nongovernmental entity, or by a private gift or grant to the U. T. System or any of its institutions shall be subject to ownership by the Board of Regents.
- 3.1 Nonconformance with Intellectual Property Guidelines. Administrative approval of such grants and contracts containing provisions inconsistent with this policy or other policies and guidelines adopted by the Board imply a decision that the value to the U. T. System or any of its institutions of receiving the grant or performing the contract outweighs the impact of any nonconforming provisions on the intellectual property policies and guidelines of the U. T. System or any of its institutions (Reference Regents' *Rules and Regulations* Series 90105, Number 2, Section 2).
- 3.2 Conflicting Provisions. The intellectual property policies and guidelines of the U. T. System or any of its institutions are subject to, and thus amended and superseded by, the specific terms pertaining to intellectual property rights included in federal grants and contracts, or grants and contracts with nonprofit and for profit nongovernmental entities or private donors, to the extent of any conflict.
- 3.3 Cooperation with Necessary Assignments. Those persons subject to this policy whose intellectual property creations result from a grant or contract with the federal government, or any agency thereof, with a nonprofit or for profit nongovernmental entity, or by private gift to the U. T. System or any of its institutions shall make such assignment of such creations as is necessary in each case in order that the U. T. System or any of its institutions may discharge its obligation, expressed or implied, under the particular agreement.
- 3.4 Sharing of Royalty Income. In the event that two or more persons who are entitled to share royalty income pursuant to Number 2, Section 2.5 of this Series (or equity pursuant to Regents' *Rules and Regulations* Series 90103 concerning equity interests) cannot agree in writing on an appropriate sharing arrangement, that portion of the royalty income to which the creators are entitled will be distributed to them as the institution's president or, in the event that the creators are

located at two or more institutions within the U. T. System, the Chancellor may deem appropriate under the circumstances and such decision shall be binding on the creators.

- 3.5 Geographical Scope of Protection. A decision by the U. T. System or any of its institutions to seek patent or other available protection for intellectual property covered by Number 2, Section 2 of this Series shall not obligate the U. T. System or any of its institutions to pursue such protection in all national jurisdictions. The U. T. System's decision relating to the geographical scope and duration of such protection shall be final.

3. Definitions

None

4. Relevant Federal and State Statutes

None

5. Relevant System Policies, Procedures, and Forms

Regents' *Rules and Regulations* Series 90103 – Equity Interests

6. Who Should Know

Administrators
Faculty

7. System Administration Office(s) Responsible for Rule

Office of General Counsel

8. Dates Approved or Amended

December 10, 2004

9. Contact Information

Questions or comments regarding this rule should be directed to:
bor@utsystem.edu

APPENDIX F

MASSACHUSETTS INSTITUTE OF TECHNOLOGY POLICY

13.1 Intellectual Property

MIT Policies and Procedures

The aim of the Institute's policy on patents, copyrights, and other Intellectual Property is to make available Institute technology to industry and others for the public benefit, while providing recognition to individual inventors and encouraging the prompt and open dissemination of research results.

The complete policy statement is set forth in the Guide to the Ownership, Distribution and Commercial Development of MIT Technology (Guide), which is available from the Technology Licensing Office (TLO).

13.1.1 Ownership of Intellectual Property

With the exception of student theses as described below in Section 13.1.3 (Ownership of Copyrights in Theses), rights in patentable inventions, mask works, tangible research property, trademarks, and copyrightable works, including software ("Intellectual Property"), made or created by MIT faculty, students, staff, and others participating in MIT programs, including visitors, are as follows:

- a) Inventor(s)/author(s) will own Intellectual Property that is:
 - i) not developed in the course of or pursuant to a sponsored research or other agreement (the faculty advisor, administrative officer, or the Office of Sponsored Programs contracts administrator can advise on the terms of the agreements that apply to specific research); and
 - ii) not created as a "work-for-hire" by operation of copyright law (a "work-for-hire" is defined, in part, as a work prepared by an employee within the scope of his or her employment) and not created pursuant to a written agreement with MIT providing for a transfer of copyright or ownership of Intellectual Property to MIT; and
 - iii) not developed with the significant use of funds or facilities administered by MIT ("significant use" is discussed in Section 2.1.2 of the Guide).
- b) Ownership of all other Intellectual Property will be as follows:
 - i) ownership of Intellectual Property developed in the course of or pursuant to a sponsored research or other agreement will be determined according to the terms of such agreement;
 - ii) ownership of copyrightable works created as "works-for-hire" or pursuant to a written agreement with MIT providing for the transfer of any Intellectual Property or ownership to MIT will vest with MIT;
 - iii) ownership of Intellectual Property developed by faculty, students, staff, and others participating in MIT programs, including visitors, with the significant use of funds or facilities administered by MIT will vest with MIT.

13.1.2 Significant Use of MIT-Administered Resources

When Intellectual Property is developed by MIT faculty, students, staff, visitors, or others participating in MIT programs using significant MIT funds or facilities, MIT will own the Intellectual Property. If the material is not subject to a sponsored research or other agreement giving a third party rights, the issue of whether or not a significant use was made of MIT funds or facilities will be reviewed by the inventor's/author's laboratory director or department head, and a recommendation forwarded to the Technology Licensing Office (TLO). The Vice President for Research will make the final decision on this issue and on any dispute or interpretation of policy relating to Intellectual Property.

Textbooks developed in conjunction with class teaching are excluded from the "significant use" category and not considered "works-for-hire," unless such textbooks were developed using MIT-administered funds paid specifically to support textbook development. Otherwise, the author is the owner.

Generally, an invention, software, or other copyrightable material, mask work, or tangible research property will not be considered to have been developed using MIT funds or facilities if:

- a) only a minimal amount of unrestricted funds has been used; and
- b) the Intellectual Property has been developed outside of the assigned area of research of the inventor(s)/author(s) under a research assistantship or sponsored project; and
- c) only a minimal amount of time has been spent using significant MIT facilities or only insignificant facilities and equipment have been utilized (note: use of office, library, machine shop facilities, and of traditional desktop personal computers are examples of facilities and equipment that are not considered significant); and
- d) the development has been made on the personal, unpaid time of the inventor(s)/author(s).

When an Intellectual Property is not subject to a sponsored research or other agreement (such as an equipment agreement), but has been developed using significant MIT funds or facilities, the Technology Licensing Office may, at its discretion and consistent with the public interest, license the inventor(s)/author(s) exclusively or nonexclusively on a royalty basis. The inventor(s)/author(s) must demonstrate technical and financial capability to commercialize the Intellectual Property, and the TLO will have the right to terminate such license if the inventor(s)/author(s) have not achieved effective dissemination within three years. Where such a license is issued, the inventor(s)/author(s) may be required to assume the costs of filing, prosecuting, and maintaining any patent rights.

13.1.3 Ownership of Copyrights in Theses

The ownership of copyrights in student theses is governed by the following:

- a) Copyright ownership of theses generated by research that is performed in whole or in part by the student with financial support in the form of wages,

salaries, stipend, or grant from funds administered by the Institute shall be determined in accordance with the terms of the support agreement, or in the absence of such terms, shall become the property of the Institute.

b) Copyright ownership of theses generated by research performed in whole or in part utilizing equipment or facilities provided to the Institute under conditions that impose copyright restrictions shall be determined in accordance with such restrictions. Questions regarding restrictions imposed on any of the Institute's facilities or equipment may be addressed to the administrative officer of the laboratory or department or to the appropriate contract administrator in the Office of Sponsored Programs.

c) Students will own the copyrights to theses not within the provisions of a) and b) above; however, a student must, as a condition to a degree award, grant royalty-free permission to the Institute to reproduce and publicly distribute copies of his/her thesis.

d) Where significant use is made of MIT facilities or equipment provided to MIT without copyright restrictions, students own copyrights in theses per c) above; however, software code, patentable subject matter, and other Intellectual Property contained or disclosed in the theses are subject to the significant use policy set forth in Section 13.1.2 above.

13.1.4 Invention and Proprietary Information Agreements

All members of the MIT community--including visiting scientists and fellows--who participate in either sponsored research or Institute-funded research or who use significant funds or facilities administered by the Institute must agree to the terms in MIT's Invention and Proprietary Information Agreement and sign the agreement. By accepting such funds or using such significant facilities, the individual agrees to assign to MIT or its designate his or her title to Intellectual Property created through the use of such funds or facilities.

It is the responsibility of the administrative officer of each laboratory or department to distribute these forms and to collect signed copies. The forms should be signed in triplicate: one copy to be retained by the individual, one by the laboratory or department, and one forwarded to the Technology Licensing Office (TLO).

Any questions regarding the meaning of any terms in this agreement should be addressed to the TLO. Copies of the form are appended to the *Guide to the Ownership, Distribution and Commercial Development of MIT Technology*, or may be obtained from either the administrative officer in each laboratory or department or the TLO.

13.1.5 Consulting Agreements

It is the responsibility of individual members of the MIT community to ensure that the terms of their consulting agreements with third parties do not conflict with their commitments to the Institute (see Sections 4.3 Full-Time Service, 4.4 Conflict of Interest, and 4.5 Outside Professional Activities). Each individual should

make the nature of his or her obligations to the Institute clear to any third party for whom he or she expects to consult. Specifically, the scope of the consulting services should be distinguished from the scope of research commitments at the Institute. The Institute will not negotiate any consulting agreements on behalf of any faculty, student, or staff member; however, any questions regarding the Institute's policies may be directed to the Technology Licensing Office.

13.1.6 Organization

There are two offices and one committee responsible for addressing all Intellectual Property matters at the Institute. The President appoints various members of the community to the Committee on Intellectual Property that is empowered to develop Intellectual Property policies for the Institute. The Vice President for Research chairs this committee and is responsible for the implementation and administration of these policies. The Office of Sponsored Programs negotiates the patent and copyright terms for each research agreement with every government and industrial sponsor, subject to Technology Licensing Office (TLO) approval of any non-standard license terms. The TLO licenses the resulting intellectual property. All technology disclosures should be sent to the TLO.

13.1.7 Disclosures and Technology Transfer

The federal government funds a significant amount of research at the Institute, and the Institute is obligated by federal regulations to report promptly to the appropriate federal agency any inventions conceived or reduced to practice during the course of a government-sponsored research program. The Institute similarly is obligated to report inventions to its industrial sponsors who provide financial support for research.

In order to comply with these policies and contract terms, inventors and authors must report to the Technology Licensing Office (TLO) any Intellectual Property (as defined in the first paragraph of Section 13.1.1 Ownership of Intellectual Property above) created during the course of a sponsored research agreement or with the use of significant funds or facilities administered by the Institute.

The form for reporting the creation of Intellectual Property is entitled MIT Technology Disclosure, and a copy is appended to the Guide to the Ownership, Distribution and Commercial Development of MIT Technology, or may be obtained from the TLO. Copies of the disclosures should also be submitted simultaneously to the inventor's project supervisor and the department head or laboratory director. There is a space on the MIT Technology Disclosure form to identify the sponsor that funded the research resulting in the Intellectual Property.

At the time the invention is disclosed, it is assigned an internal case number and a copy of the disclosure is sent to the Intellectual Property Coordinator in the Office of Sponsored Programs, who reviews the patent and copyright terms of the applicable research agreements and notifies sponsors of the disclosures. In the TLO, the disclosure is assigned to a technology licensing officer who will contact the

inventor(s) to discuss the invention. A decision is then made as to whether technology transfer will be accomplished most effectively by applying for patent or other legal protection. Industrial sponsors are usually granted rights to elect a license to technology for which patent or other legal protection is sought; the specific terms are then negotiated with the TLO.

More generally, the TLO will pursue the licensing of technology by researching the market for the technology, entering into discussions with potential licensees, developing a business plan, negotiating appropriate licenses or other agreements, monitoring progress, and distributing royalties to the inventor(s)/author(s) in accordance with MIT royalty policy.

13.1.8 Teaching Materials

In the case of copyrightable works developed by the Faculty, MIT's mission has generally been best served by allowing the individual faculty member to decide when, how, and in what form these works should be disseminated. [See policies on intellectual property (Section [13.1.1](#), Ownership of Intellectual Property) and textbooks (Section [13.1.3](#), Ownership of Copyrights in Theses).] Where significant Institute resources are involved in producing a work (see Section [13.1.2](#), Significant Use of MIT-Administered Resources), or where there are contractual requirements, MIT and the faculty author share ownership of the work and responsibility for the decisions.

Students should also be recognized as creators and authors of their own material. The academic and financial rights of students should be honored in the creation and dissemination of educational materials.

APPENDIX G

STANFORD UNIVERSITY POLICY

Stanford University Research Policy Handbook Document 5.2

Title: **Copyright Policy** Originally issued: Sept 1, 1983 Current version: Dec 22, 1998

Classification: STANFORD UNIVERSITY POLICY Summary: Establishes Stanford policy on copyright ownership and defines administrative procedures for policy implementation. Related Research Policy Handbook Documents:

4.1 Faculty Policy on Conflict of Commitment and Interest

5.1 Inventions, Patents and Licensing

5.3 Tangible Research Property

See also: SU-18 Patent and Copyright Agreement for Stanford Personnel SU-18A Patent and Copyright Agreement for Personnel at Stanford Who Have a Prior Existing and Conflicting Intellectual Property Agreement with Another Employer Authority: Stanford Board of Trustees Contact Person: Director, Office of Technology Licensing

This document describes Stanford policies and associated administrative procedures for copyrightable materials and other intellectual property. Its objectives are: to enable the University to foster the free and creative expression and exchange of ideas and comment; to preserve traditional University practices and privileges with respect to the publication of scholarly works; to establish principles and procedures for sharing income derived from copyrightable material produced at the University; and to protect the University's assets and imprimatur. Section headings for this Policy Statement are: 1. COPYRIGHT POLICY, 2. ADMINISTRATION OF POLICY, 3. OTHER INTELLECTUAL PROPERTY, 4. TANGIBLE RESEARCH PROPERTY, and 5. EXPLANATION OF TERMS

1. COPYRIGHT POLICY GENERAL POLICY STATEMENT Copyright is the ownership and control of the intellectual property in original works of authorship which are subject to copyright law. It is the policy of the University that all rights in copyright shall remain with the creator unless the work is a work-for-hire (and copyright vests in the University under copyright law), is supported by a direct allocation of funds through the University for the pursuit of a specific project, is commissioned by the University, makes significant use of University resources or personnel, or is otherwise subject to contractual obligations. NOTE: Policy governing patentable software is contained in the Research Policy Handbook document entitled Inventions, Patents and Licensing (document 5.1). **BOOKS, ARTICLES, AND SIMILAR WORKS, INCLUDING UNPATENTABLE SOFTWARE** In accord with academic tradition, except to the extent set forth in this policy, Stanford does not claim ownership to pedagogical, scholarly, or artistic works, regardless of their form of expression. Such works include those of students created in the course of their education, such as dissertations, papers and articles. The University claims no ownership of popular nonfiction, novels, textbooks,

poems, musical compositions, unpatentable software, or other works of artistic imagination which are not institutional works and did not make significant use of University resources or the services of University non-faculty employees working within the scope of their employment. (See Sections 1.H and 5.B below).

INSTITUTIONAL WORKS The University shall retain ownership of works created as institutional works. Institutional works include works that are supported by a specific allocation of University funds or that are created at the direction of the University for a specific University purpose. Institutional works also include works whose authorship cannot be attributed to one or a discrete number of authors but rather result from simultaneous or sequential contributions over time by multiple faculty and students. For example, software tools developed and improved over time by multiple faculty and students where authorship is not appropriately attributed to a single or defined group of authors would constitute an institutional work. The mere fact that multiple individuals have contributed to the creation of a work shall not cause the work to constitute an institutional work.

PATENT AND COPYRIGHT AGREEMENT (Stanford Form SU-18) All faculty, staff, student employees, graduate students and postdoctoral fellows, as well as non-employees who participate or intend to participate in teaching and/or research or scholarship projects at Stanford are bound by this policy. They are also required to sign the Stanford University Patent and Copyright Agreement (referred to as SU-18). See Research Policy Handbook document 5.1, entitled Inventions, Patents and Licensing. Except as described in Section 1.B. above, this agreement assigns rights to copyrightable works resulting from University projects to Stanford. This policy applies, and those subject to this policy are deemed to assign their rights to copyrightable works, whether or not a SU-18 is signed and is on file. Royalty income received by the University for such works will normally be distributed in accordance with University policy (see Section 2.B.2 below). Physical embodiments of copyrightable works may also be subject to the University's policy on Tangible Research Property, also in the Research Policy Handbook document 5.3.

WORKS OF NON-EMPLOYEES Under the Copyright Act, works of non-employees such as consultants, independent contractors, etc. generally are owned by the creator and not by the University, unless there is a written agreement to the contrary. As it is Stanford's policy that the University shall retain ownership of such works (created as institutional rather than personal efforts, as described in Section 1.C, above), Stanford will generally require a written agreement from non-employees that ownership of such works will be assigned to the University. Examples of works which the University may retain non-employees to prepare are: Reports by consultants or subcontractors Computer software Architectural or engineering drawings Illustrations or designs Artistic works

VIDEOTAPING AND RELATED CLASSROOM TECHNOLOGY Courses taught and courseware developed for teaching at Stanford belong to Stanford. Any courses which are videotaped or recorded using any other media are Stanford property, and may not be further distributed without permission from the cognizant academic dean (or, in the case of SLAC, by the director). Blanket permission is provided for evanescent video or other copies for the use of students, or for other University purposes. Prior to videotaping, permission should be obtained from anyone who will appear in the final program. In this regard, see the University's policy on

Consent to Use of Photographic Images, which is found in the Privacy of Student Records section of the Stanford Bulletin. **CONTRACTUAL OBLIGATIONS OF THE UNIVERSITY** This Copyright Policy shall not be interpreted to limit the University's ability to meet its obligations for deliverables under any contract, grant, or other arrangement with third parties, including sponsored research agreements, license agreements and the like. Copyrightable works that are subject to sponsored research agreements or other contractual obligations of the University shall be owned by the University, so that the University may satisfy its contractual obligations. **USE OF UNIVERSITY RESOURCES** Stanford University resources are to be used solely for University purposes and not for personal gain or personal commercial advantage, nor for any other non-University purposes. Therefore, if the creator of a copyrightable work makes significant use of the services of University non-faculty employees or University resources to create the work, he or she shall disclose the work to the Office of Technology Licensing and assign title to the University. Examples of non-significant use include ordinary use of desktop computers, University libraries and limited secretarial or administrative resources. Questions about what constitutes significant use should be directed to the appropriate school dean or the Dean of Research. **RECONVEYANCE OF COPYRIGHT TO CREATOR** When copyright is assigned to Stanford because of the provisions of this policy, the creator of the copyrighted material may make a request to the Dean of Research that ownership be reconveyed back to the creator. Such a request can, at the discretion of the Dean, be granted if it does not: (i) violate any legal obligations of or to the University, (ii) limit appropriate University uses of the materials, (iii) create a real or potential conflict of interest for the creator, or (iv) otherwise conflict with University goals or principles.

