

# Creating Intellectual Property Policies and Current Issues in Administering Online Courses

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**Beth Cate**  
Indiana University

**David Drooz**  
North Carolina State University

**Pierre Hohenberg**  
New York University

**Kathy Schulz**  
New York University

## Table of Contents

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<b>Section I: Creating an Intellectual Property Policy .....</b>	<b>2</b>
<b>Creating Intellectual Property Policies and Current Issues in Administering IP Policies</b>	<b>2</b>
Part I. Practice Guide .....	2
Part II . Sample Policy .....	8
<i>University Intellectual Property Policy Preamble</i> .....	9
<i>Patent Policy</i> .....	11
Appendix A .....	21
<i>University Patent Agreements</i> .....	21
Appendix B.....	22
<i>Implementation of Policy</i> .....	22
<i>Copyright Policy</i> .....	23
Appendix A .....	35
<i>Implementation of Policy</i> .....	35
<i>Frequently Asked Questions under the Patent Policy of the University</i> .....	36
<i>Frequently Asked Questions under the Copyright Policy of the University</i> .....	40
<b>Additional Resources .....</b>	<b>45</b>
Indiana University Intellectual Property Policy: Summary of Key Provisions .....	45
Summary of Copyright Policy at North Carolina State University .....	48
<i>NC State University Advice Memo: Volunteer Agreement on Copyright</i> .....	51
<i>Volunteer Agreement to Grant Copyright License to NC State University</i> .....	51
<i>Volunteer Agreement to Assign Copyright to NC State University</i> .....	52
<i>NC State University Advice Memo: Copyright of Works Created by Independent Contractors</i> .....	53
<b>Section II: Distance Education and Faculty Rights .....</b>	<b>54</b>
<b>Faculty Rights and Distance Education Courseware: Coming to Terms with Intellectual Property Policies .....</b>	<b>54</b>
Reference Sources for Creation of Intellectual Property Policies .....	63
<b>Checklist of Issues for Evaluating the Adequacy of Institutional Intellectual Property and Employment Policies and Procedures for Electronic Courseware .....</b>	<b>64</b>
<b>Section III: Online Course Hosting.....</b>	<b>66</b>
<b>Online Course Hosting — A Case Study .....</b>	<b>66</b>
Attachment 1 .....	77
<i>Instructional Services Accessibility Primer &amp; Checklist Instructional Services</i> .....	77
Attachment 2.....	88
<i>NCSU Web Hosting Policy</i> .....	88



# Section I: Creating an Intellectual Property Policy

## **CREATING INTELLECTUAL PROPERTY POLICIES AND CURRENT ISSUES IN ADMINISTERING IP POLICIES**

November 7–9, 2007

Pierre Hohenberg, Senior Vice Provost for Research  
Kathy Schulz, Associate General Counsel  
New York University, New York, NY

This paper consists of two parts: first, a brief practice guide and, second, a sample intellectual property policy covering patents and copyrights, with frequently-asked questions (FAQs) following each substantive part of the policy. The practice guide is provided to guide lawyers and their clients in thinking about beginning the process of adopting (or modifying) an intellectual property policy, with cross references to the attached sample policy (where relevant). The sample policy is the result of an extensive committee process, but one which has not yet been finalized, and the policy has not yet been adopted; therefore, the sample policy is offered solely for educational purposes as an illustration of the issues that arise in formulating such policies and how they might be resolved.

### **Part I. Practice Guide**

1. When is it time for a college or university to consider updating or adopting an intellectual property policy?
  - a. Significant changes in law have occurred
  - b. Technological and/or cultural changes (e.g. the development of the Web and online education) have occurred
  - c. If your policy has not been updated in more than ten years
  - d. If you consistently find that examples posed by practices on your campus are not adequately addressed by your existing policy
  - e. If you don't have a policy in place which covers intellectual property rights and practice
  
2. Recommendations for organizing the policy effort on campus
  - a. Intellectual property issues arise from the core academic activities of the university community, namely teaching, study and research, and the chief academic officer of the institution should be responsible for the policy effort

- b. Typically, significant policy efforts are the product of university-wide committees or adopted pursuant to other mechanisms for the formulation of policy
  - c. A chair of the committee should be appointed
  - d. Consider whether to create an administrative working group which, together with the chair, would collect and discuss notes on meetings, varying ways of addressing issues, and the actual language of a draft policy
  - e. Representatives on the committee should include the following areas:
    - technology transfer
    - sponsored research and programs
    - each of the academic schools or divisions within the university including, in particular, schools or divisions where significant research is conducted
    - legal counsel
    - libraries, museums and archives
    - information technology or computing services
    - faculty senate or other governing body
    - student body
  - f. Consider whether it is desirable to have subcommittees or working groups for different purposes. Creating subcommittees may enable committee meetings to remain more focused and efficient while, at the same time, allowing development of important issues and consideration of the views of persons outside the committee. All subcommittee work should be reported back to the committee in some form. Topic-specific subcommittees could be formed around any issue of concern including software, open source and similar issues, student ownership, and faculty consulting
  - g. Determine in advance what steps will be necessary, once the committee has approved a draft policy, to approve and publish the policy as a university policy. Such steps are likely to include approval of senior administration, discussion at a university senate meeting (or equivalent) and approval by the board of trustees or regents.
3. Mission of committee and “ground-rules”
- a. What is the scope of the committee’s charge? Does the subject matter for consideration by the committee include all or some of the following:
    - copyrights
    - patent rights
    - trademark rights
    - fair use issues relating to use of copyrighted materials by students, faculty and staff on campus
    - coursepacks
    - issues relating to the use of the university’s name
    - related conflict of interest issues

- related conflict of commitment issues including consulting
  - b. It is important to discuss the scope of the committee's charge with the committee and establish ground rules as to what is and what is not to be covered. Other ground rules could include the approval process for the final policy, absenteeism from committee meetings, confidentiality of committee proceedings until policy is proposed, etc.
4. Basic issues to consider in an intellectual property policy:<sup>1</sup>
- a. Ownership
    - i. **General Rule Regarding Faculty Work:** Universities have traditionally declined to assert ownership of their employed faculty's independent scholarly works such as course materials (e.g. syllabi), scholarly articles and books, artwork, software, etc. See Policy III(A). This rule differs from the general rule applicable to patentable inventions, see Patent Policy III.
    - ii. **Principal Exceptions:** It is also typical for the university to claim ownership of intellectual property, as an exception to the general rule stated above, in situations where such property was created with substantial use of university resources, created under institutional auspices or as part of a larger research team, or created in the course of a sponsored research project. See Policy III(B)(3),(5),(6) and (7). Despite allocation of ownership of intellectual property to the university, the faculty involved with the work should retain a right to publish scholarly articles or books about the work. See Policy III(B)(7)
    - iii. **Visitors:** Visitors participating in research on campus should be encouraged to sign a written agreement clarifying the respective institutions' rights in resulting intellectual property, prior to undertaking the research. See Policy II(C)
    - iv. **Employees:** The intellectual property created by employees (other than faculty), acting within the scope of their employment (whether as administrators or as participants in research), should be owned by the university under applicable law; such employees should be able to engage in scholarly activities and writings about such intellectual property. See Policy III(B)(4).

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<sup>1</sup> The issues listed in Sections 4 and 5 focus on copyright issues, given the general topic of this conference, although many concepts are applicable, either directly or by analogy, to patent issues. Unless otherwise noted, all cross references are to the Copyright Policy attached hereto.

- v. **Students:** Students should own the rights to the intellectual property arising in the course of their course work and other educational activities, see Policy IV(A). Exceptions similar to those applicable to faculty (e.g. participation in university-sponsored research) should apply, see Policy IV(B). Different rules may also apply to student involvement with faculty research where the student's work is directed by the faculty member, see Policy IV(D) and (E).

b. Use of Materials

- i. **By Faculty:** The presumption is that faculty-owned materials may be used without restriction by, or accounting to, the university. The university may retain a license to certain materials created and owned by faculty such as material created for classroom use, see Policy III(B)(1). The university is likely to also have an interest in regulating any material which makes use of the university's name or will involve the faculty creator in teaching activities, see Policy III(C).
- ii. **By the University:** The university will affirmatively seek to license materials which it owns in furtherance of its charitable mission to support education and research and the widest possible use of the results of research for the public good. Most, if not all, universities share any proceeds resulting from commercialization of university-owned intellectual property with the creators, see Policy V. The ratio for sharing proceeds may vary and some university policies cap the amount which may be paid to creators.

5. Specific issues which are likely to arise:

- a. **Distance Education:** Materials created as part of distance education programs may be treated separately within a policy or may be treated as part of other instructional activities generally, see Policy III(C). Because instructional activities of all types implicate the core educational function of the university and often implicate use of the university's name and conflict of commitment and conflict of interest issues, separate consideration of these types of activities within a policy is advisable. Additionally, creation of distance education materials by faculty are likely to involve investment of resources by the university and lead to, at a minimum, a retained interest on the part of the university, see Policy III(C)(2).
- b. **Reproductions of Lectures:** In addition to distance education activities, or as part of such activities, technology may be used to create podcasts of lectures or other devices to replicate faculty lectures for offer to greater numbers of students across broader territories. Faculty are likely to be concerned about such activities

and their role in controlling and modifying content, use of their name and likeness, and obtaining credit for, or sharing proceeds from, use of their lectures.

Concepts such as “distance education” and “podcasting” are likely to evolve as technology develops. It is important that the policy use language which is sufficiently generic to provide adequate coverage for these and other activities without requiring updates to the terms of the policy as technology changes.

- c. **Consulting by Faculty:** It is in the interests of both faculty and the university to clarify under what circumstances faculty will be free to transfer ownership of materials created in the course of consulting to an outside party. In all cases, the university’s intellectual property policy should apply in such a manner as to ensure that any conflict is resolved in a manner that is consistent with the policy. Analysis of consulting, and whether faculty are free to own and/or transfer rights to a third party, is likely to include consideration of the conflict of commitment policy applicable to outside consulting, whether the faculty member is involved with university research in the same area as the consulting, whether the consulting involves teaching activities, whether any use of the university’s name is involved and whether university resources were involved with the creation of materials. See, generally, Policy III(D).
- d. **Substantial Use of Resources:** What constitutes substantial use of university resources will vary from institution to institution. Whether resources used to create materials are “substantial” is often a criterion used to distinguish between materials owned by the university and those owned by faculty. Examples of non-substantial resources are likely to include resources that are widely available to all faculty such as secretarial support, desktop computers and library facilities. Substantial resources might include specialized computer resources or other equipment and significant use of student or research support. See, generally, Policy III(G)(2).
- e. **Open Source Code:** Increasingly, faculty and others are interested in making software widely available using open-source licensing. The open-source model typically provides that software is freely licensed on the condition that users incorporate such software only in other software or programs which are similarly and freely licensed. Proposals for open-source licensing of software owned by the university should be evaluated to ensure compliance with the terms of any relevant research sponsorship contracts and to analyze whether the goals of the institution would be better served through commercialization. Other issues for consideration include available band-width support for open source licensing, and whether open source licensing should be truly “open” and available for commercial purposes or whether academic or other interests suggest a more limited license for non-profit educational purposes only. See, generally, Policy VII.

5. Ongoing administration of policy and disputes
  - a. The policy should contain a disclosure mechanism so that materials which are owned by the university, or in which the university retains an interest, are brought to the attention of an administrative office with responsibility in this area. Typically, this office would be the technology transfer office.
  - b. Some provision for ongoing interpretation and implementation of the policy should be part of the policy. Options include the appointment of a standing committee or the designation of an administrator (presumably within the office of the chief academic officer or other person leading the policy effort).
  - c. Frequently asked questions (FAQs) may play a role in addressing specific factual situations. If there are recurring questions which arise, or questions which may be particularly complex to analyze under the policy, FAQs may save a question from needing to be presented to the standing committee or other responsible person. FAQs may also serve to make the university community feel more supported and informed in working with the policy. FAQs may be included as part of a policy or presented in a supplementary manner. In any event, updating and adding FAQs is important to reflect continued evolution of the policy in light of technology and the ongoing experiences of faculty, students and staff working with the policy.
  - d. Given the complexity of many intellectual property issues and the varying perspectives of different university constituents, it is advisable to either adopt an internal dispute resolution mechanism or tie disputes under the policy into an existing internal mechanism.
  - e. Resources available to the university community in interpreting and complying with the policy should be identified in the policy. Such resources are likely to include the technology transfer office, legal counsel and academic officers responsible for research.