2. ADMINISTRATION OF POLICY DETERMINATIONS OF OWNERSHIP AND POLICY IN UNCLEAR CASES Questions of ownership or other matters pertaining to materials covered by this policy shall be resolved by the Dean of Research (or his or her designee) in consultation with the Office of Sponsored Research, the Office of Technology Licensing and the Legal Office. For academic and research issues, the Dean of Research is the Provost's designee. **LICENSING AND INCOME SHARING** **Licensing** The Office of Technology Licensing (OTL) seeks the most effective means of technology transfer for public use and benefit and, toward that end, handles the evaluation, marketing, negotiations and licensing of University-owned inventions or copyrightable materials with commercial potential. Computer databases, software and firmware, and other copyrightable works owned by the University, are licensed through OTL. Exceptions to this procedure must be approved in advance by the Dean of Research. **Royalty Distribution** Royalties will normally be allocated in accordance with the University's policy on Inventions, Patents, and Licensing. If copyright protection alone is claimed, royalties normally will be allocated in a similar manner, with the "inventor's share" allocated among individuals identified by the investigator (or department head if not under a sponsored agreement), based on their relative contributions to the work. Where royalty distribution to individuals would be impracticable or inequitable (for example, when the copyrightable material has been

developed as a laboratory project, or where individual royalty distribution could distort academic priorities), the "inventor's share" may be allocated to a research or educational account in the laboratory where the copyrightable material was developed. Such determination will be made on a case-by-case basis by the Office of Technology Licensing after consultation with the principal investigator or department head, and is subject to the approval of the Dean of Research. Assignments No assignment, license or other agreement may be entered into or will be considered valid with respect to copyrighted works owned by the University except by an official specifically authorized to do so. Questions regarding licensing and royalty-sharing should be addressed to the Office of Technology Licensing.

USE OF THE UNIVERSITY NAME IN COPYRIGHT NOTICES The following notice should be placed on University-owned materials in order to protect the copyright: Copyright © [year] The Board of Trustees of The Leland Stanford Junior University. All Rights Reserved. No other institutional or departmental name is to be used in the copyright notice, although the name and address of the department to which readers can direct inquiries may be listed below the copyright notice. The date in the notice should be the year in which the work is first published, i.e. distributed to the public or any sizable audience. Additionally, works may be registered with the United States Copyright Office using its official forms. Forms may be obtained from the Office of Technology Licensing, to which questions concerning copyright notices and registration also may be addressed.

COPYRIGHT AGREEMENTS Each department is responsible for getting a Patent and Copyright Agreement (SU-18) signed, normally at the time of the individual's initial association with Stanford. See Section 1.D above.

COPYING OF WORKS OWNED BY OTHERS Members of the University community are cautioned to observe the rights of other copyright owners. Contact the Provost's Office or the Legal Office for University policies pertaining to copying for classroom use. Policies regarding copying for library purposes may be obtained from the Office of the Director of Libraries.

SPONSORED AGREEMENTS Contracts and grants frequently contain complex provisions relating to copyright, rights in data, royalties, publication and various categories of material including proprietary data, computer software, licenses, etc. Questions regarding the specific terms and conditions of individual contracts and grants, or regarding rules, regulations and statutes applicable to the various government agencies, should be addressed to the University's Office of Sponsored Research.

GENERAL ADVICE AND ASSISTANCE The Office of Sponsored Research, the Office of Technology Licensing, the Office of the Dean of Research and the Legal Office are available to advise on questions arising under this policy, and to assist with the negotiation and interpretation of the provisions of proposed formal agreements with third parties, as described earlier in this section.

3. OTHER INTELLECTUAL PROPERTY TRADE AND SERVICE MARKS Trade and service marks are distinctive words or graphic symbols identifying the sources, product, producer, or distributor of goods or services. Trade or service marks relating to goods or services distributed by the University shall be owned by the University. Examples include names and symbols used in conjunction with computer programs or University activities and events. Consult the Office of Technology Licensing for

information about registration, protection, and use of marks. PATENTS, See Stanford Policy on Inventions, Patents and Licensing, Research Policy Handbook document 5.1. PROPRIETARY INFORMATION Proprietary information arising out of University work (e.g., actual and proposed terms of research agreements, financial arrangements, or confidential business information) shall be owned by the University. "Trade secret" is a legal term referring to any information, whether or not copyrightable or patentable, which is not generally known or accessible, and which gives competitive advantage to its owner. Trade secrets are proprietary information. NOTE: All research involving proprietary information owned by others is subject to the University's Policy Guidelines on Openness in Research, as adopted by the Senate of the Academic Council. This policy can be found in the Research Policy Handbook document 2.6.

4. TANGIBLE RESEARCH PROPERTY The University encourages the prompt and open exchange, for others' scholarly use, of software, firmware and biological material resulting from research. See Stanford's policy on Tangible Research Property, Research Policy Handbook document 5.3.

5. EXPLANATION OF TERMS COPYRIGHT Copyrightable Works Under the federal copyright law, copyright subsists in "original works of authorship" which have been fixed in any tangible medium of expression from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. These works include: Literary works such as books, journal articles, poems, manuals, memoranda, tests, computer programs, instructional material, databases, bibliographies; Musical works including any accompanying words; Dramatic works, including any accompanying music; Pantomimes and choreographic works (if fixed, as in notation or videotape); Pictorial, graphic and sculptural works, including photographs, diagrams, sketches and integrated circuit masks; Motion pictures and other audiovisual works such as videotapes; Sound recordings. Scope of Copyright Protection Copyright protection does not extend to any idea, process, concept, discovery or the like, but only to the work in which it may be embodied, illustrated, or explained. For example, a written description of a manufacturing process is copyrightable, but the copyright only prevents unauthorized copying of the description; the process described could be freely copied unless it enjoys some other protection, such as patent. Subject to various exceptions and limitations provided for in the copyright law, the copyright owner has the exclusive right to reproduce the work, prepare derivative works, distribute copies by sale or otherwise, and display or perform the work publicly. Ownership of copyright is distinct from the ownership of any material object in which the work may be embodied. For example, if one purchases a videotape, one does not necessarily obtain the right to make a public showing for profit. The term of copyright in works created on or after January 1, 1978, is the life of the author plus seventy years. Copyright in works-for-hire is for ninety-five years from the date of first publication or one hundred twenty years from creation, whichever period first expires. WORKS FOR HIRE "Work for hire" is a legal term defined in the Copyright Act as "a work prepared by an employee within the scope of his or her employment." This definition includes works prepared by employees

in satisfaction of sponsored agreements between the University and outside agencies. Certain commissioned works also are works for hire if the parties so agree in writing. The employer (i.e., the University) by law is the "author," and hence the owner, of works for hire for copyright purposes. Works for hire subject to this principle include works that are developed, in whole or in part, by University employees. For example, under Section 1.H of this policy, significant use of staff or student employee programmers or University film production personnel will typically result in University ownership of the copyright in the resulting work. Where a work is jointly developed by University faculty or staff or student employees and a non-University third-party, the copyright in the resulting work typically will be jointly owned by the University and the third party. In such instances, both the University and the other party would have nonexclusive rights to exploit the work, subject to the duty to account to each other. Whether the University claims ownership of a work will be determined in accordance with the provisions of this policy, and not solely based upon whether the work constitutes a work-for-hire under the copyright law. For example, copyright in pedagogical, scholarly or artistic works to which the University disclaims ownership under this policy shall be held by the creators regardless of whether the work constitutes a work-for-hire under copyright law. University ownership in a work for hire may be relinquished only by an official of the University authorized to do so by the Board of Trustees. **Provider:** Office of the Vice Provost and Dean of Research and Graduate Policy, Stanford University
Contact: Director, Office of Technology Licensing
Last updated: December 22, 1998

Patent and Copyright Agreement for Stanford Personnel

I understand that, consistent with applicable laws and regulations, Stanford University is governed in the handling of intellectual property by its official policies titled Inventions, Patents and Licensing and Copyright Policy (both published in the Research Policy Handbook), and I agree to abide by the terms and conditions of those policies.

Pursuant to those policies, and in consideration of my employment by Stanford, the receipt of remuneration from Stanford, participation in projects administered by Stanford, access to or use of facilities provided by Stanford and/or other valuable consideration, I hereby agree as follows:

I will disclose to Stanford all potentially patentable inventions conceived or first reduced to practice in whole or in part in the course of my University responsibilities or with more than incidental use of University resources. I further agree to assign to Stanford all my right, title and interest in such patentable inventions and to execute and deliver all documents and do any and all things necessary and proper on my part to effect such assignment. (See Inventions, Patents and Licensing, particularly Section 2. D., for further clarification and discussion related to this paragraph.)

I am free to place my inventions in the public domain as long as in so doing neither I nor Stanford violates the terms of any agreements that governed the work done.

Stanford policy states that all rights in copyright shall remain with the creator unless the work:

is a work-for-hire (and copyright therefore vests in the University under copyright law), is supported by a direct allocation of funds through the University for the pursuit of a specific project,

is commissioned by the University, or

is otherwise subject to contractual obligations.

I will assign or confirm in writing to Stanford all my right, title and interest, including associated copyright, in and to copyrightable materials falling under a) through d), above.

I am now under no consulting or other obligations to any third person, organization or corporation in respect to rights in inventions or copyrightable materials which are, or could be reasonably construed to be, in conflict with this agreement.

NOTE: An alternative to this agreement may be appropriate for personnel with a prior existing and conflicting employment agreement that establishes a right to intellectual property in conflict with Stanford policies. Personnel in this situation should contact the office of the Vice Provost and Dean of Research.

I will not enter into any agreement creating copyright or patent obligations in conflict with this agreement.

This agreement is effective on the later of September 1, 1994 (on the one hand) or my date of hire, enrollment, or participation in projects administered by Stanford (on the other hand), and is binding on me, my estate, heirs and assigns.

Signed this _____ day of _____, 20____

Signature Printed or typed name _____

Title (e.g. professor, student, etc.) Department Stanford ID No.

Original to Office of Technology Licensing, 1705 El Camino Real, Palo Alto, CA, 94306 Campus Mail Code: 1850

Signer retains a copy.

December, 1997

Patent and Copyright Agreement for Personnel at Stanford Who Have a Prior Existing and Conflicting Intellectual Property Agreement with Another Employer

I understand that, consistent with applicable laws and regulations, Stanford University is governed in the handling of intellectual property by its official policies titled Inventions, Patents and Licensing and Copyright Policy (both published in the Research Policy Handbook), and I agree to abide by the terms and conditions of those policies in the course of my Stanford activities.

Pursuant to these policies, and in consideration of my participation in projects administered by Stanford, access to or use of facilities provided by Stanford and/or other valuable consideration, I hereby agree as follows:

I will disclose to Stanford all potentially patentable inventions conceived or first reduced to practice in whole or in part in the course of my Stanford responsibilities, my participation in research projects at Stanford or with more than incidental use of University resources. I further assign jointly to Stanford and to my non-Stanford employer all my right, title and interest in such patentable inventions and to execute and deliver all documents and do any and all things necessary and proper on my part to effect such assignment. Such assignment is not inconsistent with the terms of my continuing employment outside of Stanford or with any other agreement I have entered into.

I will not use any information defined as confidential or proprietary by my non-Stanford employer in the course of my Stanford responsibilities and I will not do consulting or any work for my non-Stanford employer while at any facility owned or leased by Stanford.

I am free to place my inventions in the public domain as long as in so doing neither I nor Stanford violates the terms of any agreements that governed the work done or my agreements with my non-Stanford employer.

I recognize Stanford's policy that all rights in copyright shall remain with the creator unless the work:

is a Stanford work-for-hire (and copyright therefore vests in Stanford under copyright law),

is supported by a direct allocation of funds through Stanford for the pursuit of a specific project,

is commissioned by Stanford, or

is otherwise subject to Stanford-related contractual obligations.

I will assign and confirm in writing to Stanford all my right, title and interest, including associated copyright, in and to copyrightable materials falling under a) through d) above. I will not enter into any agreement creating copyright or patent obligations in conflict with this agreement.

This agreement is effective on date of my Stanford hire, enrollment or participation in projects administered by Stanford, and is binding on me, my estate, heirs and assigns.

Signed this _____ day of _____, 20____

Signature Printed or typed name

Title (e.g. professor, student, etc.)

Department

Social Security No.

Acknowledged and accepted:

Non-Stanford Employer: _____ (Insert name)

By: _____

Signature _____

Title _____

Date _____

APPENDIX H

UNIVERSITY OF ARIZONA POLICY

THE UNIVERSITY OF ARIZONA INTELLECTUAL PROPERTY POLICY

Approved: August 31, 1993

PURPOSE

This **policy** is intended to guide management of intellectual property at The University of Arizona. The Arizona Board of Regents (Board) is entrusted by the people of the State of Arizona with the responsibility of developing and maintaining a system of higher education that provides an opportunity for education to all qualified persons, that explores and expands the frontiers of knowledge, and that serves to improve the quality of life for the people of Arizona. In pursuit of these responsibilities, the Board endeavors to develop and maintain an educational system marked by excellent academic programs, distinguished faculty, institutional diversity, fully equipped facilities, and an open and stimulating environment for learning, teaching, research and service to the public.

In broad terms, the academic system serves to create and disseminate information for the benefit of all through research, teaching and public service. Information is communicated by members of the University community who publish and otherwise promulgate their knowledge in numerous ways. Information is transmitted by students who graduate and share their new knowledge with colleagues in the public and private sectors. Finally, information is shared through various University extension programs. Sharing information depends fundamentally on open communication, and open communication in turn:

- Is essential for creating and sharing verifiable scientific knowledge that can benefit the entire society;
- Is a measure of the rate of scientific progress that depends on information and data developed by others;
- Is a necessary condition for efficient and proper use of public and private resources;
- Is a primary force in enhancing cultural, social and economic well-being; and
- Is necessary for an informed citizenry and, as such, basic to the functioning of a democracy.

Under some circumstances, there are valid reasons for limiting the open dissemination of information. Such grounds include national security, the conduct of diplomacy, individual privacy, commercialization of intellectual property, and international competitiveness. In accommodating the last two interests, it sometimes will be necessary to strike a balance between openness and control. The Board believes that maintaining openness generally has a superior social claim over commercial concerns and that restrictions on openness should be approached as exceptions rather than norms. However, the benefits of commercialization can be substantial to the inventor(s), the

University, the State and/or the nation. Patents, copyrights, trade-secret laws and trademarks are mechanisms to protect intellectual property. They control the flow of information but are essential if interested parties are to invest the funds that are usually required to transform the results of University research into economically viable products and processes.

POLICY

A. GENERAL STATEMENT

The Arizona Board of Regents encourages University faculty and staff members to undertake creative research endeavors and to add new scholarship to the well of beneficial information available to the public for its instruction and use. Scholarship may be manifest through publications and in disclosures of intellectual property. These two manifestations of scholarly inquiry are not mutually exclusive. Quite often the draft of a manuscript for publication in a peer-reviewed journal can serve as the body of a disclosure of intellectual property. The discovery or invention then can be evaluated to determine its potential for viable transfer through commercialization into the public sector while the manuscript is undergoing peer review. Thus, the discovery or invention can be protected and still allow for timely publication of the research that led to that discovery or invention. Intellectual property developed by University employees in the course and scope of their employment is presumed to belong to the Board unless provided otherwise by this **policy**.

B. DEFINITIONS

1. Copyright: **Copyright** protects a work of authorship fixed in any tangible medium of expression from unauthorized reproduction. Copyrighted material may include, but is not limited to, computer software, mask works, artwork, music, technical articles, books and other literary works. Books, particularly textbooks, and technical or professional articles published in journals or by some recognized publisher, normally will carry the **copyright** of the publisher. **Copyright** provides protection for the expression of an idea, but not the idea itself. For example, a copyrighted set of plans for building a solar device provides exclusionary rights regarding the reproduction and sale of the plans, but the purchaser of the plans may build and sell the solar device, assuming that the device is not protected by a patent.

2. Designated Individual: The Designated Individual is the Vice President for Research who has been appointed by the University President to be in charge of intellectual property matters. Certain aspects of intellectual property management may be delegated to the Office of Technology Transfer (OTT) by this **policy** or the Designated Individual. Trademark Licensing for the University is handled by the Trademark Licensing Administrator.

3. Employee: For purposes of this **policy**, University employees shall include full-time and part-time classified staff, student employees, appointed personnel, graduate assistants and associates, persons with "no salary" appointments, and shall also include

visiting faculty and academic professionals who development intellectual property using University resources and facilities unless there is an agreement providing otherwise. Persons who are not otherwise University employees and who come to the University as guest lecturers, or to teach colloquia, seminars or short courses are not University employees for purposes of this **policy** to the extent of their teaching and classroom activities.

4. Fund for Promotion of Research: The Fund for Promotion of Research is a University account administered by the Vice President for Research to promote research and technology transfer. It is funded by the university share of net fees and royalties received from the licensing and sale of University-owned intellectual properties, except trademarks.

5. Intellectual Property: Intellectual property includes works of authorship, inventions and discoveries that may be subject to protection by patents, copyrights, trademarks and trade secrets.

6. Invention: Under patent law, an invention is the result of conceiving and reducing to practice some innovation that can be delineated, defined and reproduced. Not all inventions are patentable; some may be obvious, some may be unintentional copies of others' inventions, and some may be intentionally withheld from the patent system to prevent the required publication of the invention that is accomplished by the issuance of a patent.

7. Mask Work: A type of intellectual property protected under federal law that is a series of related images imprinted or intended to be imprinted in a semiconductor chip product.

8. Net Income: Net income shall be defined as gross revenues resulting from a given intellectual property less all costs incurred by the University or its nominee in commercializing the said intellectual property, and in obtaining and maintaining intellectual property protection, domestic and foreign.

9. Patent: Patenting is an international legal system by which an inventor can prevent others from making, using or selling his/her invention. The U.S. patent is obtained through application to the U.S. Patent and Trademark Office, and provides negative exclusionary rights in the United States for a period of 17 years from date of issue. An issued patent is an instructional document and must teach one who is familiar with the field the best means for producing, constructing or using the product or process.

10. Software: As used in this **policy**, software is defined as a set of statements or instructions -- lines of code -- to be used directly or indirectly in a computer to bring about a certain result.