**Part II . Sample Policy**

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The following is a draft of an intellectual property policy that is being considered by New York University. Since it is still under review and has not been adopted, all specific references to NYU have been removed and it is offered solely for educational purposes as an illustration of the issues that arise in formulating such policies and how they might be resolved.

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## University Intellectual Property Policy Preamble

September, 2007

### Preamble

The University's mission is to provide and promote education and research. This mission is supported by well-established academic values and practices including, among others, academic freedom, promotion of excellence and innovation in teaching and research, support of the ability of faculty and researchers to publish, share information and collaborate in research activities, and support of students in full participation in these and other educational activities.

This Intellectual Property Policy comprises both a patent policy and a copyright policy. It is intended to replace the University's patent policy, as approved on \_\_\_\_\_ and amended through \_\_\_\_\_, the copyright policy as approved on \_\_\_\_\_, and the computer software policy approved on \_\_\_\_\_.

The patent policy guides faculty and staff in identifying and administering patentable inventions, and delineates the common situation in which the University will own patentable inventions arising out of research and other activities conducted by faculty and staff at the University and other instances when ownership rights will reside with faculty, staff or third parties. The copyright policy defines the range of materials subject to copyright and identifies many situations in which such materials may be created at the University; the copyright policy preserves the traditional relationship between university and faculty member by allocating ownership of most traditional works of scholarship to faculty while also providing examples of instances where a University investment of resources or the presence of another University interest will cause ownership to be vested in the University. Both the patent policy and the copyright policy provide a formula for the distribution of any revenue received by the University from the commercialization of patentable inventions or copyrightable materials owned by the University and invented or created by faculty and other University employees.

While the patent and copyright policies are substantively different in most areas, they share certain common provisions (e.g., Scope and Applicability, Commercialization and Administration of Policy) which have been restated in each policy for ease of reference.

In certain cases, patentable inventions may be created in conjunction with copyrightable materials. Unless otherwise determined by the Provost, in these situations, the patent policy shall apply to the whole of such intellectual property.

This intellectual property policy should be read together with the other policies of the University including the conflicts of interest policy, the sponsored research guidelines, policy on

faculty responsibility and the photocopying policy. The University's policies are available online at \_\_\_\_\_.

While this Policy reflects many recent developments and the experiences of numerous constituents at the University, continued interpretation will be required and is provided for within the Policy, under the auspices of the Provost. Appendix B to the patent policy and Appendix A to the copyright policy contain additional information about the administration and interpretation of this Policy at the University.

The electronic version of this Policy will, from time to time, contain "Frequently Asked Questions" which interpret and detail the applicability of the Policy to various practical situations.

# Patent Policy

## I. Preamble

The University is dedicated to teaching, research, and the expansion of knowledge. While the University encourages research and related activities for their intrinsic value, it recognizes that inventions and discoveries may result from various activities conducted wholly or in part at the University or under University auspices. It is the University's policy to promote the use of inventions for the public good and, where appropriate, to pursue patents and licenses to encourage development and marketing of such inventions. This patent policy expresses the University's commitment to promoting research and scholarship as well as to facilitating the development, dissemination, and commercialization of inventions and discoveries for the greatest public benefit.

Under applicable Federal law, an "invention" is, as a general matter, a new and useful discovery, process, machine, manufacture or composition of matter, or any new and useful improvement thereof. If a patent is granted with respect to an invention, the patent owner will have the exclusive right to manufacture, use and sell the invention, and license those rights to others for a limited period of time provided by law.

This patent policy defines ownership rights relating to inventions and discoveries and ensures that the proceeds from any commercialization are distributed to members of the University community who make inventions covered by this Policy, and to their schools, their departments and the University, in a manner consistent with the research and other objectives of the University.

This Policy also aims to assist members of the University community in complying with the University's obligations under the Bayh-Dole Act (relating to federally funded research), as well as in complying with obligations resulting from the University's acceptance of research funding from other sponsors. The University may have obligations to seek patent protection and to commercialize inventions made in the course of federally sponsored research in accordance with the terms of federal patent policy regarding such inventions.

For all inventions and discoveries which are subject to the patent policy, it is within the University's sole discretion to determine whether to seek patent protection and to pursue commercialization of such inventions and discoveries. The University has created the Technology Transfer Office, which is responsible for managing all activities relating to the protection and commercial promotion of intellectual property.

## II. Scope and Applicability

A. This policy applies to the following categories of persons:

1. Faculty (full-time and part-time, including visiting faculty who have a University faculty appointment);

2. Research scientists and post-doctoral appointees;
3. Students (including visiting students);
4. Other employees (full-time and part-time), including professional staff, technical employees and clerical employees; and
5. Non-employees who participate in research at the University or research carried out under the auspices of the University, such as visiting faculty and scholars who do not have a faculty appointment, fellows, and consultants.

B. This patent policy applies to every invention and discovery made by a member or members of the University Community, as described below.

### III. Ownership of Inventions and Discoveries

A. *Full-time Employees, including faculty, research scientists, post-doctoral appointees, and staff*

The University will own any inventions conceived or first reduced to practice by full-time employees (i) in the course of University employment or (ii) with Substantial Use of University Resources. The University will not claim ownership of an invention that was conceived and first reduced to practice (a) as part of a consulting agreement or employment arrangement with an outside organization, if certain conditions are met (see Section IV.B), or (b) during an unpaid leave.

Generally speaking, for faculty members and other academic appointees, the phrase “course of University employment” refers to their “Field of Appointment”, as defined in Section III.G below (see, however, an exception for consulting in Section IV.B below).

B. *Part-time Employees, including faculty, research scientists, post-doctoral appointees, and staff*

Inventions conceived or first reduced to practice by part-time employees are the property of the University if an invention was conceived or first reduced to practice in the course of University employment or with Substantial Use of University Resources.

C. *University Faculty on Leave and/or Visiting Other Institutions*

In general, inventions conceived or first reduced to practice by University faculty during a paid leave (whether at the University or elsewhere, including another institution or a company) are the property of the University, but inventions conceived and first reduced to practice by University faculty during an unpaid leave are not the property of the University, unless Substantial Use of University Resources was involved.

If conception of an invention occurred during an unpaid leave and reduction to practice occurred after the faculty member’s return to the University (after the unpaid leave ended), the invention is wholly or partially the property of the University, depending on the circumstances under which the invention was conceived and reduced to practice. Similarly, if conception of an invention occurred before the leave began and reduction to practice occurred while the faculty member was on leave, the invention is wholly or partially the

property of the University, depending on the circumstances under which the invention was conceived and reduced to practice.

In cases in which there are potential conflicts between the University's policies and those of an institution at which faculty will be on leave and/or visiting, such conflicts shall be resolved through good faith negotiations between the University and such institution, preferably before the leave begins.

*D. Visitors from Other Institutions (Non-Employees)*

It is not unusual for visitors from other institutions (home institutions) to participate in research or other activities at the University or under University auspices. Such participation by a visitor might result in inventions or discoveries. Such visitors are often subject to intellectual property policies of their home institutions. The obligations of each visitor under the University patent policy and his/her home institution's intellectual property policy should be assessed and potential conflicts resolved through good faith negotiations between the University and his/her home institution prior to the start of the visitor's participation in such research or other activities. It is particularly important that such conflicts be resolved prior to the start of a visit when the research at the University is sponsored by a third party.

Inventions and discoveries made by a visitor shall be jointly owned by the University and the home institution, unless agreed otherwise by the University and the home institution. Terms and conditions for commercialization of such jointly-owned inventions, including sharing of proceeds, if any, from commercialization, shall be determined through good faith negotiations by the University and the visitor's home institution.

*E. Graduate and Undergraduate Students*

This section applies to students enrolled at the University and non-enrolled students who are visiting the University, as described below.

1. Class Work

In general, students shall retain ownership of inventions conceived or first reduced to practice as part of class work.

2. Research

When a student conceives or first reduces to practice or contributes to the conception of an invention in the course of (a) sponsored research (e.g., under a graduate or research assistantship), including research for the student's thesis or dissertation (but excluding class work); (b) any research involving Substantial Use of University Resources; (c) participation as a team member in a University-based project involving other students, faculty or staff; or (d) employment at the University, the University shall own such invention and the student shall share in the proceeds, if any, as an inventor in accordance with Section V on Commercialization of Patents.

*F. Consultants Hired by the University*

Inventions conceived or first reduced to practice in the course of a consultant's paid consulting work for the University shall be the property of the University. Consultants should be hired only pursuant to a prior written agreement in a form approved by the University.

## G. Definitions

1. “Field of Appointment” refers to the broad academic field or area of research or clinical activities in which a faculty member is engaged. Primary indicators include, but are not limited to, the academic unit or department in which the faculty member is appointed or closely related departments, or any area in which the faculty member might conduct research as part of his/her academic appointment.
2. “Substantial Use of University Resources” – The precise determination of what usage of University resources or assistance of non-faculty personnel shall be considered substantial, or of when the identity of a project resides with the University rather than with particular individuals, involves the exercise of judgment based on the circumstances and on practices within the discipline. As a basic principle, however, use of University resources or assistance from non-faculty personnel that is incidental and not essential to the development of the invention does not constitute substantial use. Thus, for example, none of the following shall be considered substantial use:
  - a. Use of resources or personnel commonly available to faculty in the same school, institute or department, such as libraries, offices, desktop computers, or secretarial staff;
  - b. Occasional use of a specialized piece of equipment or facility for routine tasks;
  - c. Receipt of salary by faculty for their academic appointments;
  - d. The use of resources or facilities generally available to students as part of their educational activities.

## IV. University Faculty’s Outside Consulting Activities

- A. All full-time faculty who engage in outside consulting activities have the following obligations:
- B.
  1. Consulting activities and agreements under which they are carried out must be consistent with all University policies, including, but not limited to, this patent policy. Full-time faculty are permitted to spend no more than one day per week (or the equivalent of an eight-hour work day) on outside consulting activities during any semester, or summer month in which they are receiving summer compensation from the University (see policy on “Restrictions on Outside Employment”).
  2. Faculty shall disclose to the University all consulting activities, in accordance with the policies of the University and the relevant school.
  3. Prior to beginning outside consulting activities, Faculty shall inform the party for whom the consulting activities are to be performed of the University’s intellectual property and conflict of interest policies, including this patent policy, and the faculty member’s obligations under such policies.

4. Faculty are ordinarily not permitted to hold an executive or managerial position in a public or private organization. Any exceptions require prior written permission from the relevant dean and from the Provost. (See Policy on Faculty Responsibility).
- B. The University will make no claim to an invention made by a faculty member in the course of a disclosed consulting engagement if:
1. The invention resulted from work on a problem or topic (a) proposed by the company to which the faculty member is consulting and (b) on which the faculty member has not engaged in research at the University (whether or not it is within the individual's Field of Appointment), and
  2. The invention was conceived and first reduced to practice without the use of University resources or personnel. (Note that this is a more restrictive standard than "Substantial Use.")

A faculty member may agree to assign inventions made in the course of consulting to the company only if these conditions are satisfied. Faculty are encouraged to disclose inventions made in the course of consulting to the University to determine if such conditions are met.

- C. Disclosure of Inventions – If an invention does not meet the conditions described in Section IV.B above, the inventor shall disclose the invention to the Technology Transfer Office as described in Section VIII.

#### V. Commercialization of Patents

- A. When the University owns the patent rights to an invention, the inventor has the right to share in the net proceeds derived from commercializing the patent. Specifically, net proceeds (see below) shall ordinarily be distributed as follows:
1. 15 percent for the general support of the Technology Transfer Office and to cover any other expenses associated with the commercialization of the University's inventions; and
  2. The remaining net proceeds (85 %) shall be distributed as follows:
    - a. Inventor share: [X]% of net proceeds to the inventor or inventors (including inventors at other institutions), up to a total of \$[Y], and [X-]% thereafter.
    - b. The remainder of net proceeds shall be used by the University for research, scholarship and other educational activities in the following manner:
      - i. [Z1] to the department in which the invention was made;
      - ii. [Z2] to the school or other University division in which the invention was made; and
      - iii. [Z3] to University.



Gross proceeds are all proceeds from licensing or otherwise granting rights in an invention to third parties, including license fees, royalties on sales or other usage, and milestone payments, but excluding research funding. Net proceeds are gross proceeds minus all out-of-pocket expenses incurred by the University that are associated with the particular invention. Out-of-pocket expenses may include patent expenses, legal expenses associated with negotiating an agreement, travel expenses, payments due to other parties with rights in the invention, or any reasonable expenses incurred in pursuing the University's patent rights. If the University pursues or defends litigation to enforce patent rights, then the proceeds of any judgment or settlement from such litigation shall ordinarily be included in gross proceeds, and the associated litigation expenses shall be deducted as out-of-pocket expenses. If litigation is pursued, the distribution described above may be modified to reflect the greater economic risk being incurred by the University in pursuing such litigation.

Inventors who are (i) employees of the University, (ii) acting within the course of such employment and (iii) not faculty or research staff, will not automatically be covered by this Section; rather, in such cases, the supervisor of such an employee or the relevant project leader shall make a determination as to the appropriateness of such employee sharing in the proceeds of commercialization.

- B. Equity — Equity received from a company or other entity in lieu of license fees or royalties shall be allocated by calculating and distributing the appropriate number of shares, using the same percentages outlined above, irrespective of their value. In the event there is a single share or a partial share which cannot be distributed to the inventor(s), that share or partial share shall belong to the University. Unless otherwise required by contractual arrangements or applicable law, the University shall distribute shares of equity at the time they are received by the University or will require that the inventor receive such equity directly from the company or other entity. In the event that the University is required to hold the shares for any length of time or is otherwise restricted from distributing shares to inventors, the University shall hold such shares or other interests but shall not be responsible for any fluctuation in the value of the shares or any matters relating to the administration of such shares or interests.
- C. Use of funds — Shares of proceeds shall be used by departments, schools and the University to further the research, scholarship and educational goals of the University.
- D. If more than one inventor is to share in the inventor share, the inventors shall decide among themselves their respective shares and shall provide the Technology Transfer Office with a written agreement signed by all inventors. Such written agreement among the inventors shall be provided to the Office within three months of a written request from the Office for such an agreement and shall be irrevocable unless it is modified in writing by all inventors. In the absence of such a written agreement, the University shall determine the distribution of shares to inventors.
- E. Whenever the University licenses rights to an invention, it will reserve the right for the University to use the invention for internal research and educational purposes and will generally seek to reserve such rights for other non-profit research institutions.

## VI. Transfer of Intellectual Property Owned by the University to the Inventor

- A. If the University determines that it will not pursue patenting and/or commercialization of an invention subject to the University's ownership under this patent policy, the University will consider a written request by the inventor to transfer ownership in the invention to the inventor, subject to the terms of any applicable agreements with third parties under which the invention was conceived or first reduced to practice. Transfer of ownership to the inventor will be subject to an irrevocable royalty-free license to the University to use the invention for education, research and other non-commercial purposes and reservation to the University of the right to grant similar licenses to other nonprofit institutions. In those instances in which there are multiple inventors, all inventors must be in agreement and be party to such a request. If the University (1) has not filed a patent application 120 days after a completed Invention Disclosure has been submitted to the Technology Transfer Office on the invention or (2) has notified the inventor(s) that it will abandon the invention or its patent application(s) and/or patent(s), an inventor may make such a request. In the event that the 120 day waiting period would result in a loss of patent rights, an inventor may make such request at any time. An explanation for the timing of the request must be included in the request.

In some instances, the University will not pursue patenting but may elect not to release rights to an invention to the inventor. For example, it may be most efficient to protect and commercialize cell lines and other biological materials without patent protection. In such cases, materials will generally remain owned by the University which will grant licenses to third parties to use the materials for specified purposes, in return for compensation (in the case of commercial use) and under the condition that such materials will be returned or destroyed at the University's request. Any such commercialization of unpatented research property will first take into consideration (i) the ability of the inventor under a material transfer agreement signed by the University to openly exchange those materials with utility as research tools with scientific colleagues outside of his or her laboratory and (ii) the responsibility of the inventor and the University otherwise to use materials resulting from sponsored research to promote and facilitate further research.

In some cases, the University may decide to seek patent protection for an invention only in the United States or only in select foreign countries and not to file patent applications in other foreign countries for such invention. If the inventor wishes to file patent applications in foreign countries in which the University does not wish to file, he or she may request permission to do so at his or her own expense. In the case of multiple inventors, all inventors must agree and be party to the request, although all inventors need not agree to participate in the expense of such filings. The University, in its sole discretion, will decide if permission will be granted. Because the existence of patent rights which are not owned by the University in particular countries could block a licensee of the patents which the University has pursued from commercializing the invention in such countries, and could therefore impede the University's ability to license the patents which it has pursued, the University shall retain ownership of all patent applications filed and all patents issued (U.S. and non U.S.) for the

invention. If the University receives revenues that are or can be attributed specifically to such foreign patent applications and patents for which the inventor has paid expenses, the inventor's share of net proceeds from such revenue shall be increased from 42.5% to 63.75%, and the department, school, and University shares shall be reduced correspondingly in order to recognize both the expenses incurred by the University in the preparation of the U.S. application which will serve as the basis for foreign applications and the expenses incurred by the inventor on the foreign applications. The inventor may also request reimbursement of out of pocket patent expenses he/she incurred in filing such foreign patent applications and in obtaining and maintaining resulting patents from gross proceeds attributed specifically to such foreign patent applications and patents. In the event an inventor takes such action, the inventor shall provide the University with copies of all documents relating to such foreign filings, including, but not limited to, all documents sent from and submitted to any foreign patent office and documents showing the costs of obtaining such protection.

- B. If, after the transfer of ownership to the inventor pursuant to a request made under Section VI A., the inventor receives proceeds from commercializing the patent, the University may require reimbursement from the inventor for any out-of-pocket expenses incurred by the University in connection with the invention, including legal and marketing expenses.
- C. If, after transfer of ownership to the inventor pursuant to Section VI A, the inventor's research at the University results in new inventions for which a continuation-in-part or related new patent application could be made, he/she must fully disclose each such new invention to the University, which may claim ownership of such new inventions.

## VII. Making University-Owned Inventions Freely Available to the Public

If the inventor of an invention owned by the University wishes to make such invention freely available to the public, through royalty-free licensing or other means, the University, subject to the terms of any applicable agreements with third parties under which the invention was conceived or first reduced to practice, will consider a request to do so, in order to determine whether the benefits to the public of making such inventions freely available outweigh any advantages that might be derived from commercialization. In the case of multiple inventors, all inventors must agree and be party to the request. The Provost, or his or her designee, may seek advice from the Intellectual Property Advisory Committee and shall make a determination on such requests.

## VIII. Administration of Policy

- A. *University Administration.* This patent policy will be administered by the Provost, subject to the oversight of the Intellectual Property Advisory Committee and in consultation with the Deans of each School of the University. The Provost may delegate his/her duties under this Policy to such other officers or employees of the University as he/she may find appropriate. Further information about the Intellectual Property Advisory Committee and other University departments which play a role in administering this patent policy is contained in Appendix B.

B. *Disclosure of Patentable Materials.*

1. In order to ensure that the University is fully informed of inventions and discoveries, able to make a proper determination of inventorship and ownership and able to fulfill reporting obligations to governmental and other research sponsors, all persons subject to this Policy shall promptly notify and fully disclose to the University all inventions and discoveries resulting from various activities conducted wholly or in part at the University or under University auspices. Because patent rights may be lost if information describing an invention has been published prior to filing of a patent application, notice and disclosure of an invention or discovery should be made to the Technology Transfer Office at least two (2) months prior to any public disclosure (including but not limited to publication or presentation, such as at academic conferences). Inventors must complete an Invention Disclosure Form which is available on the Technology Transfer Office's Web site.
2. If the inventor is uncertain whether the University has ownership rights in an invention, the invention shall be disclosed to the University.
3. Upon disclosure of an invention, the University shall determine whether ownership vests in the University.
4. If the University asserts ownership rights to the invention, the University has 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. Inventors shall cooperate in every necessary way (but at no out of pocket expense to them) with the University and/or the outside agent, including signing all necessary documents and assigning to the University any ownership rights the inventor may have in order to permit the University or the outside agent to evaluate the invention, to seek, maintain and defend a patent, and/or otherwise to introduce the invention into public use.
5. Written materials and/or handbooks that provide information about the University's patent policy and procedures are available through the Technology Transfer Office or the Office of Sponsored Programs. Any questions regarding the University's patent policy and procedures should be directed to the Technology Transfer Office or to the Office of Legal Counsel.

C. *Agreement to Policy.* This Policy constitutes an understanding that it is binding on all individuals who accept the University employment, who use the University resources or facilities, or who participate in the University research. All individuals employed by or affiliated with the University shall be advised of the University's policies and procedures relating to intellectual property through publication in the Faculty Handbook on the University's website. The University may require formal patent agreements to implement this 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 may have under any other University policy, including without limitation the copyright policy, or any applicable law.

All individuals must have a signed Patent Agreement (see Appendix A) on the occasion of first submitting a grant application or first engaging in sponsored research. All directors or Principal Investigators of sponsored projects must secure signatures to the Patent Agreement from all research personnel, including students working on the project, at the time of their appointment and file the agreement(s) with the Office of Sponsored Programs at the school of medicine.

- D. *Disputes.* Disputes involving intellectual property rights or this Policy shall be reviewed and resolved by the Provost or such other officers or employees as he/she designates. Decisions made by delegates may be appealed to the Provost, who will review the matter and reach a decision in consultation with the Intellectual Property Advisory Committee, the relevant Dean or Director, and certain others as determined by the Provost. In the event that disputes are reviewed and resolved by the Provost, such decisions may be appealed to the President, who will review the matter and make the final decision.
- E. *Standing Committee.* The Provost shall establish and appoint an Intellectual Property Advisory Committee, which shall be a standing the University committee with broad responsibilities on matters relating to all intellectual property matters (e.g., patents, copyrights, software).
- F. *Administration by Schools.*
  - 1. The Deans of each School of the University shall work closely with the Provost and the Intellectual Property Advisory Committee to ensure that the perspectives, practices and values of each School are taken into consideration in the decision-making process under this patent policy.
  - 2. Each School of the University retains the right to supplement this Policy as necessary or desired by that School, including requiring formal patent agreements of their employees or affiliates. Any supplement shall be consistent with the terms of this Policy, in writing, approved by the Dean of the relevant School and submitted to the Provost for review and approval.

**APPENDIX A**

**University Patent Agreements**

I have read and understand the University's (the "University's") patent policy. As a condition and in consideration of the following, as applicable:

- (1) my participation in sponsored research at the University;
- (2) my receipt as a student of support from or through the University;
- (3) opportunities made or to be made available to me to make substantial use of University administered funds or University resources and facilities;
- (4) my employment by the School of \_\_\_\_\_; and/or
- (5) my being a visiting researcher at the University,

I agree to be bound by all the provisions of the patent policy and I:

- A. hereby agree to assign and do assign to the University all of my right, title and interest in any invention or discovery, developed in the course of my employment by the University or in connection with my participation in research or related activities at the University, which I am obligated to assign to the University under the terms of the patent policy;
- B. agree to execute such documents and take such further action as may be requested by the University to further implement the patent policy or this agreement; and
- C. agree to disclose to the Technology Transfer Office, promptly after discovery, any invention developed in the course of my employment by the University, or in connection with my participation in research or related activities at the University.

Further, if I am a director or principal investigator of a sponsored project, I agree to secure signatures to the Patent Agreement from all research personnel, including students working on the project, at the time of their appointment and file the signatures with the appropriate Office of Sponsored Programs.

NAME: \_\_\_\_\_

SIGNED: \_\_\_\_\_

DATE: \_\_\_\_\_

WITNESS: \_\_\_\_\_

## **APPENDIX B**

### **Implementation of Policy**

This Appendix describes the means by which the University administers the Patent Policy patent policy. It is not formally part of this policy and may be modified by the University as appropriate without formal approval.

#### I. The Intellectual Property Advisory Committee

##### A. The members of the Committee on Intellectual Property shall include:

1. The Director of the Technology Transfer Office and/or his/her designee(s);
2. The Directors of the Offices of Sponsored Programs, or their designee(s);
3. One or more designees of the Provost;
4. Faculty from diverse schools of the University; and
5. One or more representatives from the Office of Legal Counsel.