11. Technology Transfer Committee: The Committee is a University committee of not less than five persons that may be composed of faculty, staff and students. Members are appointed by the President of the University. The Committee considers proposed changes in intellectual property **policy** and makes recommendations to the President through the Designated Individual.

12. Trade Secret: Trade Secret, while appearing to be in conflict with a public institution's primary role of information dissemination, is nonetheless a legal property protection device governed by state rather than federal laws. Certain technologies, either

due to rapid changes in the field, or due to non-patentability, may be licensable to industry as trade secrets. Use of trade secret protection may be approved, but it should be used rarely. However, if public disclosure will inhibit a company's willingness to invest the necessary funds for product development and commercialization, the OTT, in consultation with the employee and the Designated Individual, may license the subject intellectual property as a trade secret. Knowledge formalized as a trade secret cannot be disclosed in any open scientific forum as long as it maintains trade secret status. All intellectual property falling within this category will be treated in the same manner as patented and copyrighted technologies regarding licensing and royalty distribution as provided in this **policy**.

13. Trademark: Trademark is the mark that distinguishes an organization or product. The various symbols and logos of the University are trademarks that belong to the Board and may not be used by third parties without a proper license and specific approval of the University's Licensing Administrator. That licensing program is managed outside of the intellectual property procedures described here. Other trademarks may be generated that are intellectual property covered by this **policy**. These are exemplified by Gatorade, a product that is not patented, but for which the trademark is licensed by the University that developed the formula. Such trademarks will be licensed by the University Designated Individual.

C. OWNERSHIP OF INTELLECTUAL PROPERTY

1. University Owned Intellectual Property; Except as otherwise provided in this **policy**, the University owns intellectual property that:

- a. Results from research carried on by or under direction of any employee or student of the University and having all or part of the attendant costs paid from University funds or from funds under the control of or administered by the University or the Board; or
- b. Is made by any employee of the University as a direct result of his/her duties with the University; or
- c. Has been developed in whole or in part by any employee, student or other person through the utilization of University resources or facilities unless such resources or facilities are available without charge to the public or the applicable use fee (not including tuition) has been paid.

Discussion: If intellectual property is developed by an employee within his or her area of expertise or responsibility, then the intellectual property is owned by the University unless it falls within a specific exception listed below. The determination of ownership of intellectual property is not dependent on the person's physical location. For example, if a chemist is working on a new chemical structure and a related idea comes to him/her while showering at home, the intellectual property is owned by the University. But a chemist working in a home workshop, creating a new wooden toy, is the owner of that intellectual property, although such intellectual property should be disclosed to the University Designated individual. In general, decisions concerning intellectual property ownership are based on common sense. That is, if it is reasonable and logical to assume

the employee's discovery was made without any influence of the University or its resources, then ownership is the employee's.

2. Individual Owned Intellectual Property; The Designated Individual will release to the employee who created the intellectual property all claims of Board ownership as to intellectual property that:

- a. Involves no use of University facilities or resources, or if University facilities or resources are used, they must be available without charge to the public, or the applicable use fee (not including tuition) must have been paid by the person claiming ownership of the intellectual property; and
- b. The intellectual property was not prepared as a result of employment responsibilities; and
- c. The intellectual property is not directly related to the employee's field of employment.

Discussion: In the event that an employee develops intellectual property that is unrelated to his/her duties and that was developed on the individual's own time, that intellectual property belongs to the individual. For example, an employee in the music department who develops software that tracks little league players and documents their capability/performance would own the copyrights to those materials. However, if the music department employee was instructed to create software to recruit music students, that intellectual property would belong to the University.

3. Scholarly Writings; The Board does not presently claim **copyright** ownership of textbooks and scholarly works or publications in peer-reviewed and professional or trade journals authored by employees. The exception to this is "work for hire" where the preparation of such materials was specifically directed by a University administrator and University funds were provided expressly for their development. The board does not claim **copyright** ownership of creative artistic works created by employees. The exception to this is the same as for scholarly writings (see section C(3) above).

4. Sponsor-Supported Efforts; The rights to intellectual property produced as a result of work supported partially or fully by an external agency and for which a contract is on file with the Vice President for Research will be determined by the terms of the specific contract. If no contract is on file, rights to intellectual property created as a result of sponsored research will reside in the University.

5. Student Owned Intellectual Property; Students own the intellectual property they develop as a result of class work unless University resources beyond those described in Section C(2)(a) above are used in such development. Students own the copyrights for their theses and dissertations but ownership of other intellectual property described in these publications, including software and patentable inventions, will be determined according to Sections C(1) through (4) above.

D. PROCEDURES

1. Disclosure of Intellectual Property

- a. The creator of intellectual property shall file a disclosure with the head of his or her department. Within ten days of such disclosure, the department head shall transmit the disclosure to OTT with an information copy to the dean of the college or other administrative officer. The department head shall append to the disclosure a statement

setting forth his or her opinion concerning the scientific, technical and economic merit of such intellectual property; the likelihood and desirability of obtaining patent, trademark, **copyright** or trade secret protection; an estimate of the commercial potential; and a general description of the University facilities or resources used in the development of the intellectual property.

b. OTT shall make a determination of the ownership of the intellectual property within 10 days of receipt of the disclosure. If the property is determined to be owned by the University, OTT, or its designated agent, shall then have 120 days to make a determination whether or not to commercialize the disclosed intellectual property. Following this determination, OTT shall have an additional ten days in which to inform the creator of the intellectual property of this decision.

c. Employees who make disclosures are responsible for informing all persons involved in creating and developing the intellectual property of the disclosure and the ensuing events, especially those events related to further development through the various avenues of protecting the property and subsequent licensing or sale of the property.

d. The terms of contracts made with research sponsors wherein the rights to any technology resulting from the sponsored research are granted to the sponsor must be made known in advance by the principal investigators to all involved in the project.

2. Disclosure Processing

OTT, in consultation with the Designated Individual, will determine the ownership of the disclosed intellectual property according to the terms of this **policy**.

a. Intellectual property determined to be owned by the employee, or intellectual property determined not to merit or warrant exploitation by the University shall be released outright to the employee. On mutually agreed upon terms, employee-owned intellectual property may be assigned by the employee to the University for commercialization.

b. Intellectual property owned by a sponsor pursuant to the terms of the research contract shall be released to the sponsor.

c. Intellectual property determined to be owned by the University may be patented, copyrighted, or otherwise legally protected by the University. The University may commercialize intellectual property rights using its own resources, or it may make an agreement with one or more intellectual property management organizations to undertake such activities. If the University has not taken steps to commercialize the intellectual property within two years of the determination of ownership, the employee who created the intellectual property may thereafter request a release or license agreement for such intellectual property from the Designated Individual.

d. OTT shall inform the employee/creator on a regular basis of the progress of protection efforts and commercialization of intellectual property disclosed by that employee.

3. Resolution of Disputes

In the event an employee believes that he or she is the owner of disclosed intellectual property and OTT has determined that the University is the owner, the employee may appeal the decision to the President. In the event of an appeal, the President shall appoint an ad hoc committee of at least three people which may include faculty, staff and/or

students, to review the OTT decision and make recommendations to the President for final decision. The employee is responsible for providing the committee with documentation of the development activity, as well as his or her written opinion giving the basis for the employee's belief that he or she owns the property. The committee will review all information submitted to it by the employee and make its recommendation to the President within 30 days from the date the employee submitted materials to the committee. The President shall make a final decision as to ownership of the property within 30 days of receiving the committee's recommendation. In the event of an appeal, the times provided in Section D(1)(b) above shall be suspended until the final decision of the President regarding ownership of the intellectual property.

4. Intellectual Property Income Distribution

Employees who create intellectual property that is disclosed pursuant to this **policy** and that is determined to be owned by the University are entitled to share in the net income earned from the commercialization of that intellectual property according to the Invention Income Distribution **Policy**, attached hereto as Exhibit A, unless provided otherwise by contract with that employee.

The University share of the net income earned shall be deposited in the Fund for the Promotion of Research. Income earned from the licensing of University trademarks is not subject to this **policy**.

5. Patent, Trademark, Copyright Application

The employee who creates intellectual property owned by the University will be required to cooperate fully with the University in the application for legal protection of intellectual property when requested to do so by OTT or the Designated Individual. All costs involved in obtaining and maintaining legal protection, domestic and foreign, will be borne by the University or its contract management agent.

6. Assignment of Title to Research Sponsor

On rare occasions the University may accept a grant or contract from an organization in which title or rights equivalent to title are assigned to the sponsor or the University may accept a grant or contract that gives to the sponsor an exclusive option for a limited period of time for the right of first refusal to obtain an exclusive license. The terms and conditions of such a license must be consistent with Board **policy** and will be negotiated on behalf of the University by OTT. Principal investigators and appropriate University officials must approve all such agreements in advance. It is the responsibility of the principal investigators involved to ensure that all persons involved in work supported by the grant or contract are notified of and agree to its terms.

7. Employee Has Financial Interest

Notwithstanding any other provisions of this section, a grant, contract or any other form of agreement between the University and any organization containing a provision assigning title is subject to final approval of the Board if the University employee has a financial interest in the contracting organization or any entity engaged in a business

relationship with the contracting organization. An employee has a financial interest in an organization if he or she serves as an owner, officer, director, agent, associate, partner, trustee, consultant, holds any position of management, or is otherwise employed by the organization; or is a stockholder owning three percent (3%) or more of the total stock outstanding in any class when the stock is not listed on a stock exchange, or stock with a total net value in excess of \$25,000 when such stock is listed on a stock exchange.

Approval by the Board for either the creation of any organization or any substantial interest in an organization under applicable Arizona law does not exempt any agreement between the University and an organization from the provisions of this subsection.

EXHIBIT A INVENTION INCOME DISTRIBUTION POLICY

Under the Arizona Board of Regents (ABOR) Patent **Policy**, employees and students or others who conceive and/or develop an invention as the result of the university work employing University facilities must disclose that invention. If the University retains title to the invention and income is created, the inventor(s) will receive a minimum of 50 percent (50%) of the first \$10,000, net of any direct costs, such as literature searches, legal fees or patent prosecution, incurred by the University. A minimum of 25 percent (25%) of income beyond the first \$10,000 net to the University will be paid to the inventor(s).

The University of Arizona invention income distribution schedule outlined below exceeds the ABOR minimums. It was announced at The University of Arizona Technology Transfer Committee meeting February 13, 1988, and implemented first in April, 1988. President Koffler had approved the schedule in November, 1987. Remember, all income repays any University expenses incurred in creating the income. Income listed below is net of the "first income."

APPENDIX I

YALE UNIVERSITY POLICY

Table of Contents:

General

Ownership

Students and Postdoctoral Fellows

Use of Income from University-Owned Works

Assistance from the Office of Cooperative Research

Modification: Effective Date

1. General. In the course of teaching, research and other intellectual and administrative activity at the University, faculty, staff, postdoctoral fellows and postdoctoral associates, students and others may create works that are protected by copyright. The federal Copyright Law provides that most original works of authorship are protected by copyright automatically when they are fixed in tangible form.

Copyrightable works of authorship include, among other categories, books, articles and other written works; musical and dramatic works; pictures, films, videos, sculptures and other works of art; computer software; and electronic chip designs. Works by Yale faculty, staff, postdoctoral fellows, postdoctoral associates and students may be found in any of these categories. As a matter of fundamental policy, the University encourages the wide dissemination of scholarly work produced by members of the Yale community, including copyrightable works.

2. Ownership. Under the Copyright Law, the copyright to a work created by a person in the course of his or her employment belongs to the employer rather than to the individual creator. The law provides, therefore, that works created by faculty members in the course of their teaching and research, and works created by staff members in the course of their jobs, are the property of the University.

It is traditional at Yale and other universities, however, for books, articles and other scholarly writings by a faculty member to be deemed the property of the writer, who is considered to be entitled to determine how the works are to be disseminated and to keep any income they produce. This tradition reflects the University's commitment to encourage members of the Yale community to write and to publish what they wish. In recognition of that longstanding practice, the University disclaims ownership of works by faculty, staff, postdoctoral fellows and postdoctoral associates and students, except in the following cases:

a. Assigned Tasks. The University will own the copyright to works created (i) by staff members or postdoctoral fellows or postdoctoral associates in the course of their assigned duties of employment, (ii) by student employees in the course of their assigned

duties of employment, including duties as teaching or research assistance, or (iii) by faculty members as part of an assigned task where the assignment explicitly states that the work will be owned by the University.

b. Outside Agreements. Where copyrighted materials are developed by an investigator in the course of sponsored research funded by an outside agency pursuant to an agreement approved by the Office of Grant & Contract Administration (Medical School Office) or the Office of Cooperative Research, ownership of the copyright will be determined by the applicable terms of the funding agreement.

c. Patentable Works. Where a copyrighted work, such as certain computer software, is also patentable, the University Patent Policy will apply to it, notwithstanding any inconsistent provisions of this policy.

d. Commitment of University Resources. When the University makes substantial commitments of resources to, or expenditures of resources for, a project, the University may be entitled to ownership of any works created. The term "substantial" is not meant to include ordinary use of Yale's libraries, faculty offices, departmental office equipment or University owned personal computers. The Provost will determine whether substantial commitments exist in a particular case and whether the University ought therefore not to disclaim ownership of such works. Where feasible, the Provost will make this determination before the work is created and at the beginning of the project, and will so inform the principal investigator or other responsible faculty member.

In any case in which there is a question about the University's ownership of a work, the issue will be decided by the Provost in consultation with the Committee on Cooperative Research, Patents and Licensing and the Office of the General Counsel.

3. Students and Postdoctoral Fellows. Because students and postdoctoral fellows are in many cases not employees of the University, the Copyright Law would not automatically make the University the owner of copyright to their works. To assure fairness, the provisions of this Copyright Policy are made applicable to students and postdoctoral fellows, especially as stated in paragraph 2.a. above, as a condition of their enrollment or affiliation at the University.

4. Use of Income from University-Owned Works.

a. Division. Any income which the University receives from the licensing, sale, lease, or other use of copyrighted works owned by the University pursuant to this Copyright Policy will be shared as determined by the University in its sole discretion.

The University will ordinarily share net income with the creator or creators of the work on the same terms as those of the University Patent Policy. For this purpose, net income means gross income less the University's costs for securing the copyright, for defending it against infringement and for licensing or otherwise using the work.

b. Disposition of University Shares. The portion of net income that is not paid to the creator or creators of a work will be used as determined by the University in its sole discretion. The University will ordinarily use that portion of net income for the purpose of research or scholarly activity, with preference being given to the field in which the work was generated.

5. Assistance from the Office of Cooperative Research. A faculty member, staff member, fellow or student who has created and under this policy owns a copyrighted work, and who wishes to engage the Office of Cooperative Research for assistance in licensing or otherwise exploiting the copyright, may request such assistance from the Office of Cooperative Research. If that Office provides such assistance, all net income from its licensing efforts will be shared between the University and the creator(s) as provided in the Patent Policy.

6. Modification: Effective Date. This policy is subject to modification or revocation by the Corporation at any time, in its discretion. This policy is effective from the date of approval by the Corporation with respect to works created after that date and shall remain in effect until modified or revoked. October 2001

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Last modified: December 17, 2003. (CSK)

Home URL: <http://www.yale.edu/ocr/>

Below is a preliminary statement of a change in Yale's copyright management policy advanced in the university's Committee on Cooperative Research. THIS DOCUMENT DOES NOT REPRESENT YALE POLICY nor the views of the Committee-which debated the statement but forwarded it to the Provost with neither vote nor recommendation. Scott Bennett, University Librarian at Yale, is the document's author. He is making the statement available "with the hope that we can find ways to share information about institutional efforts, including those still in process, to effect change in copyright management policies."

Position Paper on Yale University Copyright Policy

Prepared for the

COOPERATIVE RESEARCH COMMITTEE

By Scott Bennett

University Librarian

March 1998

INTRODUCTION

The University's existing copyright policy addresses ownership issues. Under existing policy the University disclaims, except in defined circumstances, any ownership of the copyrights in books, articles, and other scholarly works created by faculty, students, and staff.

This is a sound basis for University copyright policy and is characteristic of the policies found at other leading research universities. Even though the University advances no ownership claim to copyrights in most copyrights created at Yale, it is appropriate for the University to urge that copyrights be used to advance education goals.

This paper describes how an addendum to University policy might encourage faculty, staff, and students to use their copyrights to facilitate their own scholarly work in teaching and research at Yale and elsewhere. This paper (1) characterizes the policy addendum that is needed; (2) identifies the values such an addendum should foster and the realm within which it should operate; (3) outlines the broad options faculty and others have for using their copyrights and recommends one of them; and (4) recommends means of implementing the policy addendum.

(1) CHARACTERISTICS OF THE POLICY ADDENDUM

Existing University policy defines the copyright ownership position of faculty, students, and staff. This policy is legally binding.

By contrast, the proposed policy addendum will address the use of the author's ownership position and will not be legally binding. It will be advisory instead. The policy addendum will help faculty and others understand the options they have in exercising their rights as copyright owners, and how some of these options can significantly advance the teaching, learning, and research enterprise to which members of the campus community are committed. The policy addendum will encourage uses of copyrights somewhat different from common practice and may invoke University resources to help enable this use.

Formal advocacy of the policy addendum by the President and Provost and adoption by the Yale Corporation is sought not for enforcement reasons but to underscore the vital importance of the addendum to the strength of teaching, learning, and research at Yale.

(2) VALUES AND REALM OF POLICY OPERATION

The policy addendum seeks to:

- Provide the widest possible freedom and flexibility for faculty and others to employ their work for teaching, learning, and research in a fast-changing technological environment.
- Strengthen the University as an organizational means through which faculty and others can achieve their aspirations for teaching, learning, and research.
- Foster the Constitutionally defined purpose of the copyright law and the encouragement of learning through the minimally constrained use of copyrighted material in teaching, learning and research.

The fundamental business of education is to create and share knowledge. The existing marketplace for intellectual property often accomplishes this through the strong and productive balancing of creators' and users' rights that copyright law is designed to achieve. This commonly happens where strong competitive forces work in relatively large markets, for instance, in the publication of textbooks, trade books, and imaginative literature, or in the creation of software and courseware. The effective sharing of knowledge is jeopardized in smaller markets where few competitive forces exist to identify a commercial interest for the author. This is commonly the case in the publication of many specialized scholarly monographs and most journal articles, where reading audiences are relatively small and publishing outlets limited in number. Especially with regard to journal articles, authors commonly give away their ownership rights in exchange for prestigious publication. In doing so, they often lose sight of the real but diffuse commercial value of their copyrights in the larger enterprise of teaching, learning, and research. As a result, publishers are a liberty to control the use of the author's work, sometimes imposing significant costs and administrative burdens on using the work for non-commercial education purposes. Rarely does the author have any voice in deciding how the work will be used.