##### B. The Intellectual Property Advisory Committee shall advise and make recommendations to the Provost regarding:

1. University policies, guidelines and procedures relating to all intellectual property matters;
2. Policy amendments based on periodic reviews of University policies, guidelines and procedures relating to intellectual property;
3. Disputes relating to intellectual property; and
4. The University's ownership of particular works of intellectual property.

#### II. The Technology Transfer Office – The Technology Transfer Office manages all activities relating to the protection and commercial promotion of intellectual property at the University, including the School of Medicine. The responsibilities of the Technology Transfer Office include:

1. Determining which technologies the University should seek to patent;
2. Facilitating the transfer of inventions, copyrightable works and other intellectual property to the marketplace;
3. Securing patent protection for new technologies subject to University ownership under the patent policy;
4. Securing copyright registration for new works subject to University ownership under the copyright policy;
5. Generating industrial support for ongoing research projects;
6. Licensing University inventions and copyrightable works to ensure full commercial application and generate royalties; and
7. Fostering the creation of start-up companies around University inventions, copyrightable works and other intellectual property

#### III. Office of Legal Counsel – Legal questions regarding intellectual property and relevant policies may be referred directly to the Office of Legal Counsel.

# Copyright Policy

## I. Preamble

In the course of their activities at the University, faculty, administrators, staff and students are continually creating copyrightable works. As a matter of law, copyright will adhere upon creation of any original work of authorship that is reduced to tangible form, including literary works, computer software, data sets, musical works, dramatic works, pantomimes and choreographic works, artistic works (pictorial, graphic, and sculptural), audiovisual works including motion pictures, sound recordings, and architectural works. Ownership of copyright to material gives the owner the exclusive rights to reproduce the material, make derivative works based on it, distribute copies to the public, and perform or display the material publicly. Copyright law is primarily a matter of federal law, codified in Title 17 of the United States Code, 17 U.S.C. §§ 101 et. seq. (2006).

Under the copyright law, copyrightable works created by employees in the course of employment will be owned by their employers. However, traditionally, universities (including the University) have declined to assert ownership on behalf of the university in works of scholarship created by faculty in the course of traditional academic activities. Exceptions to this practice have always existed in order to locate within the university ownership of certain copyrightable materials in which the university, and/or its sponsors, public or private, also have a demonstrated interest.

As new technologies and media have emerged over the past decade, the processes for creation and distribution of copyrightable materials and the role of such materials in education and research have changed. One example is the area of instructional media where the University and its various constituents have been involved, together and separately, in the creation and distribution of online courses and other forms of instructional content. During this period, the copyright law has also developed. The present revision of the University's copyright policy, is intended to take these developments into account.

The copyright policy addresses, primarily, the distribution of rights in and to copyrightable materials between the University and its various constituents. It does not address the use by the University or such constituents of copyrightable materials owned by third parties. In the course of educational and research activities at the University, faculty, administrators, staff and students are likely to make use of materials owned by third parties. To a large extent, those uses may constitute "fair use" under the law, which provides that "use . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright", 17 U.S.C. § 107. Uses that are not "fair uses" may require permission to be granted by the copyright owner. The University is committed to the support of fair use principles.



In certain cases, copyrightable materials may be created in conjunction with inventions subject to the patent policy. Unless otherwise determined by the Provost, in such situations, the patent policy shall apply to the whole of such intellectual property.

## II. Scope and Applicability

A. This copyright policy applies to the following categories of persons:

1. Faculty (full-time and part-time, including visiting faculty who have an University faculty appointment);
2. Research scientists and post-doctoral appointees;
3. Students (including visiting students);
4. Other employees (full-time and part-time), including professional staff, technical employees and clerical employees; and
5. Non-employees who participate in research at the University or research carried out under the auspices of the University, such as visiting faculty and scholars who do not have a faculty appointment, fellows, and consultants.

B. This right policy will apply to faculty and others who are on a paid leave from the University and create copyrightable materials during such leave, but shall not ordinarily apply to persons on an unpaid leave of absence or copyrightable materials created during such leave. The provisions of Section III(D) relating to the creation of copyrightable materials in the course of consulting activities shall apply to activities conducted by faculty while on an unpaid leave.

C. It is not unusual for visitors from other institutions (home institutions) to participate in research and other activities at the University or under the University auspices. Such participation might involve joint creation of copyrightable materials. Such visitors are often subject to intellectual property policies of their home institutions. Consideration should be given to the intellectual property policies of the visitor's home institution in order to avoid potential conflicts between this Policy and the policies of the home institution. Obligations of each visitor under this Policy will be assessed and potential conflicts will be resolved through good faith negotiations between the University and the home institution, preferably prior to the start of the visitor's participation in such research or other activities. It is particularly important that such conflicts be resolved prior to the start of a visit when the research at the University is sponsored by a third party.

### III. Copyright Ownership Principles

- A. **General Principle:** The University will not claim copyright ownership of Traditional Works of Scholarship except as otherwise provided in this Article III, and persons covered by this Policy may claim copyright to such works under their name.

“Traditional Works of Scholarship” shall be defined to include: syllabi and other original materials created for use in a University course, books (including textbooks), other forms of textual material (whether in printed form or electronic media), software, works of art and other creative works including music, lyrics, photographs, poetry, choreography, architectural works, sculpture, pictorial and graphic works, motion pictures, and sound recordings, which in each case are created as part of the regular academic and scholarly activities of a person covered by this Policy.

Under applicable law, multiple creators who intend to create a joint work will be viewed as joint holders of copyright. Under this Policy, works created by more than one person involved in a common project shall be considered to be created by all such persons unless otherwise agreed in writing by each person.

Copyrightable materials which appear on Web pages will be considered to fall within the various categories described in this Policy, including Web pages which may be hosted by or on behalf of the University.

- B. **Standing Exceptions:** The University will retain ownership of copyrightable materials, or reserve a license to such materials, in the situations listed below. In each case, the situations listed below will apply whether such materials are in print or electronic form or other media, now in existence or hereafter arising. In each situation where the University retains ownership (i) the creator(s) of such materials shall retain a non-exclusive, world-wide, royalty-free, non-assignable license to use such materials for their personal non-profit educational and research purposes and (ii) the University may determine to make such materials available on an open-source or open-access basis or otherwise take action to make such materials widely-available as contemplated by Section VII.
1. The University retains a non-exclusive, world-wide, royalty-free license to any material, regardless of type or creator, to the extent such material is used in the title or description of a University course, in the syllabus of a University course or created for distribution or actually distributed to students in a University course, for all educational and research purposes.
  2. The University retains a non-exclusive, world-wide, royalty-free license to any material created for a University publication, to the extent such material is not otherwise owned by the University under this Section III.
  3. The University retains ownership of any material which was created making Substantial Use of University Resources, as defined below in Section E.

4. The University retains ownership of any material created by a non-faculty employee in the course of employment (including research), but the University will not own Traditional Works of Scholarship reporting on the work which led to the creation of such materials unless required under Section III(B)(7).
  5. The University retains ownership of any material created in the course of research or other collaborative projects conducted under the University institutional auspices (including school or department auspices) where the identity of the project resides with the University (e.g. resulting in a publication of a school or department, curricular efforts).
  6. The University retains ownership of any material created in the course of a research or other collaborative project where development has been by a team such that the identity of the project resides with the University rather than with particular individuals.
  7. The University retains ownership of any material created as the result of a research project, except Traditional Works of Scholarship reporting on such results, sponsored by a governmental, corporate, non-profit or other sponsor where the contract or agreement with such sponsor imposes obligations on the University with respect to such copyrightable materials. With respect to Traditional Works of Scholarship reporting on the results of such a research project, the University shall retain only those rights, if any, which are necessary for the University to meet its express obligations under the contract or agreement with the relevant sponsor.
  8. The University retains ownership of any material created at the direction of, or commissioned by, the University.
  9. The University retains ownership of any material which is closely associated with a patent owned by the University under the University's patent policy. This exception will typically apply to any copyrightable material created to effectuate an invention (e.g. software) or supplement an invention (e.g. documentation), but will not apply to Traditional Works of Scholarship reporting on the research which led to the creation of such materials unless required under Section III(B)(7).
  10. The University retains ownership of any material, in any form or media (including without limitation video or audio) which is a reproduction of a University course or program. The University will not claim ownership of the intellectual content within such reproduction. Any commercialization by the University of any such material shall be in accordance with Sections III(C)(2) and V.
- C. **Instructional Media:** This Section highlights the applicability of this copyright policy to instructional media. Instructional media are produced in a variety of forms including electronic and print publications. Instructional media includes teaching activities or interactive components that involve creators with the users of the instructional media.

The presence of teaching and similar activities distinguishes this form of media from certain traditional works such as printed textbooks.

Restrictions on certain outside uses of instructional media are intended to involve the Provost in determining appropriate uses of Instructional Media and to further effectuate the University's policies regarding conflict of interest, conflict of commitment and appropriate use of the University name.

Instructional media, within this Policy, are intended to encompass (i) the content of courses and programs delivered using any form of media including print, in-person delivery, over the World Wide Web or using other forms of electronic media, videotaping, audiotaping, television broadcast, or radio broadcast, as well as forms of media which may arise in the future, and (ii) if applicable, the technology used to structure and deliver such course and program content. Instructional media, within this Policy, would not extend to cover a traditional textbook, whether in printed or electronic form, without the presence of further instructional involvement of the creator.

1. Instructional Media Owned by the Creator

Instructional media created by faculty as part of activities which do not otherwise fall within any exception contained in Section III(B) or (C), will be owned by the faculty creator, subject, in certain cases to a retained interest of the University. Faculty may use or license instructional media owned by them under this Section 1 for all purposes including commercial purposes. Any use must be approved under the University's conflict of interest and conflict of commitment policies and shall not make use of the University name other than for purposes of identification.

The license to instructional media reserved by the University under Section B(1) may be used by the University, without restriction, for educational and research purposes including licensing third parties for such purposes.

2. Instructional Media Owned by the University

Certain instructional media will, pursuant to Section III(B) and (C) be owned by the University. As a general matter, instructional media owned by the University and created with faculty involvement may be used by the University outside of the University for educational and research purposes and for commercial purposes. In all uses outside of the University, The University will consult with the primary faculty creators as to the planned use of such materials prior to granting rights to third parties.

#### D. Faculty Consulting.

1. All full-time faculty who engage in outside consulting activities have the following obligations:
  - (a) Consulting activities and agreements under which they are carried out must be consistent with all University policies, including, but not limited to, this copyright policy. Full-time faculty are permitted to spend no more than one day per week (or the equivalent of an eight-hour work day) on outside consulting activities during any semester or summer month in which they are receiving summer compensation from the University (see policy on “Restrictions on Outside Employment” in the Faculty Handbook).
  - (b) Faculty shall disclose to the University all consulting activities, in accordance with the policies of the University and the relevant school.
  - (c) Prior to beginning outside consulting activities, faculty shall inform the party for whom the consulting activities are to be performed of the University’s intellectual property and conflict of interest policies, including this policy, and the faculty member’s obligations under such policies.
  - (d) Faculty are ordinarily not permitted to hold an executive or managerial position in a public or private organization. Any exceptions require prior written permission from the relevant dean and from the Provost. (S “faculty responsibility to the university policy in the Faculty Handbook).
2. Faculty may engage in consulting activity outside of the University and shall own copyrightable materials created in the course of such consulting or may assign such ownership to a third party if such consulting activities and the copyrightable materials arising in connection with such consulting:
  - (a) shall not include teaching or similar instructional activities by the faculty creator unless permitted by the University’s policies relating to conflict of interest and conflict of commitment;
  - (b) shall not otherwise violate such conflict of interest and conflict of commitment policies;
  - (c) were performed or created without the use of the University resources (Note that this is a more restrictive standard than “Substantial Use of the University Resources”);
  - (d) shall not relate to any ongoing research at the University ; and
  - (e) shall not make any use of the University name other than for identification purposes.
3. If consulting activity or the copyrightable materials created in connection with such activities do not meet the conditions described in Section III.D.2 above, the faculty member shall disclose the consulting activity and any copyrightable materials arising from such activity to the Technology Transfer Office as described in Section VIII.B.

- E. **“Substantial Use of University Resources”** The Substantial Use of University Resources in the creation of copyrightable material will give the University an interest in such material and support ownership by the University as contemplated by Section III(B)(3). The precise determination of what usage of the University resources or assistance of non-faculty or student personnel shall be considered substantial, or of when the identity of a project resides with the University rather than with particular individuals, involves the exercise of judgment based on the circumstances and on practices within the discipline. As basic principles, use of the University resources or assistance from non-faculty or student personnel that is incidental and not essential to the creation of the materials does not constitute substantial use of resources, while use of the University name or consultants engaged by the University for purposes of creating the materials would constitute substantial use of resources. For example, none of the following shall be considered substantial use of the University resources:
1. Use of resources or non-faculty or student personnel commonly available to faculty in the same school, institute or department, such as libraries, offices, desktop computers, secretarial staff or specialized course management programs that are widely available to faculty;
  2. Occasional use of a specialized piece of equipment or facility for routine tasks;
  3. Receipt of salary by faculty for their academic appointments; and
  4. The use of resources or facilities generally available to students as part of their educational activities.

#### IV. Student Works

- A. **General Principle.** Subject to the terms of this Section IV, students own the copyright to original works created in the course of their academic activities at the University, including class work, research materials, works of art or music and theses (“Student Work”). Student Work created jointly by more than one student will be owned jointly by such students.
- B. **Standing Exceptions.** Each of the provisions of Section III(B) shall apply to Student Work (as though set forth in full in this Section) to allocate certain rights or copyright ownership of Student Work to the University.
- C. **Limited License.** In addition to the provisions of Section III(B), the University retains a non-exclusive world-wide royalty-free license to Student Work for so long as the student creator is matriculated at the University to use such Student Work for the University’s educational and research purposes including publicizing the University or any program or department of the University. This limited license shall terminate when the student graduates from the University or ceases to be matriculated.
- D. **Participation in Faculty Research.** Where a student(s) participates in the work or research of a faculty member(s), and such student participation does not constitute Substantial Use of the University Resources on the part of the faculty member(s), the student and faculty member may agree prior to the commencement of such work or

research to allocate the copyright arising with respect to such work or research between the student and faculty member, as they may agree. No such agreement shall operate to transfer copyright to all or any portion of a student's thesis or dissertation to a faculty member, or otherwise transfer ownership to a faculty member of work produced by a student in the course of the faculty member's teaching or academic advising activities involving such faculty member.

- E. **Participation by Students in the Creation of Software.** In situations where a faculty member has initiated and is leading his or her own personal research project involving the creation of software code, and one or more students are involved in such research project to the limited extent of making discrete contributions to the research (and the involvement of students does not rise to the level of a joint research project between such faculty member and the student), then, absent written agreement between the faculty member and the student or the applicability of any of the Standing Exceptions in Section III(B), the following terms shall apply: (1) there shall be no presumption of joint copyright ownership by faculty and student, (2) each of the faculty member and the student shall own the copyright to the portions of the research which constitute their original work and shall be free to license or otherwise use such work, (3) the faculty member shall hold a non-exclusive royalty-free license to use the work of the student in such research for all purposes determined by the faculty member, consistent with this Policy and other policies of the University, (4) the student shall not hold any license or other right to use any portion of the research other than the original work created by the student and (5) the faculty member shall determine, consistent with academic principles, whether and how to credit student contributions to the research project.

## V. Commercialization of Copyrights

- A. When the University asserts copyright ownership in material (i) the creator or (ii) in the case of instructional media, the faculty member(s) represented within such media, has the right to share in any net proceeds derived from commercializing that material.

Specifically, net proceeds (see below) shall ordinarily be distributed as follows:

1. 15 percent for the general support of the Technology Transfer Office and to cover any other expenses associated with commercialization; and
2. The remaining net proceeds (85%) shall be distributed as follows:
  - a. Creator share: [X]% of net proceeds to the creator(s) (including creators at other institutions), up to a total of \$[Y], and [X-]% thereafter.
  - b. The remainder of net proceeds shall be used by the University for research, scholarship and other educational activities in the following manner:
    - i. [Z1] to the department in which the material was created

- ii. [Z2] to the school or other University division in which the material was created; and
- iii. [Z3] to the University.

Gross proceeds are all proceeds from licensing or otherwise granting rights in copyrightable material to third parties, including licensing fees, royalties on sales and other usage, and milestone payments, but excluding research funding. Net proceeds are gross proceeds minus all out-of-pocket expenses incurred by the University that are associated with the particular material. Out-of-pocket expenses may include legal expenses associated with securing the copyright, negotiating an agreement, travel expenses, payments due to other parties with rights in the work, or any reasonable expenses incurred in pursuing the commercialization of the material. If the University pursues or defends litigation to enforce copyright ownership, then the proceeds of any judgment or settlement from such litigation shall ordinarily be included in gross proceeds, and the associated litigation expenses shall be deducted as out-of-pocket expenses. If litigation is pursued, the distribution described above may be modified to reflect the greater economic risk being incurred by the University in pursuing such litigation.

Creators who are (i) employees of the University, (ii) acting within the course of such employment and (iii) not faculty or research staff, will not automatically be covered by this Section; rather, in such cases, the supervisor of such an employee or the relevant project leader shall make a determination as to the appropriateness of such employee sharing in the proceeds of commercialization.

- B. Equity – Equity received from a company or other entity in lieu of license fees or royalties shall be allocated by calculating and distributing the appropriate number of shares, using the same percentages outlined above, irrespective of their value. In the event that there is a single share or a partial share, which cannot be distributed to the creator(s), that share or partial share shall belong to the University. Unless otherwise required by contractual arrangements or applicable law, the University shall distribute shares or equity at the time they are received by the University or will require that the creator receive such equity directly from the company or other entity. In the event that the University is required to hold the shares for any length of time or is otherwise restricted from distributing shares to creators, the University shall hold such shares or other interests but shall not be responsible for any fluctuation in the value of the shares or any matters relating to the administration of such shares or interests.
- C. Use of funds – Shares of proceeds shall be used by departments, schools and the University to further the research, scholarship and education goals of the University.
- D. If more than one creator is to share in the creator share, the creators shall decide among themselves their respective shares and shall provide the Technology Transfer Office with a written agreement signed by all creators. Such written agreement shall be provided within three months of a written request from the Technology Transfer Office for such an



agreement and shall be irrevocable unless it is modified in writing by all creators. In the absence of such a written agreement, the University shall determine the distribution of shares to creators.

- E. Whenever the University licenses rights to copyrightable material, it will reserve the right for the University to use the material for internal research and educational purposes and will generally seek to reserve such rights for other non-profit research institutions.

#### VI. Transfer of Copyrightable Materials Owned by the University to the Creator

If the University determines that it will not pursue commercialization of copyrightable material subject to University ownership under this copyright policy, the University will consider a written request by the creator to transfer ownership in the material to the creator, subject to the terms of any applicable agreements with third parties under which the material was created. Transfer of ownership to the creator will be subject to an irrevocable royalty-free license to the University to use the material for education, research and other non-commercial purposes and reservation to the University of the right to grant similar licenses to other nonprofit institutions. In those instances in which there are multiple creators, all creators must be in agreement and be party to such a request.

#### VII. Open Source Code and Other Open Access Licensing of Copyrightable Materials

- A. In accordance with the University's mission of conducting education and research, an owner of copyrightable material may desire to make copyrightable materials widely available to the public via open source licensing of software or publication of materials via open-access licenses. In each case, the decision to make materials widely available should include a number of considerations including, without limitation: who owns the material under this copyright policy whether the same interests would be better served by commercialization of such materials and whether open access should be limited to nonprofit and educational purposes.
- B. Open access licensing may also be covered by separate policies and procedures of the University in effect from time to time. Such policies and practices may cover issues such as permitted use of the University resources (including computer resources and bandwidth) and require consultation with the Provost and the University's Offices of Information Technology Services and Legal Counsel to determine the implications of open-access licensing using the University resources.
- C. As a general matter, an individual who owns copyrightable material (and the University does not retain an interest in such material) under Section III, may freely engage in open access licensing which does not use the University resources.
- D. In the event that the University either owns copyrightable material under Section III or retains an interest in such material, open access licensing may be conducted only following disclosure to the University under Section VIII(B). Following disclosure and a request that such material be made available on an open-access basis, the University shall

make a determination as to such request weighing the factors outlines in Section (A) and taking into consideration the views of the relevant faculty and Dean and the Technology Transfer Office.

## VIII. Administration of Policy

- A. **University Administration.** This copyright policy will be administered by the Provost, subject to the oversight of the Intellectual Property Advisory Committee and in consultation with the Deans of each School of the University. The Provost may delegate his/her duties under this Policy to such other officers or employees of the University as he/she may find appropriate. Further information about the Intellectual Property Advisory Committee and other University departments which play a role in administering this copyright policy is contained in Appendix A.
- B. **Disclosure of Copyrightable Materials.** It is the responsibility of the creator or group of creators of copyrightable material to promptly notify and fully disclose to the University any work in which the University may claim ownership rights or an interest under this Policy, including any work which made Substantial Use of the University Resources. If a creator is uncertain whether the University has ownership rights or other interests in certain material, that work shall be disclosed to the University.
- C. **Agreement to Policy.** This Policy constitutes an understanding that it is binding on the University and on all individuals who accept University employment, who use the University resources or facilities, or who participate in University research. All individuals employed by or affiliated with the University shall be advised of the University's policies and procedures relating to intellectual property through publication in the Faculty Handbook on the University's website. The University may require formal copyright agreements to implement this 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 may have under any other University policy, including without limitation the patent policy, or any applicable law.
- D. **Disputes.** Disputes involving intellectual property rights or this Policy shall be reviewed and resolved by the Provost or such other officers or employees as he/she designates. Decisions made by delegees may be appealed to the Provost, who will review the matter and reach a decision in consultation with the Intellectual Property Advisory Committee, the relevant Dean or Director, and others determined by the Provost. In the event that disputes are reviewed and resolved by the Provost, such decisions may be appealed to the President, who will review the matter and make the final decision.
- E. **Standing Committee.** The Provost shall establish and appoint an Intellectual Property Advisory Committee, which shall be a standing University committee with broad responsibilities on matters relating to all intellectual property matters (e.g., patents, copyrights, software).

- F. **Administration by Schools.** (i) The Deans of each School of the University shall work closely with the Provost and the Intellectual Property Advisory Committee to ensure that the perspectives, practices and values of each School are taken into consideration in the decision-making process under this copyright policy. In addition, the relevant Dean shall be involved with any decision to (x) grant open access to copyrightable material in which the University retains ownership or an interest under Section VII(D) and (y) commercialize instructional media which is a reproduction of a University course or program.
- (ii) Each School of the University retains the right to supplement this Policy as necessary or desired by that School, including requiring formal copyright agreements of their employees. Any supplement shall be consistent with the terms of this Policy, in writing, approved by the Dean of the relevant School and submitted to the Provost for review and approval.

## **APPENDIX A**

### **Implementation of Policy**

This Appendix describes the means by which the University administers the copyright policy. It is not formally part of this policy and may be modified by the University as appropriate without formal approval.

#### I. The Intellectual Property Advisory Committee

##### A. The members of the Committee on Intellectual Property shall include:

1. The Director of the Technology Transfer Office and/or his/her designee(s);
2. The Directors of the Offices of Sponsored Programs, or their designee(s);
3. One or more designees of the Provost;
4. Faculty from diverse schools of the University; and
5. One or more representatives from the Office of Legal Counsel.

##### B. The Intellectual Property Advisory Committee shall advise and make recommendations to the Provost regarding:

1. University policies, guidelines and procedures relating to all intellectual property matters;
2. Policy amendments based on periodic reviews of University policies, guidelines and procedures relating to intellectual property;
3. Disputes relating to intellectual property; and
4. The University's ownership of particular works of intellectual property.