The policy addendum should therefore address primarily those authoring and publishing situations where small markets fail to define economic interests effectively. Of course there is no bright line separating effective from ineffective marketplaces. The advisory nature of the policy addendum acknowledges and supports the need of individual authors to understand and make their own judgments about the marketplaces in which they publish.

(3) OUTLINE OF OPTIONS AND RECOMMENDED POLICY

Copyright law gives the creator of copyrighted work exclusive rights, including principally the right to publish the work in print or other media, to reproduce it (e.g., through photocopying), to prepare translations or other derivative works, and to authorize others to exercise any of these rights. These rights may be both segmented and transferred to others. Copyright creators may therefore transfer some or all of these rights to a publisher. The copyright creator may also retain ownership but grant licenses

to other parties to exercise one or more of these rights. Copyright licenses may be exclusive or non-exclusive; for a specified period of time or for the full term of the copyright; royalty-free or royalty-bearing; for one medium or many; or defined or restricted in various other ways.

Faculty and other academic authors have three options, broadly speaking, for managing their copyrights:

- They can continue the frequent existing practice of transferring ownership of copyrights to publishers, in exchange for publication.
- They can reserve specified rights for themselves (e.g., the right to republish an essay in a book, the right to copy material for instructional purposes, etc.) but otherwise transfer ownership of the copyright to the publisher.
- They can retain ownership of the copyright and license to publishers all the rights the publishers need to conduct their business

Use of the first option, though common, is ill advised because it allows the publisher to prohibit or heavily burden many republication and educational uses of copyrighted works, without even consulting the author. The difficulty in using the second option lies in the author's need to anticipate everything he or she may wish to do with the work, especially over time as information technology transforms both publishing and instruction.

Faculty and other academic authors maximize their freedom to use their own work, and that of like-minded colleagues, when they decline to transfer copyrights to their scholarly work to publishers, but routinely grant publishers exclusive licenses for the first formal publication of their work (in print, digital, or some other form) and non-exclusive rights for at least the following purposes:

- Subsequent republication of the work
- Reformatted publication (e.g., works transferred from print to microform and digital forms)
- Distribution through document delivery services
- Reproduction in course packs.

Faculty and other academic authors may often, but not routinely, wish to grant non-exclusive licenses to publishers for the following additional purposes:

- Creating derivative works (e.g., translations, multi-media adaptations, etc.)
- Public performance and display of literary, musical, dramatic, and choreographic works, motion pictures, and other audiovisual works.

Finally, faculty and other academic authors who retain their copyrights may wish to grant a limited set of rights that any reader can exercise without explicit permission. These rights might involve the use of the author's work for non-profit educational purposes.

There are four essential features of these recommendations. (1) The author retains all of his or her rights under the copyright law. This is essential to fostering the values described in the second section of this paper. (2) The right of first formal publication is licensed to the publisher and secures the publisher's essential business

interests while advancing the author's interest in prestigious publication. This license for formal publication does not prohibit the author from using, if he or she wishes, a variety of informal means of circulating the work before formal publication, including self-publication (on a personal Web site) or unjuried publication on Internet lists used by a number of disciplines to provide early exposure to research results. (3) The non-exclusive rights granted for other activities permits the publisher to pursue sometimes important but secondary lines of business, but allows the author and others he or she may license to do the same. This freedom for alternative means of action creates now absent incentives for everyone concerned to act in competitive, cost-effective ways. (4) The author should be in a position to create any blanket grant of re-use rights he or she wishes, as a way of advancing education and simplifying rights management.

Additionally, the grant of both exclusive and non-exclusive rights may be time-bound. There may be circumstances, for instance, in which faculty and other authors might wish to limit the duration of an exclusive license to first formal publication or of a non-exclusive right to subsequent republication or the creation of derivative works. Or one might wish to grant a time-bound exclusive license for activities normally performed under a non-exclusive license.

(4) POLICY IMPLEMENTATION

There are three key implementation questions. How will an advisory policy be developed and promulgated? How will faculty and other authors actually manage the rights they retain under the recommended policy? What can be done to promote the adoption of the recommended policy beyond Yale?

First, a widely consultative procedure is needed. It might include a series of town meetings on copyright issues among the faculty and an invitation to publishers to comment on the proposed policy. The policy addendum should also be reviewed and approved as part of the University Copyright Policy, so that the President and Provost can advocate it as official University policy.

Second, by retaining ownership of their copyrights, faculty and other authors will take on some responsibility for managing those rights. When faculty and other authors assign their copyrights to publishers, publishers become responsible for all management of those rights. When faculty retain their copyrights and grant non-exclusive rights to publishers of the sort recommended above, publishers may continue to manage those rights under the terms of the license. But faculty and other authors will, in some measure, become newly involved in the ongoing management of their copyrights and in responding to people who wish to use their works. This new involvement might be facilitated by:

- Providing publishers with a new copyright notice, to use in lieu of the notice they now frequently publish on the first page of journal articles or elsewhere, stating for readers the terms under which the work is published and any blanket terms (beyond those provided in copyright law) under which the work may be used without the author's permission.

- Creating a registry, available on the network, of Yale authors who subscribe to the new policy and explaining what uses may be made of these authors' work without permission and what uses require their permission. Individual works excluded from this blanket description would be identified. The means of communicating with Yale authors would be identified. Authors who leave Yale would have the option of maintaining or not their use of the registry.
- Developing a capacity in the Office of Cooperative Research or elsewhere to assist authors in managing copyrights with significant commercial value, where such assistance is desired.

These mechanisms for facilitating use under the proposed copyright policy addendum may seem somewhat burdensome. One can imagine these mechanisms changing over time, as new practices are more widely adopted. One might even imagine an importantly expanded registry role for the Copyright Office at the Library of Congress, to accommodate these new practices. The important point here is that the means of implementing new copyright management practices will evolve over time, and the assessment of the value and cost of implementation strategies will change accordingly.

Third, and finally, the copyright policy addendum will be designed to advance crucial values for teaching, learning, and research. It is in Yale's interest to pursue such a policy and to work for its broadest possible adoption, so that Yale faculty and students can use scholarly works from other institutions as freely as other scholars will be able to use Yale works. Such adoption will require a significant leadership and educational effort pursued through various academic, professional, and disciplinary societies, through the publishing community, and among other universities capable of exercising leadership on such a matter. This effort must begin somewhere. Yale is an excellent place to start a process of fundamental change and education in the management of copyrights.

APPENDIX J

UNIVERSITY OF CALIFORNIA POLICY

University of California on Copyright Ownership
Office of the President
August 19, 1992

I. Preamble

The creation of copyrighted works is one of the ways the University fulfills its mission of contributing to the body of knowledge for the public good. The University encourages the creation of original works of authorship and the free expression and exchange of ideas.

This Policy is intended to embody the spirit of academic tradition, which provides copyright ownership to faculty for their scholarly and aesthetic copyrighted works, and is otherwise consistent with the United States Copyright Law, which provides the University ownership of its employment-related works. Pursuant to Regents' Standing Order 100.4 (mm), the President has responsibility for all matters relating to intellectual property, including copyrights in which the University is involved.

II. Purpose and Scope

This statement sets forth the University's Policy on the Copyright Ownership for works produced at, by, or through the University of California, its campuses, and the Department of Energy Laboratories. This Policy applies to University employees, students, and other persons or entities using designated University facilities or acting under contract with the University for commissioned works. This Policy addresses ownership of copyright; it does not address ownership or access to the underlying research results or data, as covered in Academic Personnel Manual Section 020, University Regulation 4. It does not change or affect obligations under the University of California Patent Policy. If, in any case, the application of the two policies gives rise to a conflict, the ownership principles of the Patent Policy shall apply.

III. Definitions

For purposes of this Policy, the following definitions shall apply:

A. Copyright

Copyright is the intangible property right granted by Federal statute for an original work fixed in a tangible form of expression. Copyright provides the owner with the following exclusive rights in a work: to reproduce, to prepare derivative works, to distribute by sale or otherwise, to perform publicly, and to display publicly.

B. Designated Academic Appointees

Those University employees who have a general obligation to produce scholarly/aesthetic works. Included are all appointees in the Professor series, In-Residence series, and the Professional Research series. Appointees in other academic

titles may also be designated by the appropriate Chancellor or Vice President as having the obligation to produce scholarly/aesthetic works

C. Independent Academic Effort

Inquiry, investigation, or research carried out by designated academic appointees to advance knowledge or the arts where the specific choice, content, course, and direction of the effort is determined by the designated academic appointee without direct assignment or supervision by the University. The general obligation of designated academic appointees to produce scholarly/aesthetic works is considered independent academic effort.

D. License

A contract in which a copyright owner grants to another permission to exercise one or more of the rights under copyright.

E. Originator (s)

One who produces a work by his or her own intellectual labor. When there is more than one originator, the ownership of each originator's contribution shall be considered separately pursuant to this Policy.

F. Permissible Consulting Activities

Professional or scholarly services provided by University employees for compensation, which do not interfere with regular University duties, do not utilize University resources, and are not prohibited by terms of the University employment contract or other applicable University agreements or policies.

G. Royalties

A payment made to an owner of a copyright for the privilege of practicing a right under the copyright.

H. Sponsor

An organization or agency which provides funding, equipment, or other support for the University to carry out a specified project in research, training, or public service pursuant to a written agreement. Sponsors include Federal, State, local, and other governmental entities as well as private industry, educational institutions, and private foundations.

I. University Facilities

Buildings, equipment, and other facilities under the control of the University, that are designated by the appropriate Chancellor, Laboratory Director, or Vice President as requiring an advance agreement, from non-University personnel and University personnel acting outside the scope of their employment, concerning the disposition of any copyrighted works that are originated with the use of these facilities. Such facilities normally include campus computer centers and normally do not include University libraries. For the purposes of this Policy, the Department of Energy Laboratories are considered to be under the control of the University.

J. University Funds

Funds, regardless of source, that are administered under the control, responsibility, or authority of the University.

K. University Resources

University funds or facilities.

L. Work

Any copyrighted expression, including literary work (written lectures are included); musical work including any accompanying words; dramatic work, including any accompanying music; pantomimes and choreographic work; pictorial, graphic, and sculptural work; motion pictures and other audiovisual work; sound recordings; and computer software.

IV. Copyright Ownership by Category of Work

A. Scholarly/Aesthetic Work

A scholarly/aesthetic work is a work originated by a designated academic appointee resulting from independent academic effort.

Ownership of copyrights to scholarly/aesthetic works shall reside with the designated academic appointee originator, unless they are also sponsored works or contracted facilities works, or unless the designated academic appointee agrees to participate in a project which has special provisions on copyright ownership pursuant to Section VI.C. of this Policy.

B. Personal Work

A personal work is a work that is prepared outside the course and scope of University employment (except for permissible non-University consulting activities) without the use of University Resources.

Ownership of copyrights to Personal works shall reside with the originator.

C. Student Work

A student work is a work produced by a registered student without the use of University funds (other than Student Financial Aid), that is produced outside any University employment, and is not a sponsored, contracted facilities, or commissioned work. Ownership of copyrights to student works shall reside with the originator.

D. Sponsored Work

A sponsored work is a work first produced by or through the University in the performance of a written agreement between the University and a sponsor. Sponsored works generally include interim and final technical reports, software, and other works first created in the performance of a sponsored agreement. Sponsored works do not include journal articles, lectures, books or other copyrighted works created through independent academic effort and based on the findings of the sponsored project, unless the sponsored agreement states otherwise.

Ownership of copyrights to sponsored works shall be with the University unless the sponsored agreement states otherwise. Any sponsored work agreement which provides for ownership by other than the University generally shall provide the University with a free-of-cost, nonexclusive, world-wide license to use and reproduce the copyrighted work for education and research purposes.

E. Commissioned Work

A commissioned work is a work produced for University purposes by individuals not employed at the University or by University employees outside their regular University employment.

When the University commissions for the production of a work, title normally shall reside with the University. In all cases, copyright ownership shall be specified in a written agreement. Any such agreement which provides for ownership by other than the University, generally shall also provide the University with a free-of-cost, nonexclusive, world-wide license to use and reproduce the copyrighted work for education and research purposes.

F. Contracted Facilities Work

A contracted facilities work is a work produced by non-University personnel or University personnel acting outside the course and scope of their employment, using designated University facilities pursuant to a written agreement. Ownership of copyrights to contracted facilities work shall be governed by the agreement permitting use of the specified University facilities. Depending on the nature of the facility and the nature and extent of the use, the agreement may specify that ownership of resulting copyrights rests with the University, or the University simply may be paid a fee for the use of the facility, or some other arrangement may be appropriate.

G. Institutional Work

Except as otherwise provided in this Policy, the University shall own all copyrights to works made by University employees in the course and scope of their employment and shall own all copyrights to works made with the use of University resources.

H. Work Acquired by Assignment or Will

The University may acquire copyrights by assignment or will pursuant to the terms of a written agreement or testament. The terms of such agreements should be consistent with this Policy on Copyright Ownership and other University policies governing such acquisitions.

V. Copyright Ownership of Jointly Originated Works

Copyright ownership of jointly originated works shall be determined by separately assessing the Category of Work of each originator pursuant to Section IV. above. Rights between joint owners of a copyright shall be determined pursuant to copyright law.

VI. Copyright Agreement and Notification

A. Prior to any use of a University facility by non-University personnel or by University personnel outside University employment, a signed agreement shall be required that specifies the disposition of copyrighted works. University employees using University facilities for work outside University employment are responsible for bringing this to the University's attention so that an appropriate agreement for use can be negotiated. (See IV.F. above.)

B. Designated academic appointees participating in sponsored projects must have an agreement on file with the designated campus official which acknowledges: (a) individual and joint responsibility to produce and deliver sponsored works to the sponsor, as required by the terms of the sponsored project agreement, and/or to the

University when so requested, and (b) that copyright ownership of sponsored works, unless reserved to the sponsor or otherwise provided for in the sponsored project agreement, shall vest in the University. (See IV.D. above).

C. Any designated academic appointee, other employee, or student wishing to participate in a specified University project that includes copyright ownership requirements other than provided in Section IV. of this Policy must sign an agreement indicating his or her concurrence with that project's special conditions. Chancellors and Vice Presidents shall designate special University projects that shall require such special copyright agreements.

VII. Release of University Rights

The University may release its ownership rights in copyrighted works to the originator(s) when, as determined by the University: (a) there are no overriding or special obligations to a sponsor or other third party; and (b) the best interests of the University would be so served. Such release of ownership rights must be contingent on the agreement of the originator(s) that no further effort on, or development of, the work will be made using University resources and that the University is granted a free-of-cost, nonexclusive, worldwide license to use and reproduce the work for education and research purposes.

VIII. Licensing and Royalties

The University may assign or license its copyrights to others. Royalty or income received from such transactions may be shared with the originator(s) of such works, as determined by the appropriate Chancellor, Laboratory Director, or Vice President, taking into account the originator's contribution, the University's costs, any provisions imposed by sponsors or other funding sources, and any other applicable agreements concerning the copyright.

IX. Copyright Responsibilities and Administration: Chancellors, Laboratory Directors, and Vice Presidents

For copyrighted works under their respective jurisdictions, Chancellors, Laboratory Directors, and Vice Presidents are authorized to:

A. Issue guidelines, implementing procedures, and supplementary local policies consistent with this Policy. These may include directives regarding licensure, disposition of royalty income, and other rights related to copyrights. Copies of such guidelines, policies and procedures shall be sent to the President;

B. Identify campus, Laboratory, and other University facilities or projects as having special copyright assignment obligations and issue guidelines and implementing procedures regarding assignment of copyright in works produced using such facilities or projects;

C. Register copyrights, accept copyrights from third parties, and sell, assign, or grant licenses in the name of The Regents for any rights to copyrights; and

D. Release University ownership rights to copyrighted works which are in the name of The Regents of the University of California pursuant to Section VII.

April 29, 1986

**CHANCELLORS
LABORATORY DIRECTORS
MEMBERS, PRESIDENT'S CABINET**

Dear Colleagues:

I am issuing the attached University of California Policy on the Reproduction of Copyrighted Materials for Teaching and Research and the accompanying Guidelines for the Reproduction of Copyrighted Materials for Teaching and Research are intended to encourage the legitimate educational use of photocopied materials and to reduce the University's potential liability for copyright infringement.

The assumption of the Guidelines is that individual University employees will take responsibility for making the necessary decisions respecting compliance with the law. Consequently, it is essential that the Policy and Guidelines be widely distributed and that faculty and staff be made fully aware of their contents. Appendix 3 of the Guidelines discusses appropriate procedures for such distribution and notification. I would also like to ask Chancellors to establish or designate an office on each campus to serve as a central resource for faculty and staff to consult about the application of the Policy.

I want to thank everyone who participated in the review of this Policy for their valuable comments and suggestions.

Sincerely,

David Pierpont Gardner

Attachments

cc:

Principal Officers of The Regents
Chair, Academic Council
Director--Coordination and Review
Members, Intellectual Property Advisory Council

April 1986

**UNIVERSITY OF CALIFORNIA POLICY
ON THE REPRODUCTION OF COPYRIGHTED MATERIALS
FOR TEACHING AND RESEARCH**

In the course of their duties, faculty and staff of the University of California may wish to use photocopied materials in the classroom and for research. In many cases, photocopying can facilitate the University's missions of teaching, research, and public service. The University therefore wishes to encourage the appropriate use of such material within the spirit and the letter of the United States Copyright Law. (Title 17 United State Code).

Copyright is a constitutionally conceived property right which is designed to promote the creation and dissemination of original works of authorship. That purpose is implemented by giving a copyright owner certain exclusive rights with respect to the owner's work, subject to certain limitations, in the mutual interest of the author, the owner, and the public. These rights include exclusive rights of reproduction, preparation of derivative works, distribution, and performance. The University strongly believes that these rights are vital in maintaining a free flow of ideas in our society.

A major limitation on the exclusive rights granted to the copyright owner is the doctrine of "fair use" (17 United States Code, Section 107) which permits certain limited copying of copyrighted works for educational or research purposes without the permission of the copyright owner. "Fair use" is a limited exception to the exclusive use of the copyright owner, which if exceeded, can subject the one making unauthorized copies and the University to severe penalties. The wide availability of copying machines has created a situation where this exception can easily be breached.

To provide guidance to all University employees, the attached Guidelines are to be used to determine whether copying is within the "fair use" doctrine. If the copying is not within the Guidelines, permission should be obtained from the copyright owner before any copies are made. If it is unclear whether copying would require such permission guidance should be requested from the Office of the General Counsel.

It is important that this Policy and Guidelines be widely distributed so that the numerous users of photocopied materials in the University will be aware of the Copyright Law.

**GUIDELINES FOR THE REPRODUCTION OF COPYRIGHTED MATERIALS
FOR TEACHING AND RESEARCH**

- I. Introduction
- II. Unrestricted Photocopying
- III. Permissible Photocopying of Copyrighted Works
- IV. Copying Requiring Prior Written Permission from the Copyright Owner
- V. Infringement
- Appendix 1. Ad Hoc Committee Guidelines
- Appendix 2. Obtaining Permission from the Copyright Owner
- Appendix 3. Implementation

I. INTRODUCTION

The purpose of these Guidelines is to provide direction on photocopying of copyrighted materials for teaching and research. Some kinds of works are not covered by copyright and therefore may be freely reproduced and distributed. Examples of such works are presented in Section II.

Under the "fair use" provision of the Copyright Act of 1976, you are permitted to photocopy and distribute portions of copyrighted works for educational use without securing permission from the owner or paying royalties. The law in this area is quite general, however, and it is important that certain conditions are met to insure that the copying does fall under this fair use exemption. Section III describes the explicit factors that you should take into consideration before reproducing and distributing copyrighted materials.

Situations may arise in which intended copying is not exempted under fair use. In such cases it is necessary to obtain written permission from the copyright owner before copying is done. Section IV explains some kinds of circumstances that require you to obtain permission. Instructions for securing permission are provided in Appendix 2 of these Guidelines. It is the policy of the University that users secure such permission whenever it is legally required.

II. UNRESTRICTED PHOTOCOPYING

A. Uncopyrighted Published Works

Anyone may reproduce without restriction works that entered the public domain. Any work published in the U.S. before January 1, 1978 without a copyright notice entered the public domain.

Copies of works protected by copyright must bear a copyright notice, which consists of the copyright symbol (a letter "c" in a circle, the word "Copyright" or the abbreviation "Copr.") plus the year of first publication for books and the name of the copyright owner. Prior to 1/1/78, in the case of a book or other printed publication, this notice had to be on the title page or the page immediately following: for periodicals, on the title page, the first page of the text of each separate issue or under the title heading. "Notice" requirements for works published after 1/1/78 have been relaxed somewhat with respect to both the position of notices and inadvertent omission of these, so there may be limited protection for some works on which notices do not appear. However, in such instances, if you were to innocently infringe a copyright, in a reliance upon an authorized copy from which the copyright notice had been omitted, there would be no liability for actual or statutory damages for any infringing acts committed before receiving actual notice of copyright registration, if it is proved that you were misled by the omission of copyright notice; in such a case, a court may allow or disallow recovery of any of the infringer's profits attributable to the infringement, and may enjoin the continuation of the infringing undertaking or may require the infringer to pay the copyright owner a reasonable license fee as a condition of continuation of the infringing undertaking.

B. Published Works with Expired Copyrights

Anyone may reproduce without constraint published works whose copyrights have expired. All U.S. copyrights dated earlier than 75 years ago have expired. Copyrights dated later than that may also have expired because the initial period of copyright protection prior to 1978 is for 28 years if there is no renewal. The work probably will not contain notice of the renewal. We recommend that you either assume the protection is still in effect for copyrights more recent than 75 years old, or ask the owners of them (or the U.S. Copyright Office) whether they are still subject to copyright protection. Usually publishers are either the owners or know the owners' locations. If not, owners may be located through the U.S. Copyright Office in Washington, DC.

C. U.S. Government Publications

U.S. Government publications are documents prepared by an officer or employee of the U.S. Government as part of that person's official duties. Government publications include the opinions of courts in legal cases, Congressional Reports on proposed bills, testimony offered at Congressional hearings, and reports of government employees. Works prepared by outside authors on contract to the Government may or may not be protected by copyright. As with other publications, copyright notices may be in the front (for pre-1978 publications) or on the front and back (in works published since 1/1/78. In the absence of copyright notice in such works, it would be reasonable to assume they are in the public domain.

III. PERMISSIBLE PHOTOCOPYING OF COPYRIGHTED WORKS

Teachers may reproduce copyrighted works for classroom use and for research without securing permission and without paying royalties when the circumstances amount to what the law calls "fair use."

A. "Fair Use" - Current Law

In determining whether the use is a "fair use" the law requires consideration of the following factors (17 U.S.C. sec. 107):

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purpose;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The Guidelines in this report discuss the boundaries for fair use of photocopied material. Fair use cannot always be expressed in numbers - either the number of pages copied or the numbers of copies distributed. Therefore you should weigh the various factors in the Act to determine whether the intended use of photocopied copyrighted

material is within the spirit of the fair use doctrine. You should secure permission from the copyright owner unless the intended use is clearly permissible under fair use.

B. UC Guidelines for Determining "Fair Use"

Educators including representatives of higher education developed, along with publishers, a set of minimum standards of fair use which were set forth in the "Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions" (the Ad Hoc Committee Guidelines).

These standards are reproduced in their entirety in Appendix 1 and can be used as a practical approach to determine fair use. Any copying that falls within the Ad Hoc Committee Guidelines is considered to be fair use and permissible.

Since these standards are often not realistic in a University setting, the following Guidelines should be used to judge if intended photocopying of copyrighted materials constitutes fair use in teaching and research at the University of California.

1. Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- a) A chapter from a book;
- b) An article from a periodical or newspaper;
- c) A short story, short essay or short poem, whether or not from a collective work;
- d) A chart, graph, diagram, cartoon, or picture from a book, periodical, or newspaper;

2. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion provided that:

- a) The copying does not substantially exceed the test of brevity as defined below; and
- b) Meets the cumulative effect test as defined below; and
- c) Each copy includes a notice of copyright.

3. Definitions

a) Brevity

(1) Poetry: A complete poem if less than 250 words or, from a longer poem, an excerpt of not more than 250 words.

(2) Prose: Either a complete article, story or essay of less than 2,500 words or an excerpt of not more than 2,500 words from any prose work.

(3) Illustration: One chart, graph, diagram, drawing, cartoon, or picture per book or per periodical issue. In some cases, such illustrations are copyrighted individually and cannot be reproduced under fair use. (See IV C below)

b) Cumulative Effect

- (1) The copying of the material is for only one course per class term of the instructor for whom the copies are made.
- (2) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
- (3) There shall not be more than nine instances of such multiple copying for one course during one class term.

The limitations stated in (1) and (2) above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.

4. Prohibitions as to a) and b) above notwithstanding any of the above, the following shall be prohibited:

- (a) There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets, answer sheets, and like consumable materials.
- b) Copying shall not:
 - (1) substitute for the purchase of books, publishers' reprints, or periodicals;
 - (2) be directed by higher authority;
- c) No charge shall be made to the student beyond the actual cost of the photocopying.

C. Situations Not Specifically Covered by UC Guidelines

The doctrine of "fair use" may permit reproduction of copyrighted works in excess of the word limit restriction specified in the UC Guidelines. 1. Since this is an area of unclear legal definition, you should use caution and discretion in such copying and should seek advice from the General Counsel's Office for a legal opinion, or request prior written permission directly from the copyright owner to perform copying substantially the limits enumerated in the Guidelines. 2. Any questions regarding the application of the Guidelines in specific cases, whether a work is covered under copyright protection, or the ways to secure permission from publishers should also be referred to the General Counsel.

IV. COPYRIGHT REQUIRING PRIOR WRITTEN PERMISSION FROM THE COPYRIGHT OWNER

A. Copying for Profit

"Fair use" extends only to nonprofit copying. Teachers should not charge students more than the actual cost of photocopying, and should not make copies for students who are not in their classes without obtaining permission. This applies to classroom copies made and distributed by a commercial copy center outside the University, as well as University facilities.

B. Unpublished Works

One should obtain permission from owners of unpublished works in order to copy from them. The law gives automatic copyright protection to unpublished works from the time they are created until they are published. Unpublished works, such as theses and dissertations, may be protected by copyright. If such a work was created before January 1, 1978 and was not copyrighted, the work is protected under the new Act for the life of the author plus fifty years after or until December 31, 2002, whichever shall later occur. (17 U.S.C. Section 303). Works created after January 1, 1978 and not published enjoy copyright protection for the life of the author plus fifty years. (17 U.S.C. Section 302).

C. Special Works

In some cases, certain specialized materials such as maps, anatomical diagrams, and drawings are copyrighted separately even though they appear in a text book or other printed work. In this situation, the reproduction of the material would not constitute fair use even if only one illustration from a book were used (see II B. 3. a) (3) above). You must obtain permission to reproduce such individually copyrighted materials. D. Consumable Works Teachers must secure prior written permission before making multiple copies of copyrighted works which are intended to be consumed in classroom activities such as workbooks, exercises, and standardized tests and their answers.

V. INFRINGEMENT

Owners of copyrights can attempt to halt infringement by suing for injunctions, impounding or destruction of infringing articles, and can seek costs of suit and attorneys' fees. Additionally, they can seek recoup actual money damages suffered by the copyright owner as well as the infringer's profits. When there are only nominal monetary losses, owners can, instead of seeking their actual damages, claim "statutory" damages up to \$10,000 (or up to \$50,000 if the infringement was "willful"). The University will defend an employee who photocopies in the course and scope of his or her employment duties.

Even if the copying is held to infringe, the Copyright Act exempts employees of non-profit educational institutions, libraries, or archives from statutory damages, if the employee believed that the copying was a fair use and had reasonable grounds for that belief. Adhering to the Guidelines in III and IV above should afford reasonable grounds for believing one is engaging in "fair use".

Appendix 1. GUIDELINES

Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions WITH RESPECT TO BOOK AND PERIODICALS

The purpose of the following guidelines is to state the minimum standards of educational fair use under Section 107 of H.R. 2223. The parties agree that the

conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines. Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

GUIDELINES

I. Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A. A chapter from a book;
- B. An article from a periodical or newspaper;
- C. A short story, short essay or short poem, whether or not from a collective work;
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion provided that:

- A. The copying meets the tests of brevity and spontaneity as defined below; and,
- B. Meets the cumulative effect test as defined below; and,
- C. Each copy includes a notice of copyright.

Definitions

Brevity

(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

(Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.)

(iii) Illustration: one chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) "Special" works: certain words in poetry or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety, however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Spontaneity

(i) The copying is at the instance and inspiration of the individual teacher, and

(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

(The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of periodicals.)

III. Prohibitions as to I and II Above

Notwithstanding any of the above, the following shall be prohibited:

A. Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.

B. There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

C. Copying shall not:

1. substitute for the purchase of books, publishers' reprints or periodicals;
2. be directed by higher authority;
3. be repeated with respect to the same item by the same teacher from term to term.

D. No charge shall be made to the student beyond the actual cost of the photocopying.

Appendix 2. OBTAINING PERMISSION FROM THE COPYRIGHT OWNER

University employees should obtain prior written permission from the copyright owner to copy materials in those situations when the proposed copying does not come

within the doctrine of "fair use". Obtaining such permission is usually not difficult and, in most cases for classroom use, is granted with no royalty charge.

How to Obtain Permission:

When a proposed use of photocopied material requires a faculty member to request permission, communication of complete and accurate information to the copyright owner will facilitate the request. The Association of American Publishers suggests that the following information be included to expedite the process:

1) Title, author and/or editor, and edition of materials to be duplicated; 2) Exact material to be used, giving amount, page numbers, chapters and, if possible, a photocopy of the material; 3) Number of copies to be made; 4) Use to be made of duplicated materials (including time period or duration if copying on an on-going basis is desired); 5) Form of distribution (classroom, newsletter, etc.); 6) Whether or not the material is to be sold; and 7) Type of reprint (ditto, photocopy, offset, typeset).

When the copyright owner is the publisher of the work, the request should be sent, together with a self-addressed return envelope, to the permissions department of the publisher in question. If the address of the publisher does not appear at the front of the material, it may be obtained from The Literary Marketplace (for books) or Ulrich's International Periodicals (for journals), both published by the R.R. Bowker Company.

When the copyright owner is the author, the request should be directed to the author either in care of the publisher's permissions department, as set forth above, or at the author's address. For purposes of proof, and to define the scope of the permission, it is important that the permission be in writing. Many publishers have registered with the Copyright Clearance Center, 21 Congress Street, Salem, MA 01970. This organization can facilitate obtaining permission to copy. Check with your campus library about the use of this service.

The process of requesting permission directly from the publisher requires time, as the publisher must check the status and ownership of rights and related matters, and evaluate the request. It is advisable, therefore, to allow sufficient lead time. In some instances the publisher may assess a fee for permission, which may be passed on to students who receive copies of the photocopied material.

The following is a sample letter to a copyright owner (in this example a publisher) requesting permission to copy:

Date

Material Permissions Department
Academic Book Company
200 Park Avenue
New York, New York 10016

Dear Sir/Madam:

I would like permission to copy the following for use in my class (name of class) (next semester) or (next semester and subsequent semesters during which the course is offered.)

Title: Ethics and the Law, Second Edition

Copyright: Academic Book Co., 1965, 1971.

Author: John Smith

Material to be duplicated: Chapter 9 (photocopy enclosed).

Number of Copies: 50

Distribution: The material will be distributed to students in my class and they will pay only the cost of the photocopying.

Type of reprint: Photocopy

Use: The chapter will be used as supplementary teaching materials.

I have enclosed a self-addressed envelope for your convenience in replying to this request.

Sincerely,
Faculty Member

Appendix 3. IMPLEMENTATION

Because of the many individuals and offices affected by the University of California Policy and Guidelines on the Reproduction of Copyrighted Materials for Teaching and Research, it is important that this Policy be widely distributed and available for reference. To insure that result, the University takes the following measures to publicize the Policy and Guidelines:

- I.** They will be distributed to every faculty member.
- II.** The University of California Policy and Guidelines on the Reproduction of Copyrighted Materials for Teaching and Research will be included in the Handbook for Faculty Members of the University of California.
- III.** Notices shall be prominently posted that point out the existence and source of availability of the University of California Policy and Guidelines on the Reproduction of Copyrighted Materials for Teaching and Research at the location of all University copying facilities and other facilities at the University locations, if any, where orders for

photocopying are received. (It is understood that the terms of the University of California Policy and Guidelines on the Reproduction of Copyrighted Materials for Teaching and Research also apply to photocopying at facilities outside of the University.)

IV. In the event that any order, requisition, or like form is used in connection with the making or ordering of copies through campus facilities, such form shall include a clear representation by the university employee that the requested photocopying is in conformity with the Policy Statement. When permission from the copyright owner has to be obtained, a copy of the permission agreement should be attached to the request form and retained by the copy facility.

V. This policy supersedes all individual campus policies concerning the photocopying of materials for classroom and research use. It does not affect campus policies on the photocopying of materials for library reserve use (which are based on a different section of the U.S. Copyright Law) nor policies on videotaping, showing films, nor the reproduction of computer programs.

CHANCELLORS LABORATORY DIRECTORS

The Digital Millennium Copyright Act (DMCA) was signed into law in October 1998. The DMCA is a complex piece of legislation intended to clarify the applicability of copyright law to the digital environment. It affirms the Copyright Act's balance between the grant of exclusive rights to copyright owners and exceptions to those rights for the public benefit. In particular, the DMCA contains provisions that under certain circumstances limit the liability of online service providers for copyright violations of their users when the provider is unaware of such violations.

The enclosed Guidelines for Compliance with the Online Service Provider Provisions of the Digital Millennium Copyright Act, prepared by the Office of General Counsel, summarize the provisions under which the University may limit its liability for copyright infringement that occurs on its systems and networks. Although copyright issues are most likely to attract attention in the Web environment, they may also arise in email and other applications. The limitations on liability are especially pertinent to the actions of students.

To take advantage of the DMCA's protection from liability, each campus and Laboratory must designate an agent to receive and handle notices of infringement and register the agent with the United States Copyright Office. The agent's responsibilities are explained in the attached Guidelines.

The University will need to determine on a case-by-case basis whether to take advantage of the new protections offered by the DMCA or whether to rely on defenses that already exist, such as the fair use doctrine. The DMCA protections may not apply in some situations, or you may decide not to invoke them.

Campus-designated agents will be called on to make sensitive decisions that, if not exercised with care and good judgment, could impinge on academic freedom. It is essential that agents be appropriately positioned to determine whether to seek academic

policy or legal advice as needed before taking administrative action. Agents should have ready access to information systems administrators, counsel, and representatives of the academic administration and the Academic Senate.

By January 17, please advise me whom you have designated as your campus or Laboratory agent and the Web address where your agent's contact information is posted. Questions and comments on the Guidelines should be addressed to Counsel Mary MacDonald at mary.macdonald@ucop.edu or to Martha Winnacker (martha.winnacker@ucop.edu or 510-987-0409) in the Office of the Associate Vice President, Information Resources and Communications.

APPENDIX K

WASHINGTON STATE UNIVERSITY POLICY

Washington State University

WSU requires all users of campus Internet services to comply with all state and federal laws including copyright laws. The students, faculty and staff at WSU have access to the fundamentals of copyright law and WSU's guidelines for educational use of copyright materials at [WSU's Copyright Home Page](#) and the [U.S. Copyright Office's Home Page](#).

Allegations of copyright infringement by WSU users that comply with the Digital Millennium Copyright Act, Title II, Section 512(c) (3) will be investigated. **The Copyright Specialist will notify the Vice Provost for Academic Affairs of all valid notifications of claimed infringement received by WSU for appropriate action.** If WSU determines that any users have infringed copyrights of others on a repeat basis, the offending user's access to online services may be terminated. WSU reserves the right to choose how to address or respond to any allegation of copyright infringement received including, without limitation, the choice of any defense under applicable law.

Notification of Claimed Infringement Under The Digital Millennium Copyright Act:

If any owners of copyrights believe WSU's users are infringing copyright protected work, they may send a notice to WSU's designated agent at:

Marc Lindsey, Copyright Specialist
Office of University Publications and Printing/WSU Press
Washington State University
Pullman, WA 99164-5910
Telephone: (509) 335-1214
Fax: (509) 335-8568
E-mail: lindseym@wsu.edu <<mailto:lindseym@wsu.edu>>

Notification of claimed infringement must contain the information required by and otherwise comply with the Digital Millennium Copyright Act, Title II, Section 512(c)

Policy on Using WSU's Copyright Protected Materials:

As a general rule, you may print, reproduce and use the information in, and retrieve files containing publications or images from only those WWW documents which WSU expressly grants permission or license to use provided: (1) the use is for non-commercial, personal or educational purposes only, (2) you do not modify any information or image, and (3) you include any copyright notice originally provided in the materials. If a particular author places further restrictions on the material, you must honor those restrictions. In some instances, specific information contents may be copyrighted by others. By using any of this material, you assume all risks of copyright

infringement and related liability.