#### II. The Technology Transfer Office – The Technology Transfer Office manages all activities relating to the protection and commercial promotion of intellectual property at the University, including the School of Medicine. The responsibilities of the Technology Transfer Office include:

1. Determining which technologies the University should seek to patent;
2. Facilitating the transfer of inventions, copyrightable works and other intellectual property to the marketplace;
3. Securing patent protection for new technologies subject to University ownership under the patent policy;
4. Securing copyright registration for new works subject to University ownership under the copyright policy, where appropriate;
5. Generating industrial support for ongoing research projects;
6. Licensing University inventions and copyrightable works to ensure full commercial application and generate royalties; and
7. Building an equity portfolio of stock in companies that were started around University inventions, copyrightable works and other intellectual property

#### III. Office of Legal Counsel – Legal questions regarding intellectual property and relevant policies may be referred directly to the Office of Legal Counsel.

## Frequently Asked Questions Under the Patent Policy of the University

### Collaborative Activities

1. I am a faculty member in the Biology Department. I have been engaging in an ongoing research project with another scholar employed by another academic institution. What happens if I make an invention with this person in the course of our collaborative research?

Answer: Any time a faculty member or researcher employed by the University is engaged in collaborative research with someone who is not employed by the University, the two employing institutions (whether they be universities or other types of institutions) should enter into an agreement prior to the start of the research to coordinate patenting and licensing activities and to agree on a sharing of patent expenses and revenues.

As a faculty member, your inventions will be owned by the University under the patent policy. If you are a joint-inventor on an invention and there is no agreement in place, it is likely that the result will be joint ownership of the invention by the two employing institutions.

Whether there is an agreement in place or not, in the event that an invention results from the collaborative research, you should submit an Invention Disclosure Form to the Technology Transfer Office, indicating all inventors and their affiliations.

### Consulting Activities

1. I am a faculty member at the College of Dentistry and I want to consult for a company which insists that they must own all inventions arising from my consulting work. Is this acceptable under University policies?

Answer: At the beginning of any proposed consulting engagement, it is important to ensure that the engagement will be in compliance with all University policies relating to outside consulting activities. These policies are referenced in Section IV of the patent policy, which requires that faculty inform proposed outside companies about the existence and terms of the University's policies.

The presumption that the University will own inventions of its faculty will not apply to inventions arising in the context of consulting activities if the provisions of Section IV.B of the patent policy are satisfied: the company engaging the consultant must have proposed the topic of the work which led to the invention, the consultant shall not have engaged in research at the University on the topic or problem, and there shall have been no use by the consultant of the University resources or personnel in the conception or reduction to practice of the invention.

If all of these criteria are satisfied, then the faculty member, acting as a consultant, may assign his or her rights to the invention to the company.

All faculty are required, under Section IV.A of the patent policy, to disclose all inventions, including inventions made in the course of consulting activities, to the Technology Transfer Office to determine whether inventions are, in fact, owned by the University or by the company under this Policy.

### Research or Work Not Performed at the University

1. I am a surgeon who is a full-time faculty member at the School of Medicine. I thought of an idea for a new surgical device in the evening which is not time I would ordinarily be engaging in activities related to my employment at the University. I then made a prototype based upon my idea. I did not use any University resources to make the prototype. Do I own the invention and prototype?

**Answer:** No. Because the invention is within your Field of Appointment (as defined in the patent policy, the invention and the prototype would be owned by the University. The definition of Field of Appointment covers the “broad academic field or area of research or clinical activities in which a faculty member is engaged.” As a surgeon, the invention of a surgical device falls clearly within this language.

You should disclose the invention and prototype to the Technology Transfer Office which will evaluate obtaining patent protection and possible licensing opportunities. Under Section V of the patent policy you would be entitled to share in any revenue derived from licensing of the invention or prototype.

2. I work part-time at the University as a research scientist in the Physics Department doing MRI research. I am also employed part-time by a corporation which manufactures MRI equipment. I had an idea which I believe may lead to an invention in this field. The idea occurred to me during conversations I had with the faculty with whom I work at the University and I later worked on developing the idea while at home. If this idea supports a patentable invention, who owns it?

**Answer:** As a part-time employee or research scientist, inventions which are either “conceived or first reduced to practice” by you “in the course of” employment by the University will be owned by the University. Since the idea occurred to you as part of your collaborative work with faculty colleagues at the University, it was “conceived” in the course of your employment.

You should disclose the idea to the Technology Transfer Office which will evaluate obtaining patent protection and possible licensing opportunities. As is

the case with full-time employees, you would be entitled to share in any revenue derived from licensing of the invention under Section V of the patent policy.

### Departure from the University

1. I have been a faculty member at the University for five years. During this time, my research has led to three patentable inventions owned by the University. I am now leaving the University to continue my research at another university. Does the University continue to own my inventions? What happens if I invent something at my new university which is related to an invention owned by the University?

Answer: Inventions made while you were at the University will remain owned by the University, and you will continue to share in any net income if the University licenses the invention.

If you started inventive activities in your research (or otherwise) while you were still at the University but then these activities continued and concluded once you become employed by your new university, the invention will be co-owned by the University and your new university. In this case, the University and your new university must negotiate an inter-institutional agreement to coordinate patenting and licensing activities and to agree on a sharing of patent expenses and revenues.

### Determining Inventorship

1. I am a faculty member in the Chemistry Department. I am working with one other faculty member to direct a research project and research team which includes two part-time research scientists and a changing group of graduate students and post-doctoral fellows. If an invention results from this research project, how do I figure out who are the actual inventors?

Answer: The legal standard which determines who will be classified as an “inventor” of a patent is different from the academic standards and norms as to who will be considered an “author” on a paper which may relate to the same invention.

An invention will be defined by the claims of the related patent. To qualify as an inventor on a patent, a person must have played a role in the actual conception of at least one of the inventions claimed by the patent.

A person who carries out the instructions of another (e.g. a student who carries out an instruction you give as to the conduct of a portion of the research) would not be classified as an inventor.

If you have questions about who should be classified as “inventors” you should consult with the Technology Transfer Office.

## Funded Research

1. I am a faculty member at the School of Medicine and my research is funded by a grant from the National Institutes of Health. Does this funding create ownership rights in the Federal Government? Will inventions resulting from my research and owned by the University under the patent policy be freely licensable by the University to third parties?

Answer: NIH funding will not prevent the University from having ownership of an invention under the patent policy or from engaging in commercial licensing of the invention. The United States Government will retain a nonexclusive license to the invention for use for governmental purposes which may include the conduct of further government-sponsored research. The United States Government does not share in any revenue which may be received from licensing activities of the University.

The United States Government maintains “march-in rights” (which are rarely if ever exercised) which give the Government the right to intervene and grant commercial and other licenses to the invention in the event that the University isn’t using the invention or a licensee of the University isn’t actually commercializing the invention.

You can check with the Office of Sponsored Programs and the Technology Transfer Office for further information about different governmental funding sources and their specific rules.



## Frequently Asked Questions under the Copyright Policy of the University

### Traditional Works of Scholarship, Instructional Media and Consulting

1. I am a faculty member at the University. Working on my own, I have created a short online course on the topic of animation. I have not used the University resources or any funds from a third party to create this course. However, I do use within the online course certain materials derived from the content of a course I teach at the University and a summary of my dialogue with my students at the University within the course management site relating to this course.

Can I commercialize my rights in this online course? Does the University retain any rights to the online course?

Answer: Under Section III of the copyright policy, you would own the online course since you created it by yourself, without funds from the University or a sponsor, and without Substantial Use of the University Resources. Under Section III(B), the University would retain a non-exclusive license to the materials which were actually used in your course at the University but that license would not cover the entirety of your online course. Under Section III(C), the online course would constitute “instructional media” and prior to any commercialization of the course, you would need to ensure that such activities were permitted under the University’s conflict of interest, conflict of commitment policies, use of name and other policies by obtaining clearance from the Office of the Provost.

Do the students whose dialogue is included within the course have any rights?

Answer: Under Section IV of the copyright policy, students own the copyright to original work created by them in classes at the University, among other things. If you make use of original student work or a derivative work which is based on student work, you would need to obtain the prior permission of the student in order to use their work in your online course.

2. I am a faculty member writing a textbook consisting entirely of printed textual material in the area of economics to be published by a large academic publisher. The work reflects years of my personal research and lecture notes from classes I have taught at the University. I am writing the textbook at home and in my office, using my University computer, minimal secretarial assistance from the departmental secretary, and without any other resources from or through the University.

Does the University retain any rights to the textbook? Is the textbook “instructional media”?

Answer: Under Section III(A) of the copyright policy, your textbook would be a Traditional Work of Scholarship since it is based on your personal research and lecture notes. Your use of the type of minimal University facilities you describe are not sufficient to give rise to an interest on the part of the University under Section III(E) of the copyright policy which contemplates that all faculty will make routine use of certain limited facilities of the University such as libraries, their offices and office equipment and minimal use of shared departmental resources. The textbook would not constitute “instructional media” under Section III(C) of the Policy since a printed textbook, without additional interactive components, would not fall within the definition of “instructional”. If your textbook were to be published as an electronic publication, this analysis would continue to apply unless additional interactive components (which involve you) were added to the publication.

- 3 I am a faculty member in the field of computer science. I have been invited by a Wall Street banking firm to give a speech to a large group of its employees and invited guests on a topic of current interest in my field. I will be receiving an honorarium. Will this lecture constitute consulting or “instructional activity”?

Answer: Giving a speech to a large group of people, even if followed by a typical session of questions from the audience, should not constitute “instructional activity” under the copyright policy because the giving of speeches are a form of traditional scholarly activity and the intent of the activity is not to replicate to any extent the interaction conducted in a classroom. You should ensure that you are in compliance with the University’s policy regarding consulting and conflict of commitment.

If I am invited by the same banking firm to give a series of seminars to small groups of employees working in a related field, will this activity constitute “instructional activity”? I will be receiving payment for each session of the seminar.

Answer: This activity would replicate the interaction conducted in a classroom and would constitute instructional activity under the copyright policy. If the copyrightable materials used in the seminars are owned by you under Section III(C)(1) of the Policy, you are free to use them in outside activity. However, it is your responsibility to ensure that your activities have been approved under the University’s conflict of interest and conflict of commitment policies and that you are not using the University name in connection with such activities other than for identification purposes. You should contact the Office of the Provost to seek such approval.

4. I am a faculty member in the school of the arts who teaches screenplay writing. There is a commercial company which would like to videotape lectures by me on the subject of

screenplay writing and then sell these lectures to the public via DVD and podcast. The actual lectures would be taped outside of the University and the audience would consist of actors with no relationship to the University. I will receive an up-front amount and then royalties on sales of all lectures. How will the copyright policy and/or related policies affect my ability to participate in this project?

Answer: Clearly, a series of lectures would constitute instructional activity under the copyright policy. If the content of the lectures is not otherwise owned by the University under Section III(B) of the copyright policy, you should be able to enter into the proposed transaction after obtaining approval under the University conflict of commitment and conflict of interest policies. Additionally, the lectures should not include any reference to the University, including references to your faculty status at the University. If all or any portion of the lectures consists of materials which you previously handed out in an University class, the University would retain a non-exclusive license to such materials under Section III(B)(1).

#### Leaves of Absence from the University

1. I am a faculty member on a leave of absence from the University during which I will be paid 75% of my salary. During my leave, I will be conducting independent research in my field. Will the copyrightable materials resulting from this research be covered by copyright policy?

Answer: Yes, a leave which is paid at a rate of 75% will be treated as though a faculty member is continuing to work at the University and the copyright Policy (and all other policies of the University) would continue to apply. With respect to any particular copyrightable materials arising in the course of your research, you would need to analyze the terms of the copyright policy to determine ownership and rights to such material.

What if my leave is paid at the rate of 50% and my activities while on leave include performing work for a consulting firm in my field?

Answer: Under Section II(B) of the copyright policy, works created while on an unpaid leave (or partially paid leave at this level) would be covered by the copyright policy under the section relating to outside consulting. As long as you have not used Substantial University Resources (as defined in the Policy), the materials do not include any teaching activity, there is no violation of the conflict of interest or conflict of commitment policy or any use of the University name other than for identification purposes, and the research work is not related to research being conducted at the University, you should be free to perform work for the consulting firm and either assign or license your rights in copyrightable material to such firm. If you have questions about the applicability of any of the University policies referred to above, you should contact the Office of the Provost.

## Classroom Issues

1. I am a faculty member in the field of computer science. I developed software prior to coming to the University which I solely own. If I bring the software into the classroom and distribute it to students for purposes of conducting an exercise what is the effect under the copyright policy?