Policy on Using WSU Logos, Trademarks and Licensed Graphics, and Web Templates

All standard graphics, photographs and text of the WSU Home Page and connected pages displaying the WSU logos and logotype are copyrighted and trademarked by WSU. Redistribution or commercial use are prohibited without express written permission.

Web page guidelines and copyrighted templates containing standard graphic elements and formats have been developed to present the University's identity clearly, consistently, and with distinction. The templates also provide for a consistent user interface to improve visitors' navigation across all University Web sites. All external and internal Web pages with communications from colleges, departments, libraries, administrative and service divisions, research facilities, Extension and extended education units, primary constituent organizations, and other official units and programs of the University are required to use the Web templates. Instructions and guidelines for using the templates can be found on the [WSU Identity Web site](#).

Proper use of the WSU logo and logotype for all media is set forth in the [WSU Identity Web site](#). You may request a printed manual by calling (509) 335-3518. You may also [download official digital files](#) of the Washington State University signature from the Identity site. All logos and graphics relating to WSU are subject to licensing. If you want more information about obtaining a license, contact the Trademark Licensing Office at (509) 335-2202.

WSU

What Copyright Protects

Promotion of the Arts.

Copyright law is intended to promote and advance art. We all like art, so we would like to see more of it. How do we get artists to create more of it? We can help them get paid for their efforts. Hundreds of years ago, most artists struggled to survive. Even Mozart, a brilliant musician and composer, was reported to be relatively poor.

The first copyright law came from England in 1710 when the "Statute of Ann" was passed to protect booksellers and printers from anyone copying their work without permission. In the United States, the Constitution was first to direct Congress to make laws to promote the arts and sciences. ¹ Today, many artists still struggle financially until they produce something that is in high demand.

Eminem says he used to be poor. But now, because he has sold so many CDs, he is a multimillionaire. Stephen King sells many books, so he is paid very well. George Lucas is quite wealthy because he created the *Star Wars* movies. Because of copyright law, artists, writers, and musicians have a monetary incentive to make as much of their art as they can. It seems to work because we now have artwork everywhere. Radios play music continuously. We have libraries full of books to educate and entertain us. Our clothing

has designs created by professional artists. Just about everywhere you look, art in some form can be seen and appreciated.

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The Difference Between Copyright, Patent, and Trademarks.

Copyrights, patents, and trademarks are considered "intellectual property." Patents give inventors the exclusive right to duplicate their invention's design. Patents cover devices, formulas, tools, and anything that has utility. The recipe for a unique sausage can have a patent. To get a patent, you must apply to the U.S. Patent and Trademark Office and submit the invention's design. You must show that the design is unique. A patent examiner will determine if you are entitled to a patent. If so, a patent is granted that prohibits anyone else from making, using, offering for sale, selling or importing the invention. A patent lasts 20 years.

A trademark is a word, phrase, or logo that identifies a product, a service, or the person or company that offers a product or service to the public. You must apply to the U.S. Patent and Trademark Office to register a federal trademark. If your trademark is registered, you can generally prevent anyone else from using a mark that may confuse the public about who offers the product or service. There are also common-law trademarks that are automatic in the area where the product or service is being advertised, unless a federal trademark has been previously registered.

Copyrights apply to art, music, plays, movies, literature, and scholarly works. They are automatic and require no registration or other formality. They prevent others from copying the work. Copyrights last for the artist's or author's life plus 70 years.

For more information about patents and trademarks, visit: www.uspto.gov

Artists' Exclusive Rights.

How do they work? Copyright law gives artists a monopoly on their work – certain rights that only the artist may exercise. The artwork's creator is the only one who can:

- Make copies of the work;
- Make derivatives or revisions;
- Distribute or publish the work;
- Perform the work in public (if the work is a poem, song, play, or movie);
- Display the work in public (if the work is a painting, graphic, photo, sculpture or other still-image work); and
- Perform the work in public by digital transmission (if the work is a sound recording). 2

The artist can sell the work or any of the exclusive rights to it. Eminem sold his copyrights to the recording company. Stephen King, for some of his first books, sold his copyrights to the publisher. Artists can sell rights to their work because no one else can entertain the public without the rights or at least permission from the artist. If someone does anything with an artist's work that falls within any of the exclusive rights without owning them or having permission, he "infringes" the artist's copyright. If you made bootleg copies of Eminem's music, his record company can sue you for copyright infringement because they hold the copyrights to the music. See [How Copyright](#)

Protects, for the legal consequences of infringing copyrights. Also see Downloading or Sharing Movies, Music, or Software Online.

What is Required to be Protected by Copyright.

What kinds of work are protected by copyright? Any work that is expressed in a tangible medium, original, and has the least bit of creativity is protected by copyright.

Fixed in a Tangible Medium.

The work must be recorded somehow. If the work is a book, the content must be written down. Even an audiotape of the author telling the story fixes the work in a tangible medium. A book written entirely in Braille is fixed in a tangible medium. A song must either be recorded or scored so that someone else can hear or read the music. Photographs are tangible mediums and meet this requirement automatically. In other words, the idea behind the work must be able to be read, seen, heard, or understood by others.

Original.

It has to be original. You cannot claim copyright protection to work that was created by someone else or copy someone else's work and claim you are the author or artist.

Creative.

The material must also be creative. How creative? The Supreme Court says, "...the requisite level of creativity is extremely low; even a slight amount will suffice." The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble, or obvious" it might be." 3

Art can be expressed in an infinite number of ways. Copyright law is designed so that any *original* work that has the slightest creativity may be protected from unauthorized copying, performing, displaying, or any of the other rights that only the artist may exercise. The Copyright Act recognizes specifically these works:

- Literary works (such as poems, fiction and nonfiction books)
- Music including the lyrics
- Dramatic works including the soundtrack or music (includes plays and operas)
- Pantomimes and choreography
- Pictorial, graphic and sculptural works
- Movies and audiovisual recordings
- Sound recordings
- Architecture 4

Many other works are also protected by copyright. A child's finger painting. A doodle in a notebook by a student bored in class. A snowman. A sand castle. A love letter. Graffiti. Even e-mail can be protected if it's original and the least bit creative.

What is not required.

Until 1978, you were required to register your work with the Library of Congress and to provide a copyright notice before your work was protected. After 1978 and presently,

formalities are no longer required. Your copyright springs into existence the instant the work becomes fixed to a tangible medium.

1 *The Congress shall have 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. Constitution, Art. 1, Section 8, Clause 8.

2 17 USC Section 106.

3 *Feist Publications, Inc. vs. Rural Telephone Service Co.*, 499 U.S. 340 (1991)

4 17 USC Section 102(a)

What Copyright Does Not Protect

Materials Not Creative Enough, Idea/Expression Dichotomy, Expired Copyrights ("Public Domain"), Works Copied as Fair Use

Materials Not Creative Enough to be Protected.

No lines are drawn by the law between what is creative enough to be protected by copyright and what is not creative enough. Only cases and statutes tell us what is or is not creative enough. The Copyright Act says,

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work. 5

Idea/Expression Dichotomy.

You hear the phrase "freedom of expression" as describing the First Amendment right. It is really the freedom to communicate facts and ideas that the First Amendment protects.

6 Copyright law protects the *expression* of facts and ideas, not the ideas and facts themselves. Works that have not been fixed to a tangible medium are just ideas. Ideas are fair game for everyone to express in their own words. And ideas have been stolen since the dawn of art and literature. Here are some examples 7:

- *Canterbury Tales* by Chaucer took ideas from the Italian author, Boccaccio.
- Shakespeare took plots for 90 Percent of his greatest plays from other authors.
- Dimitri Yernetz wrote a series of books about a young magician under the title *Tanya Grotter*, written after J. K. Rowling's *Harry Potter*.
- Cameron Crowe's movie *Vanilla Sky* was a remake of a 1997 Spanish movie called *Open Your Eyes*. Penelope Cruz starred in both.

Works with Expired Copyrights ("Public Domain").

When a copyright expires, the work is said to fall or merge into the "Public Domain." This means the work is no longer protected and anyone can copy, distribute, display, or perform the work. Any work that was created or published before 1923 is now in the Public Domain. Many works created much later than 1923 are also in the public domain because certain formalities required by law at the time were not satisfied. There are other ways works can wind up in that category. Any work created by the federal government

is automatically in the Public Domain. ⁸ Anyone can also donate their works to the Public Domain by providing a statement that anyone may copy the work.

For more detail about the duration of copyrights and the Public Domain, see:

- [Public Domain](#)
- [Duration of Copyrights](#)
- [Public Domain Chart](#)
- [Public Domain Resources](#)

Work that is Copied as Fair Use.

There is a limited exception to the author or artist's monopoly over the use of works. If the purpose of copying is for education, research, teaching, comment, or criticism *and* other factors apply, the copying may qualify as a "fair use" exception to the prohibition of copying or other exclusive rights of copyright. If fair use applies, permission to copy is not required. See [Fair Use](#).

⁵ 17 USC Section 102(b)

⁶ *Harper & Row Publishers, Inc. vs. Nation Enterprises*, 471 U.S. 539, 556 (1985)

⁷ "What a Great Idea. Think I'll Steal it." *James Adams, The Globe and Mail*. February 19, 2003.

⁸ 17 USC Section 105

How Copyright Protects

[Civil Liability](#), [Direct Infringement](#), [Contributory Infringement](#), [Vicarious Infringement](#), [Damages](#) [Attorney's Fees](#), [Other Remedies](#), [Criminal Liability](#)

Civil Liability.

If anyone copies a work that is protected by someone else's copyright or does anything else that only the copyright holder may do ([exclusive rights](#)), and they do not have the copyright holder's permission, then the copyright holder may enforce the copyright with a lawsuit. In legal terms, the copier has "infringed" the copyright, or at least the lawsuit accuses the copier of infringement. If the copyright holder wins the lawsuit, the court will enter a judgment against the party accused of infringing the copyright and make him/her pay damages and possibly even the copyright holder's attorney's fees. Three levels of legal liability in copyright infringement cases depend on the activities and knowledge of the people being accused of infringement.

- **Direct Infringement.**

The copyright holder must prove that he/she owns the infringed copyright and that the accused infringer violated one of the copyright's [exclusive rights](#). ⁹ In other words, the infringer copied, distributed, displayed, or performed the work without the copyright holder's permission.

- **Contributory Infringement.**

The infringer is liable to the copyright holder if it is proved he/she engaged in personal conduct that encouraged or assisted the infringement. ¹⁰ In this level of

liability, the infringer must have actual knowledge or "reason to know of the direct infringement." The infringer must also contribute to the infringement in a material way.

- **Vicarious Infringement.**

All the copyright holder has to prove is that the infringer had the right and ability to supervise the activities that infringed the copyright and had a financial interest in the activities. 11 This is the level of liability that a university incurs by hosting an Internet service. If any users or subscribers of the Internet service infringe copyrights online, the university is vicariously liable for the copyright holder's damages. In fact, any Internet Service Provider is vicariously liable for infringement that subscribers engage in. Internet Service Providers have conditional and limited immunity from lawsuits for monetary damages under the Digital Millennium Copyright Act

Damages.

Once the court decides that the accused infringer is liable, the next phase is to determine how much in damages the copyright holder should receive. As long as the copyright holder has registered the infringed work with the U.S. Copyright Office and the infringement occurred after the effective registration date, the copyright holder has the choice of recovering 12:

- actual damages, i.e., lost profits, or
- Statutory damages, ranging from \$750 to \$30,000 for each infringing copy. 13
- If the copyright holder can prove the infringement was committed "willfully," the court has the discretion of increasing statutory damages up to \$150,000 for each copy. 14

If the work was not registered, then the copyright holder can only recover actual damages. Remember copyright is automatic and doesn't require registration to protect the work. But if it is registered, then you can recover these damages if you decide to sue someone for infringing your work.

Attorney's Fees.

If the work was registered with the U.S. Copyright Office and the infringement occurred after the registration date, the court has the discretion of adding to the judgment the cost of the copyright holder's attorney's fees. 15

Other Remedies.

There are other remedies, including a court order barring the infringer from making further copies or an order to destroy unauthorized copies. 16

Criminal Liability.

If the infringer willfully copies a work for profit or financial gain, or the work has a value of more than \$1,000, the court can sentence the infringer to one year in jail plus fines. If the copied work's value is more than \$2,500, the infringer can be sentenced to five years plus fines. 17

Criminal penalties specifically apply to making copies of materials by computer on the Internet such as music, movie, and software files. See Downloading or Sharing Movies, Songs, or Software Online.

9 *A & M Records, Inc. vs. Napster, Inc.* 239 F.3d 1004, 1013 (Ninth Cir. 2001).

10 *Napster* at page 1019.

11 *Napster* at page 1022.

12 17 USC Section 412

13 17 USC Section 504(c)(1)

14 17 USC Section 504(c)(2)

15 17 USC Sections 412 and 505

16 17 USC Sections 502 and 503

17 17 USC Sections 506 and 18 USC Section 2319

Public Domain and the Duration of Copyrights

Works in the Public Domain, Duration of Copyrights, Where You Can Find Work in the Public Domain

Works in the Public Domain.

Let's say you need to copy something for a project you're working on, and you remember that most materials are protected by copyright. Then you recall all the damages and attorney's fees that may result from a copyright infringement lawsuit. What are your options?

- Get written permission from the copyright holder.
- Copy only works that have expired copyrights (Public Domain).
- Copy work without permission IF the copying qualifies as fair use
- Instead of copying anyone else's work, create your own.

There are many works in the "Public Domain" that anyone can copy, make derivatives, distribute, perform, and display without permission. There are various ways that works get into the Public Domain.

- The copyright to a work expires.
- The author or artist donates the work to the Public Domain by expressly allowing anyone to copy it without permission.
- The work was created by the federal government.
- Any work before 1978 whose copyright formalities were not observed.

Duration of Copyrights

The duration of copyrights has changed numerous times since the first copyright statute. It was originally 14 years. Presently, it is the author or artist life plus 70 years! ¹⁸ If the work is created by employees of a corporation or the artist or author has incorporated his art business, the duration is either 95 years from the publications date or 120 years from the creation date, whichever is shorter. ¹⁹ This applies to all work created on or after January 1, 1978. All works created before this time are subject to the law that existed at the time the work was created. It also depends on whether the work was published or not. There were certain formalities that had to be observed, like displaying a copyright notice (©, name, and date) and registering the copyright with the U.S. Copyright Office. If the formalities weren't satisfied in certain prescribed times, then the copyright failed and the work merged into the Public Domain. This makes it complicated to determine if a work is in the Public Domain. But there is a simple rule of thumb:

- All published works created before 1923 are in the Public Domain.
- All unpublished works created before 1883 are in the Public Domain.

Copyright scholars have created charts that make it relatively easy to determine if work is in the Public Domain and, as such, may be copied without permission. One of those charts can be found at: www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm

Where you can find work in the Public Domain

There are many Web sites with enormous data bases of works in the Public Domain.

When shopping at sites that profess to contain Public Domain material, you should remember an old Roman warning: "Caveat Emptor." It means "buyer beware." There is always the risk that some work is fully protected by copyright and wound up in a purported Public Domain database by mistake or fraud.

Here is a collection of Public Domain sites where you can find anything from novels and poems to music, photos, and graphics that you can copy without permission: [Public Domain Resources](#)

[18](#) 17 USC Section 302(a)

[19](#) 17 USC Section 302(c)

Fair Use

Fair use is the exception to the rule that no one may exercise the author's or artists exclusive rights – for example, copying the work – without permission. The Fair Use Doctrine was first established by the courts "...to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." [20](#) The exception was then codified in the Copyright Act of 1976 as 17 USC Section 107. Since then, the courts have struggled to determine consistently how to apply the doctrine. One federal circuit judge has even said that "fair use is one of the most unsettled areas of the law. The doctrine has been said to be so flexible as to virtually defy definition." [21](#)

Fair use is indispensable in higher education, so its well worth the time and resources to learn what you can about the doctrine and use it in good faith. Use it in a way that's fair to the publishers and fair to the campus community.

The Four Factors of Fair Use.

In the delivery and pursuit of education, there will be frequent occasions when you or others need to copy materials protected by copyright. Knowing that virtually all materials – except materials in the Public Domain – are protected, you ask yourself the question: "Do I need to get permission before I copy this?" This is when you make a fair use analysis to determine if the copying qualifies. If it does, then you don't need permission. How do you determine fair use? The federal statute provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

The nature of the copyrighted work;

The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

The effect upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not by itself bar a finding of fair use if such finding is made upon consideration of all the above factors. 22

You can see that fair use is basically limited to journalism, education, and research. Making copies for the purpose of personal entertainment generally doesn't qualify as fair use with the only exception of recording programs on your video recorder for "time shifting." The U.S. Supreme Court has ruled this is fair use. 23 Making a copy of a music file off the Internet is not fair use unless you are doing it for journalism, education or research and the fair use factors juggle in favor of fair use. The first step in making the fair use inquiry is determining that the purpose of copying a copyrighted work is for criticism, comment, news reporting, education, scholarship, or research. If it is, the next step is looking at each of the four factors and seeing if they weigh for or against fair use.

Juggling the Factors of Fair Use.

In order for a copy project to qualify as fair use, it is not necessary for all four factors to weigh in favor. Indeed, some cases suggest that you don't even need a majority of factors to reach a conclusion, since factors have been evenly split and then sorted in order of importance. Congress gave few guidelines on what, exactly, to do with these four factors, but they did say that "...since the doctrine is an equitable rule of reason, no generally applicable definition is possible..." The four factors,

- should be used for "balancing the equities" rather than as a "definitive or determinative" test; and
- are to be weighed together, in light of the objectives of copyright, to promote the progress of science and the useful arts. 24

The courts have given further explanation on how the analysis should be conducted. 25

- Apply the four factors on a "case-by-case basis."
- Do not simplify the task with "bright-line rules."
- Consider the factors together "in light of the purposes of copyright" not separately in isolation.

The fair use test "...involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand." 26

This is not really significant guidance for juggling these factors but it's all we have. Let's consider each factor.

Purpose and Character of the Use.