Answer: Under Section III(B)(1) of the copyright policy, the University would retain a non-exclusive license to the software actually distributed in class and such license would be limited to use by the University only for educational and research purposes.

2. I am an adjunct professor. Does the copyright Policy apply to me? If I only teach at the University for one semester, will the copyright policy give the University a right to my syllabus?

Answer: The copyright policy would apply to you, as an adjunct, with respect to the work you do at the University. Section III(B)(1) of the Policy would reserve a non-exclusive license for the University to your course syllabus for educational and research purposes. You would, of course, continue to own the copyright to the syllabus and be free to use the syllabus in any of your activities outside of the University after your adjunct position at the University has ended.

## Software Issues

1. I am a computer science faculty member. I have been working on a personal research project over the course of the last fifteen years while working at various institutions. I would now like to continue my research as part of my scholarly activities at the University. I am not receiving any grant or other funding and there is no other involvement of the University or unusual use of the University facilities. I would like to work with one or two graduate students who receive a fellowship from the University. The students will be working under my direction to create specific pieces of code which implement certain of my ideas.

Do I need to take any action to ensure that I own all rights to the code resulting from my research?

Answer: As described, the students are working on discrete portions of research which is otherwise defined and initiated by you. Therefore, the provisions outlined in Section IV(E) should apply to automatically provide to you a license to the students' work to use such work as part of your research for all purposes, and will limit the rights of the students to only those piece of the research actually created by such student. You should not need to enter into a separate agreement with the students; however, if you choose to enter into such an agreement to

further detail or modify the provisions set forth in Section IV(E), you and the students are free to do so.

2. I am a professor of mathematics. I am working together with a group of students who receive fellowships from the University on a new problem posed by an outside corporate sponsor and of great interest to me as a mathematician. The sponsor will receive a non-exclusive license to use any results of the research. Solving the problem will involve a great deal of collaborative work by myself and the students and, based upon conclusions which I approve, the students will write software code.

How will the copyright to the resulting software code be allocated among the different participants?

Answer: This project involves the type of collaboration between faculty and students which goes beyond the making of discrete contributions by students and appears to be research, the results of which are jointly created by the entire group. In this case, the provisions of IV(E) would not apply and it is likely that the Standing Exception in Section III(B)(6) would apply to locate ownership of the software code with the University since “development has been by a team such that the identity of the project resides with the University rather than with particular individuals.”

In this instance, given the presence of a corporate sponsor, the result may vary under the Policy. In most cases where a sponsor provides funding, the agreement with the sponsor requires execution by the University and requires that the University grant a license to the sponsor. If this is the case, the Standing Exception in Section III(B)(7) would apply to locate ownership of the software code with the University.

## ADDITIONAL RESOURCES

### **Indiana University Intellectual Property Policy: Summary of Key Provisions**

*(prepared by Beth Cate, Associate General Counsel)*

Policy is available at: <http://www.research.iu.edu/respol/intprop.html> (adopted May 9, 1997)

- Covers copyrights and patents; not trademarks
- Grants IP ownership to IU in any “invention, creation, innovation, discovery, or improvement” that is
  - Developed by anyone (known as “Creator”) with “university resources.” University resources includes all tangible resources provided by IU to Creator, but does not include salary, insurance, or retirement plan contributions
  - Required to be assigned to IU by law or contract
  - Developed commercially by IU, at the Creator’s request
- Two categories of University-owned works:
  - “Applicable Intellectual Property” (AIP) – developed with IU resources but initiated by Creator
    - Creator shares in revenue from commercialization
    - IU has sole right to determine disposition of AIP, but must take Creator views into account
  - “Institutional Works” – developed with IU resources at instigation of IU, for IU’s use, through written contract
    - Creator has no rights in revenue or otherwise, unless contract provides them
- Carves out exception to IU ownership for:
  - “traditional scholarly works” (publications, artworks, “informational software” that is the digital equivalent of publications, but not “device-like software” that is executable code to perform a function), unless they are Institutional Works.
  - “instructional materials” (textbooks, syllabi, study guides, etc.), unless they are Institutional Works
- IU and Creator must work together to facilitate both scholarly publication and IP protection
- Creator must promptly disclose AIP to Technology Transfer Office (TTO)\*
- Revenue distribution (net of protection/licensing costs) for AIP:
  - First \$100K: Creator = 50%, Campus = 25%, Central Admin = 25%
  - Next \$300K: Creator = 40%, Campus = 25%, Central Admin = 35%
  - Next \$600K: Creator = 30%, Campus = 25%, Central Admin = 45%
  - Excess of \$1M: Creator = 25%, Campus = 25%, Central Admin = 50%
  - Alternative allocations possible with written exception to policy agreed by Creator, relevant deans and chancellors, and VP for research
  - In absence of written agreement otherwise, multiple Creators receive equal shares
  - Revenue allocation reviewed, and revised as necessary, every 5 years by University Research Policy Committee (URPC)\*\*

- Tech transfer office may obtain equity interests instead of royalties, in which case Creator must elect between Creator’s share of equity interest, or share of revenue generated when IU sells total equity
- Encourages faculty, staff and students to make IP they own available to university for internal, noncommercial, royalty-free use in support of university mission, with proper attribution to Creator
- Encourages Creator who assigns rights in IP they own to retain nonexclusive, royalty-free licenses for them and others at IU to use those works for noncommercial teaching and research
- IU must either pursue protection of AIP or relinquish to Creator for licensing or assignment
  - IU always retains royalty-free license to use the IP for noncommercial teaching and research
  - IU receives share of net proceeds from commercialization; share negotiated on case-by-case basis
  - Creator approached to license or assign IP must give IU enough information to assess marketability
  - IU must notify Creator within 45 days of any objection to proposed assignment or license
- All agreements to license or assign IU IP must include terms consistent with policy
- Creator must assist as needed to protect University IP
- Creator may not assign or license University IP without IU permission
- Primary responsibility for managing AIP rests with TTO, under policies developed by VP for Research and URPC
- TTO must notify Creator promptly of decision to protect/ not protect disclosed IP
- Creator and Director of TTO may appeal to URPC adverse determinations re: identification, protection, or management of IP. URPC decisions may be appealed to VP for Research. Further appeals are subject to existing IU policies re: review of administrative decisions (i.e., Faculty Boards of Review, staff grievance mechanisms, Student Code mechanisms for complaints against faculty or staff
- Policy may be “implemented or supplemented in any way consistent with its terms and those of other university policies”
- Exceptions to any policy terms may be granted by VPR, Chancellor of relevant campus, and dean of relevant school
  - VPR shall consult with URPC whenever practical
- IU shall inform all persons subject to policy upon adoption and “at regular intervals thereafter”

\*Technology transfer is handled by the IU Research and Technology Corporation, a separate 501(c)(3)

\*\*The URPC has since been superseded by the University Faculty Council Research Affairs Committee

Issues/questions that have arisen under policy, and which are being addressed in our current revision of the policy:

- Desire for change in distribution of commercialization proceeds, with more to Creator, Creator's unit, and campus and less to central administration
- Need for "de minimis" exception to University ownership based on use of IU resources. In practice, we have implemented this exception, so that e.g. limited use of IU email in the course of faculty outside consulting, to communicate about the consulting work, would not give rise to assertion of IU ownership over IP created in the course of that work. NB: Commercial entities hiring faculty to consult often require faculty to NOT use any IU resources, including email, to avoid both potential ownership claims and potential (or constructive) disclosures that might jeopardize patentability
- Clarifying that IP rights in all deliverables under a sponsored program are owned by IU, even if they are textbooks or instructional materials.
- Addressing the problem created when there is no prior written agreement for what is clearly an "Institutional Work," i.e. IP developed at the instigation of IU and with substantial IU resources.
- Determining whether and when executable software code may be a "traditional work of scholarship"
- Determining when software code is at a stage that it should be disclosed to the TTO
- Desire for clearer policy statement that authors of IU-owned copyrighted works may make noncompeting use of those works
- Desire for policy statement that authors of IU-owned copyrighted works will be consulted on, and offered first opportunity to complete, updates to those works
- Need for clearer statement about IP rights in online instructional materials developed by faculty, staff and students



## **Summary of Copyright Policy at North Carolina State University**

*(prepared by David Drooz, Senior Associate General Counsel)*

Policy is at [http://www.ncsu.edu/policies/governance\\_admin/gov\\_gen/REG01.25.3.php](http://www.ncsu.edu/policies/governance_admin/gov_gen/REG01.25.3.php)

NC State's "Copyright Regulation" is the institution-specific version of the more general University of North Carolina system-wide policy.

- The Provost and Legal Affairs are charged with educating the campus community about copyright law, especially the fair use doctrine
- Copyright Committee consists of 4 faculty, 3 staff, and 1 grad student as voting members.<sup>1</sup> Other staff (Legal, Tech Transfer, Libraries) serve in non-voting advisory roles.
  - Committee is to review copyright ownership questions and disputes, and issue recommendations to the Provost whose decision is final
  - Committee may recommend changes as needed in the Regulation
  - Committee is to explore ways of educating the campus about copyright
- The Regulation applies to all works under copyright that are created in the scope of employment or academic endeavor for students) at the University.<sup>2</sup>
- Ownership guidelines
  - Flexibility - Committee may recommend a lesser share of university ownership or a greater author royalty than the presumption in the Regulation
  - Works created by faculty and "EPA" staff<sup>3</sup>
    - Hold copyright in their scholarly and professional works except as noted below. University holds a "shop right" -- a non-transferable, perpetual, royalty-free, non-exclusive right to use the work for teaching, research and public service.<sup>4</sup>

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<sup>1</sup> Appointments are made annually by the Chancellor. Terms are staggered. The Committee meets as needed, approximately 4-6 times per year.

<sup>2</sup> However, UNC system policy provides:

In cases where an invention or creation is subject to protection under both patent law and copyright law, if the Institution elects to retain title to its patent rights, then the inventor/creator(s) shall assign copyright to the Institution and the Institution shall be compensated in accordance with the royalty provisions of the Institution's patent policy and procedures.

<sup>3</sup> "EPA" means exempt from Personnel Act -- these are professional staff in at-will or term contract positions. "SPA" means "State Personnel Act" -- these are regular state employees with statutory employment rights.

<sup>4</sup> The Regulation coins the term "shop right" and explains it:

6.4.1 "Shop Right" for NC State means the right to use the original work in NC State programs of teaching, research, and public service on a non-transferable, perpetual, royalty-free, non-exclusive basis. "Shop Right" for the creator means the right to use the original work for the creator's own teaching, research, and public service on a non-transferable, perpetual, royalty-free, non-exclusive basis. A "Shop Right" does not allow one to sell rights to the work or otherwise interfere with the copyright owner's ability to commercialize the work.

6.4.2. The practicality of a "Shop Right" is presumed, and therefore the "Shop Right" exists automatically unless the matter is submitted to the Copyright Committee for review. The Copyright Committee shall determine whether a "Shop Right" is appropriate and shall include this determination in its recommendation

- Exception: university holds copyright in “directed works” -- works created pursuant to a specific job assignment. Employee holds “shop right.”
- Exception: university holds copyright to works created with “exceptional use” of university resources. Author holds “shop right.” Reductions in teaching or service duties, grants from the university, waiver of fees for use of specialized equipment or facilities are examples of “exceptional use.”
- Exception: copyright in sponsored or externally contracted works is held according to the terms of the agreement. If the agreement is silent, then the faculty author holds copyright (university holds “shop right”) absent another exception.
- Works created by staff under the State Personnel Act
  - Treated as “work for hire” – university ownership
- Works created by independent contractors or volunteers
  - NC State units that hire a contractor must include contract language that make the copyrighted work a “work for hire” and requires assignment as a backup (resulting in university ownership)
  - For volunteers there should be an agreement that assigns or licenses copyright to the university
- Works by students
  - Students generally hold copyright to works they create
  - Unless created in scope of university employment – then the preceding employee guidelines apply
  - Unless created pursuant to sponsored research – then the preceding guideline for faculty applies
  - As a condition of enrollment, students grant a “shop right” to the university for works created as part of academic endeavor at NC State
- Works created by unknown persons apparently in scope of employment or academic endeavor at NC State
  - University holds copyright if all authors unknown
  - University shares copyright with known authors if some are known and some unknown
- Disclosure
  - Mandatory disclosure of directed works and “exceptional use” works when author wishes to commercialize
  - [Note: you may also consider mandatory disclosure in all cases where the author intends to commercialize. This increases the copyright committee’s work, but it also insures the author is not left making a unilateral decision that he holds copyright rather than the university.]