Do you intend to make a profit or other commercial benefit from your copies or displays? If so, then this factor weighs against fair use. But it doesn't – by itself – prevent the whole fair use test from ultimately qualifying. It is only the first of four factors to consider. Even if the purpose of the copy is to make a profit, other considerations can make this factor weigh in favor of fair use. For example, a company named Bleem copied the screen shots of a Sony Play Station to compare the image quality with its computer emulator screen for advertisement. There's no question that

Bleem did this as part of a commercial activity for profit; in fact, Bleem was a competitor of Sony. The Ninth Circuit Court of Appeals held that using the copy for comparative advertising was a public service, and even though Bleem made the copies for commercial reasons, the purpose of the copies weighed in favor of fair use because the comparative advertising served the public interest. 27 The U.S. Supreme Court found that the purpose of copying a Roy Orbison song by rappers 2 Live Crew – even though clearly for profit and commercial gain – was in favor of fair use because the new song was a parody and "transformed" the copy into essentially a brand new product subject to copyright protection in its own right. 28

But unless your copy somehow serves a public interest or is transformed into a new product, any commercial or profit-making purpose will weigh this factor against fair use. Here are some specific copying projects that a court determined to be against fair use.

- A copy store copying small parts of books and journals for class course packs because the store was a profit enterprise like most businesses. 29
- A large corporate research and development department copying journal articles to save money from buying several journal subscriptions because the traditional practice would be to purchase additional subscriptions. 30
- A news media company copying excerpts from an unpublished manuscript in order to publish an article first because they would sell more magazines. 31

Before looking at the next factor of fair use, keep in mind that the commercial and profit motive of this factor will relate to the last factor, commercial effect. This relation or connection will be explained in that section.

Nature of the Material Copied.

Copyright protects materials that have a minimum level of creativity (See 3. Creative). Consider a seismograph. Created by a machine, the graph serves only to chart pure data. Because there is no creativity or even an artist rendering the graph, it cannot be protected by copyright. Now progress to something slightly more creative like a telephone directory. The published facts, i.e., names, telephone numbers, and addresses, cannot be protected by copyright because the material is only facts. 32 But the compilation of those facts may be protected, "...if it features an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement. In no event may the copyright extend to the facts themselves." 33 The less creative the material is, the more this factor favors fair use. At the other end of the spectrum, you have highly creative materials, poetry, music, paintings, sculptures, plays, movies, and fictional work like novels and short stories. In the middle you have material such as nonfiction, scientific articles, historical accounts, and research in general. Material like this is certainly more creative than telephone book listings, but this factor usually still favors fair use. Materials that are "predominantly factual" or "scientific works" will make this factor lean in favor of fair use. 34

The Ninth Circuit Court has observed that this factor may be the least important of the four, saying the Supreme Court has passed over this factor without giving it much attention, stating that it is often 'not much help.'" 35 The Fifth Circuit Court also says

this factor didn't help or hinder the fair use defense in a case. ³⁶ It may be due to the type of case it is that this factor's importance is diminished.

²⁰ Campbell vs. Acuff-Rose Music, Inc. 114 S. Ct. 1164, 1170 (1994) quoting Stewart vs. Abend, 495 U.S. 207, 236 (1990).

²¹ Princeton University Press vs. Michigan Document Services 99 F.3rd 1381 (6th Circuit 1996). Cert. Den'd. 117 S. Ct. 1336 (1997).

²² 17 USC Section 107

²³ Sony Corp. vs. Universal Studios, Inc. 464 U.S. 417, 454-455 (1984)

²⁴ H.R. Report No. 94-1476, 94th Cong. 2d Sess. 65(1976)

²⁵ Sony Computer Entertainment America, Inc. vs. BLEEM, LLC, (9th Circuit 2000) quoting from Campbell vs. Acuff-Rose Music, Inc.

²⁶ Sony Corp. of Am. vs. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)

²⁷ Sony Computer Entertainment America, Inc. vs. BLEEM, LLC, (9th Circuit 2000) See footnote 25 for web site.

²⁸ Campbell vs. Rose-Acuff Music, Inc., 114 S. Ct. 1164(1994)

²⁹ Princeton University Press vs. Michigan Document Services, Inc., 99 F.3rd 1831 (6th Circuit 1996)

³⁰ American Geophysical Union vs. Texaco, Inc., 60 F.3rd 926 (2nd Circuit 1994).

³¹ Harper & Row Publishers, Inc vs. National Enterprises, 471 U.S. 539, 561 (1985)

³² 17 USC Section 302(a)

³³ Feist Publications, Inc. vs. Rural Telephone Service Co., 499 U.S. 340, 350 (1991).

³⁴ American Geophysical Union (See footnote 30 for the cite).

³⁵ Sony Computer Entertainment America, Inc., vs. BLEEM LLC, Case number 99-17137 (9th Circuit 2000) Online: laws.findlaw.com/9th/9917137v2.html

<<http://laws.findlaw.com/9th/9917137v2.html>>

³⁶ Triangle Publications, Inc. vs. Knight-Rider Newspapers, Inc., 626 F.2d 1171, 1176 (5th Circuit 1980).

Amount of the Material Copied.

The more you copy and the closer the copy is to the original, the less likely it will be fair use.³⁷ But making a copy of the entire work is not conclusively a failed attempt at qualifying for fair use. This is only one factor in four. This factor considers both the quantitative and the qualitative value of the materials that are copied. For example, if the essence or "heart" of a book is contained in only 1percent of the total pages, copying that 1 percent will make this factor lean against fair use. Copying the materials essence or heart is therefore tantamount to copying the entire portion.

The nature of both the copy and the original makes a difference in weighing this factor. If the material copied is photos, images, or audiovisual works, e.g., movies, copying the entire portion is less significant. If the nature of the copy is transformative or productive, like a parody, then copying the entire portion of the original is also less significant. There are no hard-line numerical limits to how much of the material you can copy. Here are some opinions that rule the following portions of copying are too much and weighing this factor against fair use:

- 50 percent of a cake-decorating book for class. 38
- 300 – 400 words (13 percent) copied from President Ford's unpublished memoirs. 39
- Entire articles making a "small percentage" of the periodical in which they were published. 40
- 95 pages (30 percent), 45 pages (18 percent), 78 pages (16 percent), 52 pages (8 percent), 77 pages (18 percent), and 17 pages (5 percent) of various textbooks for course packs in college classes. 41

Opinions that rule that either the portion copied is in favor of fair use or the nature of the copies or originals make this factor less significant:

- Entire copy of movies on video recorders. 42
- The "heart" of a song for creation of a parody. 43
- Copy of one screen shot from a video game that projects 30 screen shots per second. 44
- 45 seconds of a song to create background music for an educational video that was publicly broadcasted on television. 45

You can see how the factors begin to interrelate. The analysis of the amount copied factor is different depending on the first factor (purpose of the copy) and second factor (nature of the original).

Commercial Effect.

This factor considers the extent of harm the copies actually have on the artist's or author's market. How much have sales of the original work been affected because of competition from the copies? More than that, it also takes into consideration the hypothetical harm on that market and the potential market if the infringing copies were a widespread and unrestricted practice. 46 The analysis begins with what exactly *is* the market? For any real or potential harm to a market, the copied product should be in the same market as the original product. The copied product should, to some extent, be a substitution for the original product. Parodies establish a different market than the original. A hip-hop or rap parody of a 60s rock'n roll love ballad appeals to a different audience. 47 The Supreme Court treats this factor differently than the purpose of the use factor. If the purpose of the copy is commercial and profits are sought in the same market by using identical or closely identical products, then adverse commercial effect is presumed. Not only that, but the factor of commercial effect becomes the most important factor of the four. 48 On the other hand, harm in the market by a parody or other product uniquely different and independent from the original product must be demonstrated even if it is a commercial venture. The Supreme Court writes,

Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be

shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing...that meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for noncommercial purpose, the likelihood must be demonstrated. 49

The commercial effect factor is the most difficult to analyze because many pertinent factors are unknown. What market is the copyright holder targeting? Is there even any effort to sell the original product? If the original product is print media and it's out of print, it's a good argument that there is very little, if any, market to affect. Other questions arise. Is there any viable permissions market? But even if the copyright holder has never sold permission licenses, widespread and unrestricted copying could certainly harm a *potential* market.

Suggested Guidelines for Navigating the Commercial Effect Factor.

In education, some guidelines may help individuals with a copy project navigate through some unknown variables of the commercial effect factor analysis. It is possible to keep this factor weighing on the side of fair use by taking certain precautions.

- Avoid copies that you intend to distribute widely that might supplant or substitute for a product that would normally be purchased at a college bookstore or other traditional college vendor.
- Do not post any copies on the World Wide Web with open access. This has the effect of publishing the product. If anything can harm a market, being able to get the product for free online is likely to. As an alternative, consider posting the material on a closed or password-protected site under the TEACH Act
- Avoid making copies for any commercial or profit-making pursuit. As long as you are not selling copies of the original product, the actual market for the original product is not likely to be harmed. Remember that free copies can still harm a market if they are widely copied and distributed.
- In copy or display projects where it appears to be a struggle qualifying for fair use, i.e., two factors are tied against the other two factors, make a documented effort to contact the copyright holder and request permission. Proceed without permission only if you cannot find the copyright holder or cannot get any response *and* you get the approval of your institution's legal counsel first.
- Avoid any copy project where the intention is to save students money on materials they would normally purchase.

Special Fair Use Cases:

The four factors of fair use have received different treatment or balancing in certain cases.

- **Video Time Shifting 50**
The Supreme Court decided that making video recorder copies of entire movies or other programs from cable, satellite, or TV was a fair use. This seems odd

because there was no educational, research, critical, or other purpose recognized by the fair use statute. The court held that the first factor weighed in favor of fair use because the copies were generally made for nonprofit, private home use. The second and third factors were addressed in one sentence because of the nature of televised audiovisual material. The last factor was considered in favor of fair use because the movie studios couldn't prove there was any harm to their market from recording home movies.

- **Parody 51**

The Supreme Court defines parody as:

the use of some elements of a prior author's composition to create a new one that, at least in part, comments on the author's works... If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery of working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.

Far less emphasis appears to be placed on fair use factors 2-4 when the first factor, purpose of the copy, is a new or transformative product. A parody of a song is a new work subject to its own copyright protection and a criticism of the original work. The parody in this case can apparently copy fully creative works like music (nature of the original factor), borrow most of the amount of the original to the extent the parody requires (amount of the material copied factor), and be entirely commercial because the parody has a different audience than the original song and thus poses little or no harm to the original song's market (commercial effect factor). The parody **MUST** criticize the original work to qualify for fair use. 52

Fair Use Slide Rule.

Several fair use charts and other tools are available online for conducting the analysis. It is a far better idea to try and learn the fair use factors and understand what tips them either way and their interrelationship than to plug data blindly into a mechanical flow chart. If it were that easy, the process would defy the approach mandated by the courts, and it would be inherently erroneous. But charts are helpful in remembering all the circumstances that push a fair use factor either way. While the following "slide rule" is hardly unique among fair use charts, some may prefer it if it makes the analysis easier.

Purpose of Use

Favoring Fair Use

- Non profit _____
- Education _____
- Research _____
- Criticism _____
- Journalism _____
- New and Different Product _____
- Comparative advertising 53_____
- Parody _____

Against Fair Use

For profit or commercial purpose ____

Entertainment ____

Save costs ____

Other purposes ____

Total Favoring _____ Total Against _____

53 *Sony vs. BLEEM* (See footnote 35)**Nature of Material Copied****Favoring Fair Use**

Published ____

Out of print 54 ____

More factual than creative ____

Against Fair Use

Unpublished ____

Creative or fictional 55 ____

Total Favoring _____ Total Against _____

54 *Sony vs. BLEEM* (See Footnote 35)55 Like music, poetry, play scripts, fictional novels, short stories, paintings ect...**Amount of the Material Copied****Favoring Fair Use**

Just enough to serve a fair use purpose ____

Small amount of total ____

Against Fair Use

Heart of the work ____

More than is needed to serve purpose ____

Large amount of total ____

Total Favoring _____ Total Against _____

Commercial Effect**Favoring Fair Use**

Copy is not a substitute for the original product ____

Copy is not for sale or widely distributed ____

Copy is not published or posted online ____

Parody – has different market ____

Cannot get permission ____

Against Fair Use

Copy can substitute for original ____

Copy competes in sales of original ____

Copy is widely distributed ____

Copy is published or posted online ____

Copyright holder has established permissions market ____

Total Favoring _____ Total Against _____

Commercial Effect

Four Factor Balance Sheet

Purpose of the Use:	For: ___	Against: _____
Nature of Material Copied:	For: ___	Against: _____
Amount of Material Copied:	For: ___	Against: _____
Commercial Effect:	For: ___	Against: _____
	Total Favoring _____	Total Against _____

Tie Breaker

In ties, look at the circumstances of the copy project and either diminish the value of the second factor or increase the value of the fourth factor to break the tie.

More on the Four Factors of Fair Use.

For actual case studies on how the fair use analysis was applied, refer to Chapter 5 of Copyright Law On Campus. [56](#)

Classroom Guidelines

If you are not comfortable with using the four factor juggling process in order to determine fair use; if the prospect of a potential copyright infringement lawsuit is more risk than you can tolerate, then there is an alternative. The so-called "Classroom Guidelines" presents the most conservative safe harbor, short of only using copies for which permission has been received. Although the Guidelines are reported by Congress as, "...a reasonable interpretation of the *minimum* standards of fair use," they are not the *legal* standards of fair use. [57](#) Some college faculty and administrators have confused the Guidelines as being the limits set by federal law. Sadly, they are adhering to rigid and impractical limits on fair use copying than the law requires. If a zero litigation risk factor is your preferred copyright policy, the Guidelines are available here: [Classroom Guidelines](#)

The Future of Fair Use

There are many reasons that suggest the progressive trend in higher education is to learn and utilize fair use far more than it has in the past. The nature of education is changing due to technology and the digital age, which are now instrumental in how education is delivered. The [TEACH Act](#) and [Digital Millennium Copyright Act](#) are new legislation that provide both restrictions and privileges in using copyright protected materials in education through new mediums like the World Wide Web and distance education. As the Consortium for Educational Technology in University Systems (CETUS) so aptly states:

It is urgent, timely, and in the best interests of higher education that our universities raise a coordinated voice to address the topic that is known as the "fair use" of copyrighted works. The fair use doctrine is under debate now in several different forums – locally, nationally, and internationally. The debate involves both public and proprietary interest. It arises because of the changing dynamic between the broad sweep of "intellectual properties" and the deployment of powerful and rapidly growing evolving communications

techniques and infrastructures. These developments already have demonstrated their significant consequences for higher education and will have more pervasive effects in the future. 58

37 See *Sony vs. Bleem* (see footnote 35 for the cite)

38 *Marcus vs. Rowley* 695 F. 2d 1171 (9th Cir. 1983)

39 *Harper & Row Publishers, Inc. vs. Nation Enterprises*, 471 U.S. 539 (1985)

40 *American Geophysical Union vs. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994)

41 *Princeton University Press vs. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996) (en banc). The page numbers and proportions come from the initial three judge panel opinion.

42 *Sony Corp. vs. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984).

43 *Campbell vs. Rose-Acuff Music, Inc.* 114 S. Ct. 1164, (1994)

44 See *Sony vs. BLEEM* (See footnote 35 for the cite).

45 *Higgins vs. Detroit Education Broadcasting Foundation*, 4 F. Supp. 2d 701 (E.D. Mich. 1998).

46 *Sony Corp. vs. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

47 *Campbell vs. Rose-Acuff Music, Inc.* 114 S. Ct. 1164, (1994)

48 *Harper & Row Publishers, Inc. vs. Nation Enterprises*, 471 U.S. 539, 566 (1985)

49 *Sony Corp. vs. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

50 *Sony Corp. vs. Universal* (See footnote 49 for the cite)

51 *Campbell vs. Acuff-Rose Music*(see footnote 47 for the cite)

52 *Dr. Seuss vs. Penguin Books*, laws.findlaw.com/9th/9655619.html

<<http://laws.findlaw.com/9th/9655619.html>> (9th Cir. 1997)

56 Available in Holland Library(WSU) or through WSU Press at (509)335-3518.

57 *Princeton University Press vs. Michigan Document Services, Inc.*, 99 F.3rd 1381(6th Cir. 1996) (Ryan, J. dissenting)

58 <<http://www.cetus.org/fair4.html>>

Classroom Guidelines

Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

A chapter from a book;

An article from a periodical or newspaper;

A short story, short essay or short poem, whether or not from a collective work;

A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper;

Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; provided that:

The copying meets the tests of brevity and spontaneity as defined below; and,
 Meets the cumulative effect test as defined below; and,
 Each copy includes a notice of copyright.

Definitions

Brevity

(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in “i” and “ii” above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) “Special” works: Certain works in poetry, prose or in “poetic prose” which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph “ii” above notwithstanding, such “special works” may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Spontaneity

(i) The copying is at the instance and inspiration of the individual teacher, and

(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in “ii” and “iii” above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

III. Prohibitions as to I and II Above

Notwithstanding any of the above, the following shall be prohibited:

(A) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur

whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.

(B) There shall be no copying of or from works intended to be “consumable” in the course of study or teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

(C) Copying shall not:

(a) substitute for the purchase of books, publishers’ reprints or periodicals;

(b) be directed by higher authority;

(c) be repeated with respect to the same item by the same teacher from term to term.

(D) No charge shall be made to the student beyond the actual cost of the photocopying.

APPENDIX L

UNIVERSITY OF NORTH CAROLINA POLICY

Patent and Copyright Policies

MEMORANDUM

TO: Deans, Directors, and Department, Chairs
 FROM: Christopher C. Fordham, III
 SUBJECT: Revision of Board of Governors' Patent and Copyright Policies; Adoption by The Board of Trustees of Patent and Copyright Procedures
 DATE: August 30, 1983

On June 10, 1983, the Board of Governors approved the revised Patent and Copyright Policies. On August 19, the Board of Trustees of the University at Chapel Hill approved Patent and Copyright Procedures implementing for this institution the revised Policies. Copies of both documents are attached. This memorandum provides the reasons for the revisions, highlights the differences between the old Patent Policy and the revised version, and summarizes the new Procedures.

PATENT AND COPYRIGHT POLICIES

A principal reason for several policy revisions is the recent revision of federal law relating to federally funded inventions giving nonprofit organizations, with limited exceptions, a right of first refusal to Title in inventions they have made in performance of government grants and contracts. Other policy revisions were developed following evaluation of policies of major research institutions around the country and a determination that a revised policy framework might enhance the utilization of our inventions to the ultimate benefit of the public. Still further changes provide clarification and elaboration of requirements under the former version.

1. Coverage

Maintaining the scope of the former Patent Policy, the new Policies clearly apply to faculty, staff, students, and in some cases independent contractors, where there is any use of institutional time, resources, or facilities by the covered individual. The revision also more clearly identifies the kinds of intellectual and physical property to which it applies. Section I and Section IV of the Policies cover all inventions; Section XII provides, as the old Policy did, different treatment for copyrightable matter; and Section XIII addresses for the first time service marks and trademarks.

2. Obligations of Covered Persons (Employees, Students, Others)

Section IX of the revision states the duty on the part of faculty, staff, and students to disclose their inventions to the University. Such Personnel need not wait until they have perfected their inventions before making the disclosure.

Conflicting claims to an invention can occur where a University employee is hired as a consultant to a private company. Section VIII is included to alert inventors not only to the possibility of conflict with the Policies resulting from the consulting arrangement but also to the provisions of the Board of Governors' Policy on Outside Employment.

3. Income from Inventions

For federally-assisted inventions, the new law requires that the institution share royalties with the inventor and that the net balance retained by the institution be used to support scientific research or education. Both requirements were satisfied by the former Policy and are continued in Section V of the new Policies, with the same minimum of 15% of gross royalties specified for inventors.

4. Publication and Confidentiality

The revision, like the former version, specifies guidelines pursuant to which Publication might be temporarily delayed to allow time to secure patent or other protection. Another issue relating to confidentiality concerns trade secrets, to preserve freedom of publication of student work, students are prohibited from working on any project where publication is restricted beyond the time period specified in Section, VII. See also Section XIII.

5. Technology Transfer

Because of the need to assure that the constituent institutions have the ability to adapt to the varied situations that arise in the technology transfer context, the Policies' Section XI generally and broadly authorizes the use of patent management agents, in-house capability, or some other mechanism that in any given situation might be appropriate and consistent with the Policies' goals.

6. Copyright

The provisions of the former version have been continued largely unchanged, to the effect that generally, individual authors retain the copyright to works they produce on University time.

PATENT AND COPYRIGHT PROCEDURES

1. Generally

Pursuant to the Policies, Patent and Copyright Procedures have been developed specifically for the University at Chapel Hill and approved by the Board of Trustees. The procedures should be most helpful to both inventors and administrators by clarifying the invention disclosure and management process.

2. Invention Disclosure

The process of invention disclosure to the Office of Research Services is explained in Section B, and a revised invention disclosure form is provided. New reporting requirements, particularly with respect to publications relating to inventions, appear in response to federal regulations.

3. Patent Committee; Invention Evaluation and Management

The role of the Patent Committee in invention evaluation and management is described, and a list of invention management options is provided in Section B.

4. Waiver of University Rights

Where an inventor believes his or her invention does not fall within the Policies, a procedure is provided through which a waiver of University rights might be obtained.

5. Royalties

Though the Board of Governors' Policies provide only a minimum of 15% of gross royalties for the inventor, Section E of the Procedures for the University at Chapel Hill provides as an incentive that the inventor shall receive 50% of the first \$25,000 of net royalties, 35% of the next \$25,000, 20% of the next \$25,000, and 15% thereafter, and in no case less than 15% of gross royalties. This is a significant change, and I trust it will be favorably received by affected personnel.

6. Copyright Procedures

The Policies' provisions concerning authors' rights to copyrighted material are clarified and a more explicit definition of the "work for hire" concept is supplied.

7. Products of Research

University personnel occasionally are approached by personnel at other universities or at commercial establishments with the request that they share some physical product of their University research (other than copyrightable matter). The transfer to others of the physical products of research (compounds, monoclonal antibodies, etc.), be they patentable or not, can implicate important University, personal and (sometimes) federal interests. To protect such interests, any transfer should be preceded by contacting either the Office of Research Services (966-5625) or Susan Ehringhaus, Chair of the University Patent Committee (962-1219). Where necessary, contractual agreements will be drafted to provide adequate protection.

I ask that you bring these very important matters to the attention of affected personnel in your administrative jurisdiction. Additional copies for such personnel are available upon your or their request from the Office of Research Services or from Ms. Ehringhaus. Any questions should be directed to those offices, which are available to assist you in the explanation and implementation of these documents.

Thank you for your help.

THE UNIVERSITY OF NORTH CAROLINA

Patent and Copyright Policy

I. Policy

The University of North Carolina is dedicated to instruction, research, and extending knowledge to the public (public service) . It is the policy of The University to carry out its scholarly work in an open and free atmosphere and to publish results obtained therefrom freely. Research done primarily in anticipation of profit is incompatible with the aims of The University. The University recognizes, however, that patentable inventions sometimes arise in the course of research conducted by its employees and students using University facilities. The Board of Governors of The University of North Carolina has determined that patenting and licensing of inventions resulting from the work of University personnel, including students, is consistent with the purposes and mission of The University.

The aim of the patent policies of The University is to promote the progress of science and the useful arts by utilizing the benefits of the patent system consistent with the purposes for which it was established by Article I, Section 8, of the Constitution of the United States:

The Congress shall have 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.

Patents provide a means to encourage the development and utilization of discoveries and inventions. These policies have been established to ensure that those inventions in which The University has an interest will be utilized in a manner consistent with the public good through patents, licenses, or otherwise. The University is also aware of the value of patents in directing attention to individual accomplishment in science and engineering. Where possible, The University should make inventions resulting from its research available to industry and the public on a reasonable and effective basis and at the same time provide adequate recognition to inventors. Patents and their exploitation, however, represent only a small part of the benefits accruing to the public from the research program of The University.

A portion of the research conducted by The University is supported by government and a portion by private industry. Service to the public, including private industry, is an integral part of the University's mission. In agreements with private industry or other private organizations, the constituent institutions of The University must keep the interests of the general public in view. The rights and privileges set forth in cooperative agreements or contracts, with respect to patents developed as a result of research partly or wholly financed by private parties, must be fair and just to the inventors, the sponsor and the public. Research should be undertaken by The University under support from

private parties only if it is consistent with and complementary to The University's goals and responsibilities to the public.

II. Objectives

The principal objectives of The University of North Carolina Patent and Copyright Policies set forth herein are:

- 1) to provide appropriate incentive to creative intellectual effort by faculty, staff, students, and others associated with the constituent institutions of The University;
- 2) to establish principles for determining the interests of the constituent institutions, inventors, and sponsors in regards to inventions and/or discoveries;
- 3) to enable the constituent institutions to develop procedures by which the significance of inventions and/or discoveries may be determined and brought to the point of commercial utilization;
- 4) to provide the means for placing in the public realm the results of research, while safeguarding the interests of The University, inventor, and sponsor; and
- 5) to recognize the right of the inventor to financial benefits from the invention or discovery.

III. Coverage

The University of North Carolina Patent and Copyright Policies apply to all University employees at each constituent institution, both full and part time, including faculty, other professionals exempt from the Personnel Act, staff subject to the Personnel Act, and students of each constituent institution. Upon prior written agreement between persons and the constituent institutions, these Policies may be applied to persons not associated with The University who make their inventions available to the institutions under circumstances where the further development and refinement of the inventions are compatible with the research programs of the constituent institutions.

IV. Patent Ownership

Condition of Employment and Enrollment

The Patent and Copyright Policies of The University of North Carolina, as amended from time to time, shall be deemed to be a part of the conditions of employment of every employee of each constituent institution, including student employees, and of the conditions of enrollment and attendance by every student at each constituent institution.

Ownership

With the exception of "Inventions made on Own Time," hereinafter defined, every invention or discovery or part thereof that results from research or other activities carried out at a constituent institution, or that is developed with the aid of the institution's facilities, staff, or through funds administered by the constituent institution, shall be the property of the constituent institution and, as a condition of employment or enrollment and attendance, shall be assigned by the University inventor to the constituent institution in a manner determined by the constituent institution in accordance with these Policies.

Patent Application

Patents on inventions made by University employees or students, may be applied for in any country by the constituent institution or through an authorized agent(s) or assignee(s). The constituent institution shall exercise its rights of ownership of such patent(s), with or without financial gain, with due regard for the public interest, as well as the interests of inventors and sponsors concerned.

Inventions Made on Own Time

Inventions or discoveries made by University personnel or students entirely on their personal time and not involving the use of University facilities or materials are the property of the inventor except in case of conflict with any applicable agreement between the institution and the federal or state government or agency thereof. For purposes of this provision, an individual's "personal time" shall mean time other than that devoted to normal or assigned functions in teaching, extension, University service, or direction or conduct of research on University premises or utilizing University facilities. The term "University facilities" shall mean any facility, including equipment and material, available to the inventor as a direct result of the inventor's affiliation with the University, and which would not be available to a non-University individual on the same basis.

Personnel or students who claim that inventions are made on personal time have the responsibility to demonstrate that inventions so claimed are invented on personal time. All such inventions shall be disclosed in accordance with the institution's disclosure procedures applicable to inventions made on University time or with the use of University facilities, materials or equipment and shall demonstrate the basis of the inventor's claim that only personal time was utilized. In each instance so demonstrated to conform to the definition of personal time, the institution shall acknowledge in writing that the invention is the sole property of the inventor in accordance with the "waiver" provision, below.

If the inventor so desires, inventions or discoveries made on personal time and utilizing the inventor's own facilities and materials may be assigned to the institution. Under this arrangement, the procedures will be the same as for inventions or discoveries made by university personnel on University time and/or with the use of University facilities and materials.

Waiver and Release of University Rights

Pursuant to these Policies and to its patent procedures, a constituent institution, after consultation with the inventor, shall cause its rights to subsequent patents, if any, to be waived to the inventor if the institution is convinced that no University facilities, time, or materials were used in the development of the discovery or invention, that it was made on personal time, and that such waiver would not conflict with any pertinent agreement between the institution and a sponsoring agency or agencies. Pursuant to these Policies and to its patent procedures, a constituent institution, after consultation with the inventor, may in its discretion and upon such terms as it deems appropriate, cause its rights to the discovery or invention, if any, to be released and waived to the inventor if the institution is convinced that the discovery or invention is clearly one that is non-patentable, that it

does not warrant further evaluation as to patentability, or if the discovery or invention has been returned to the institution after negative evaluation by the institution's agent(s) .

V. Income from Patents

The Inventor

The inventor shall receive not less than fifteen percent (15%) of the gross royalties derived from licensing or income from assignment or sale of each patent resulting from his invention and owned by the constituent institution pursuant to these Policies. With this limitation, the exact proportion shall be determined in accordance with the institution's patent procedures as approved by that institution's Board of Trustees and the President.

The Institution

Income earned by each constituent institution from its patent and licensing activity shall be held in a separate trust fund by that institution to support research. The particular unit of the institution employing the inventor or furnishing the research facilities will be given preferential consideration, though not necessarily exclusive consideration, in the allocation of such royalty income by the institution. Allocations from such trust funds shall be made by the Chancellor of each institution after receiving recommendations from the institutional Patent Committee.

VI. Specific Conditions Governing Sponsored Research

Government Sponsored Research

Patents on inventions arising from research financed by the United States Government may be controlled by the terms of the grants and contracts specified by the government agency pursuant to Federal law. In some cases, the government claims rights to patents resulting from research financed under contracts supported by government agencies. Except as provided by Federal law or by government-supported grants or contracts, or when no patent rights are claimed by the United States Government, or when such rights are waived by the government, patents arising from government sponsored research are controlled by these Patent and Copyright Policies. When a patent arising out of research supported under government grants or contracts is owned by a constituent institution, that institution will, if requested, agree to a non-exclusive royalty-free license for use by the government of such patent. If such a patent is owned by the government, the institution shall be free to use the invention so covered for its own scientific and educational purposes without payment of royalty or other charge, consistent with Federal Law.

University Research Sponsored by Non-Governmental Entities

The University must ensure that its facilities and the results of the work of its employees are applied in a manner which best serves the interests of the public. Likewise, the legitimate interests of a private sponsor who provides financial or other support to research carried out through the constituent institutions must be considered. Constituent institutions should normally reserve the right to ownership of patents on inventions

arising out of research supported in whole or in part by grants or contracts with nongovernmental organizations or firms. Contracts or agreements which are entered into between institutions and such organizations or agencies should contain clauses setting forth such a reservation unless deviations therefrom are requested by the sponsor and approved by the institution consistent with the public interest. In the interest of fair treatment to the sponsor in consideration for the sponsor's investment and in the interest of discharging the institution's obligation to the public in the application of its facilities and its employees' time and talent, special provisions may be negotiated by the institution in such non-government sponsored contracts, upon request, provided that the institution retains the right to use the invention for its own research, educational, and service purposes without payments of royalty fees, that the institution requires the sponsor to use due diligence in the commercial use of the invention, and that the institution retains the right freely to publish the results of its research after a reasonable period necessary to protect the rights of the parties and to allow for the filing of a patent application.

VII. Publication

A major function of The University of North Carolina is the advancement and dissemination of knowledge. Any practice that unnecessarily restricts the publication of results of scientific work is to be avoided. However, it is recognized that the full development of useful inventions or discoveries may be dependent upon the securing of patent protection that will enable the commercial utilization of the discoveries or inventions. Accordingly, under certain circumstances it may be necessary to delay for a minimum period the publication of results of research.

If a sponsor proposes to support a research effort that will involve a limited exclusive license to use of patents resulting therefrom, the agreement with respect to publication shall include the following. First, the sponsor must agree that the results of the research may be published if desired by the investigators or research workers. Second, in order that patent applications not be jeopardized, the constituent institution, the investigators, and research workers may agree that any proposed publication will be submitted to the sponsor with a notice of intent to submit for publication. If within a period of no more than 90 days from the date of such notice the sponsor fails to request a delay, the investigators, research workers and institution shall be free to proceed immediately with the publication. However, if the sponsor notifies the institution that a delay is desired, the submission of the manuscript to the publisher shall be withheld for the period requested, but in no event shall the total period of delay be longer than one year from the date of the notice of intent to submit for publication mentioned above. Such a period will permit the sponsor to have the necessary patent applications prepared and filed but will not unduly restrict the dissemination of scientific knowledge.

VIII. Avoidance of Conflicts

Conflicts involving patentable inventions and discoveries may arise when a constituent institution's personnel, including students enter into personal consulting agreements with outside firms and organizations. The agreements that business firms wish to have executed by those who are to serve as their consultants frequently contain provisions as to the licensing or assignment of the consultant's inventions and patents. Unless such provisions are narrowly worded, they usually will apply to areas in which the individual's University work lies and thus come into conflict with the obligations owed by the individual to the University under these Policies, either with respect to the rights of the constituent institution itself in an invention or with respect to the rights of a sponsor of research in the same field or subject matter.

Prior to signing any consulting agreement that deals with patent rights, trade secrets, or the like, where any University time, facilities, materials or other resources are involved, University personnel and students must bring the proposed agreement to the attention of the appropriate administrators of the constituent institution in accordance with its patent procedures and either obtain a waiver of University rights or otherwise modify the consulting agreement to conform with these Policies, as is determined by the institution in its discretion.

The foregoing requirements are in addition to, and do not eliminate the necessity for, any approval which may be required by The University of North Carolina Policy on External Professional Activity of Faculty and Other Professional Staff.

IX. Duty to Disclose Discoveries and Inventions

All individuals whose discoveries and inventions are covered by these Policies have a duty to disclose their discoveries and inventions promptly, in accordance with the patent procedures adopted by each constituent institution pursuant to these Policies. The duty to disclose arises as soon as the individual has reason to believe, based on his or her own knowledge or upon information supplied by others, that the discovery or invention may be patentable. Certainty about patentability is not required before a disclosure is made. Individuals shall execute such declarations, assignments, or other documents as may be necessary in the course of invention evaluation, patent prosecution, or protection of patent rights, to insure that title in such inventions shall be held by the constituent institution, where these policies indicate the institution shall hold title, or by such other parties as may be appropriate under the circumstances.

X. Patent Committees

The Chancellor of each constituent institution of The University of North Carolina shall appoint a Patent Committee, consisting of no less than three members, one of whom shall be designated by the Chancellor to serve as chairman. The Committee for the institution shall review and recommend to the Chancellor or his delegate the procedures for the implementation of these Policies; shall resolve questions of invention ownership that may arise between the institution and its faculty, staff, or students or among individuals; shall recommend to the Chancellor the expenditure of the patent royalty fund; and shall make such recommendations as are deemed appropriate to encourage disclosure and assure prompt and expeditious handling, evaluation, and prosecution of patent opportunities.

The chairmen of the institutional patent committees, or their delegates, shall meet as an All-University Patent Committee. The meetings of the All-University Patent Committee shall be at the call of the President of The University or his delegate who shall serve as its chairman.

XI. Patent Management

The Chancellor of each constituent institution, or any person designated by him, is authorized to negotiate with reputable agencies or firms to secure for each institution arrangements for patent management, including competent evaluation of invention disclosures, expeditious filing of applications on patents, and licensing, and administration of patents.

A constituent institution is authorized to administer its own patent management and licensing program without the use of a patent management agent, if it determines that such arrangement may better serve institutional and public interests. Nothing in this section shall be construed to permit the reduction of the minimum share due an inventor as specified in Section V of these Policies.

XII. Copyrights

As a general rule, all rights to copyrightable material are the property of the creator. The distribution of royalties, if any, is a matter of arrangement between the creator and his publishers or licensees. Different treatment may be accorded by the institution in case of specific contracts providing for an exception, in cases where the constituent institution or sponsor may employ personnel for the purpose of producing a specific work, where different treatment is deemed necessary to reflect the contribution of the institution to the work, as in the case of software or audiovisual material, or where a sponsored agreement requires otherwise.

XIII. Service Marks, Trademarks and Trade Secrets

Service marks and trademarks are the property of the constituent institutions, and without express authorization from the Chancellor or his designee, no steps shall be taken for securing trademarks or service marks by usage or registration with respect to products resulting from or arising out of research or other activities carried out at a constituent institution or developed with the aid of its facilities or staff, or produced through funds administered by the constituent institution. The institutions are hereby authorized to register such marks are deemed by that institution to be appropriate and to license the use of such marks, provided that the income from such licensing shall be used to support the research and educational programs of the institution and not accrue to the personal benefit of University personnel.

The use of trade secret agreements to protect discoveries and inventions developed at the constituent institutions may not be consistent with the aims and purposes of The University of North Carolina. Special provisions may be required to protect the free dissemination of students' degree-related work.

XIV. Procedure

The Board of Trustees of each constituent institution shall adopt patent procedures that are consistent with and implement these Policies, taking into account the nature and scope of the institution's programs. The institutional patent procedures shall be reviewed and approved by the President or his representative prior to approval by the Trustees.

XV. Exceptions

Exceptions to the above policies are authorized if approved by the President following a favorable review and recommendation from the pertinent institutional committee or the All-University Patent Committee. Before approving an exception, the President must determine that, on the basis of the evidence available, such exception is in the public interest and is consistent with The University's responsibilities to the public.

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VITA

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