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to the Provost. An example of where "Shop Right" may not be "practical" would be when a faculty creator must assign copyright to a journal for purposes of publication and the journal demands no "Shop Right".

Shop rights are permanent -- if the employee leaves the university the shop right goes with her.

- Submission scholarly journal articles for publication is not “commercialization”
- Disclosure is made to department heads and forwarded to a staff person who assists the Copyright Committee. Committee then reviews ownership.
- Commercialization
  - Where author holds copyright, they may ask the Office of Technology Transfer to commercialize.
  - Where university holds copyright, OTT will commercialize when feasible and desired. After the university recovers its direct costs, the author receives 60% of the proceeds (40% to university).
  - As a practice, OTT normally caters to creator’s desires, such as how to commercialize, what publisher to use, and whether to publish as open source or under a license that allows free use (see, e.g., <http://www.gnu.org/copyleft/gpl.html> or <http://creativecommons.org/>)
- Additional employee rights – where NC State holds copyright, the creators have the right to
  - Recognition for their contribution
  - Request revisions or updates
  - First opportunity to make revisions and to make derivative works
  - Removal of their name from the work
  - Use of the work for professional purposes provided it does not interfere with copyright owner’s commercialization. This includes the creator's own teaching, research, and public service on a non-transferable, perpetual, royalty-free, non-exclusive basis

NC State University Advice Memo: Volunteer Agreement on Copyright

Any University employee who oversees volunteers for the University should have the volunteers sign and date a copyright agreement, if the volunteer service involves creation of copyrighted work. Copyrighted work includes software, graphics, text, audio, video, artwork, music, choreography, etc.

The copyright agreement for volunteers can be either a use license (permission) or an assignment (transfer of all rights) from the volunteer to the University. Form agreements are set out below. In addition, the University employee should attach to the agreement a list of all Works and Contributions that are created by the Volunteer (to be updated regularly).

The agreement and attachment should be retained by the University unit in charge of the volunteers.

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Volunteer Agreement to Grant Copyright License to NC State University

The undersigned Volunteer hereby grants North Carolina State University ("NCSU") a non-exclusive, royalty-free right in perpetuity to use the Work, in whole or in part, and to incorporate the Work, in whole or in part, into other works ("Derivative Works") for educational and research purposes, including, but not limited to, reproduction and distribution in University's printed and electronic materials and posting of the Work on the University's Web site(s).

All right, title, and interest in the Work, including without limitation, any copyright, shall remain with the Volunteer.

The University shall own the copyright in any Derivative Works it creates.

This Agreement is made in consideration of and is a condition of the volunteer opportunity offered by NCSU.

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

Printed Name: \_\_\_\_\_

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Volunteer Agreement to Assign Copyright to NC State University

The copyright in all works of authorship created in the course of the undersigned Volunteer's service to North Carolina State University ("NCSU") shall be owned by NCSU. The undersigned Volunteer hereby assigns to NCSU all right, title, and interest in:

- a. the copyright to Volunteer's work of authorship ("Work") and contribution to any such Work ("Contribution");
- b. any registrations and copyright applications, along with any renewals and extensions thereof, relating to the Contribution or the Work;
- c. all works based upon, derived from, or incorporating the Contribution or the Work;
- d. all income, royalties, damages, claims and payments now or hereafter due or payable with respect to the Contribution or the Work;
- e. all causes of action, either in law or in equity, for past, present, or future infringement of copyright related to the Contribution or the Work, and all rights corresponding to any of the foregoing, throughout the world.

In addition, to the extent any law or treaty prohibits the transfer or assignment of any moral rights or rights of restraint the Volunteer has in the Contribution or the Work, the Volunteer waives those rights as to NCSU, its successors, licensees and assigns.

This Agreement is made in consideration of and is a condition of the volunteer opportunity offered by NCSU.

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

Printed Name: \_\_\_\_\_

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## NC State University Advice Memo: Copyright of Works Created by Independent Contractors

Every University contract with an independent contractor should include a copyright assignment, if there is a possibility that the contractor's services will involve creation of copyrighted work. Copyrighted work includes software, graphics, text, audio, video, artwork, music, choreography, etc.

A form assignment clause is set out below. In addition, the contract should include as an attachment, or reference in the contract, a list of all Works and Contributions that are to be created by the contractor.

The contract and any attachment should be retained by the University unit that is working with the independent contractor.

Exceptions may be granted only by a Vice Chancellor (or designee).

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The copyright in all works of authorship created pursuant to this agreement shall be owned by NC State University. All such works or portions of works created by the Contractor are hereby agreed to be "works made for hire" within the meaning of 17 U.S.C. 201. However, if the University is not able to obtain copyright ownership under the statutory provisions for "works made for hire," then Contractor hereby assigns to NC State University all right, title, and interest in:

- a. the copyright to Contractor's work of authorship ("Work") and contribution to any such Work ("Contribution");
- b. any registrations and copyright applications, along with any renewals and extensions thereof, relating to the Contribution or the Work;
- c. all works based upon, derived from, or incorporating the Contribution or the Work;
- d. all income, royalties, damages, claims and payments now or hereafter due or payable with respect to the Contribution or the Work;
- e. all causes of action, either in law or in equity, for past, present, or future infringement of copyright related to the Contribution or the Work, and all rights corresponding to any of the foregoing, throughout the world.

In addition, to the extent any applicable law or treaty prohibits the transfer or assignment of any moral rights or rights of restraint the Contractor has in the Contribution or the Work, the Contractor waives those rights as to NCSU, its successors, licensees and assigns.

## Section II: Distance Education and Faculty Rights

### **FACULTY RIGHTS AND DISTANCE EDUCATION COURSEWARE: COMING TO TERMS WITH INTELLECTUAL PROPERTY POLICIES<sup>5</sup>**

November 7-9, 2007

**Bart Patterson, Chief Counsel**  
Nevada System of Higher Education  
Las Vegas, Nevada

#### **I. Introduction**

Many higher education institutions continue to experience unprecedented growth in distance education. As traditional course delivery methods face increasing competition, faculty are becoming especially sensitive to ownership of such course materials. These concerns may be grounded in both economic security and academic freedom. At the same time, the institution is faced with competing concerns regarding its ability to control use of a course developed in part with more expensive technology, while at the same time providing incentives for distance education course development. Absent a coherent and consistently applied policy, expectations by either party may not be realized.

This topic has received considerable attention in the last few years. I will not attempt to delve into all of the issues associated with distance education, but instead will identify some of the key considerations to address in university policies. For a more complete analysis, please see the September 2007 NACUA Publication “Legal Issues in Distance Education,” edited by Deborah C. Brown, John R. Przyphyszny and Katherine R. Tromble.

#### **II. The Application of Current Case Authority to Course Materials**

The law is not clear in its application of the work for hire doctrine to coursework developed by a faculty member in his or her employment with the university. Early decisions suggested that the work for hire doctrine may not generally apply to academic materials prepared by a faculty member. See Weinstein v. University of Illinois, 811 F.2d 1091 (7th Cir. 1987) (article prepared by faculty member was owned by faculty member; rejecting application of work for hire doctrine) and Hays v. Sony Corporation of America, 847 F.2d 412 (7<sup>th</sup> Cir. 1988) (in addressing copyright dispute involving a manual prepared by high school teachers on how to use the school’s word processing system, court stated that although the 1976 Copyright Act definition of work for hire is generally held to have extinguished the common law teacher exception to the work for hire doctrine, defining academic work as being within the work for hire doctrine would create havoc in settled practices).

In Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) the Supreme Court clarified the application of the work for hire doctrine. The Court held that under 17 U.S.C. § 101, work for hire can arise in one of two mutually exclusive means, one for employees and

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<sup>5</sup> The author is the workshop coordinator and is submitting this paper as supplemental material for the session.

one for independent contractors. For independent contractors, the work must fall within one of the nine enumerated categories of the statute and there must be an express writing stating that the work was one made for hire. 490 U.S. at 742-43. With regard to employees, the court held that the issue is one of whether the work is within the scope of employment with reference to agency law. 490 U.S. at 740.

A number of courts have subsequently interpreted these provisions in determining whether to apply the work for hire doctrine to academic works, again with varying results. For example, in Vanderhurst v. Colorado Mountain College, 16 F. Supp. 2d 1297 (1998) the court, citing Reid, held that while a veterinary technology course outline was prepared by a professor on his own time, it was part of and incidental to his teaching duties and therefore was a work for hire owned by the college. See also Foraste v. Brown University, 290 F. Supp. 2d 234 (D. R.I. 2003) (distinguishing Weinstein and Hays on the ground that those cases involved scholarly articles that were not subject to supervision, court held that university owned copyright interest in photographs taken by Foraste as a work for hire as part of his employment); Shaul v. Cherry Valley-Springfield Central School District, 363 F.3d 177 (2<sup>nd</sup> Cir. 2004) (citing the work for hire doctrine and rejecting an “academic exception,” court held that teacher did not have an ownership interest in tests, quizzes and homework problems and other teaching materials that he prepared as part of his classroom duties).

The contrary position was taken by the court in Pittsburgh State University /Kansas National Education Association v. Kansas Board of Regents/Pittsburgh State University, 122 P.3d 336 (Kansas 2005). In that case, after a significant review of case authority and commentary, the court denied summary judgment to the Board of Regents, finding that academic works are not per se works for hire simply because such works are created while the faculty member is employed by the university. See also Bosch v. Ball-Kell, 2006 WL 2548053 (C. D. Ill. Aug. 31, 2006) (unreported) (denying summary judgment on copyright claim finding that a factual issue existed as to whether teaching materials prepared by a University of Illinois College of Medicine professor were owned by university as a work for hire).

In fact, to highlight the importance of clear policies to avoid litigation in this area, one need only review the Court’s laundry list of findings in denying summary judgment on the work for hire defense asserted in Gilpin v. Siebert, 419 F. Supp. 2d 1288 (D. Ore. 2006), involving materials prepared by a counselor at Portland Community College:

- Issue of fact existed as to whether counselor created student guidebook substantially within her authorized work hours and space at the college.
- Issue of fact existed as to what portion, if any, of instructor’s manual was comprised of lesson plans that counselor designed for purposes of fulfilling her teaching duty at the college.
- Issue of fact existed as to how much time counselor spent creating instructor’s manual in her classes, as opposed to outside her official work hours.
- Issue of fact existed as to whether counselor wrote instructor’s manual at least in part to serve college.
- Issue of fact existed as to whether workbook was the kind of work that counselor was employed to perform at the college.
- Issue of fact existed as to whether counselor used significant personnel time, facilities or other resources of the college to develop works at issue.

The conclusion from the existing case authority is that institutions cannot rely upon the work for hire doctrine to establish ownership. Higher education policies should establish clear guidelines for ownership, or alternatively, there should be a written agreement concerning each work.



### **III. Faculty Concerns**

The AAUP has adopted a number of statements pertinent to the discussion, including a 1999 Statement on Distance Education. The AAUP has also developed sample intellectual property and distance education policy and contract language. (See [www.aaup.org/AAUP/issues/DE](http://www.aaup.org/AAUP/issues/DE)). These policies start with the premise that ownership of distance education course materials should not be treated any differently than ownership of traditional courses. The 1999 AAUP Statement on Copyright, as to ownership generally, states:

Intellectual property created, made, or originated by a faculty member shall be the sole and exclusive property of the faculty, author, or inventor, except as he or she may voluntarily choose to transfer such property, in full, or in part.

However, the Statement on Copyright recognizes three common exceptions, including a work for hire, negotiated contractual transfers and joint works where the institution can be considered a co-author.

### **IV. Higher Education Distance Education Ownership Policies: Covering the Waterfront**

Higher education institutions have adopted a number of different approaches in addressing faculty ownership of distance education course materials. Virtually all institutions identify works in which the institution has some ownership interest as including separate payment or course release for work, and grant funded work. This section primarily deals with the application of policy to areas in which the institution's interests may not be as clear. While it is not feasible to catalogue all of the different approaches, a few interesting approaches are described below.

#### **A. Traditional Approach**

Many higher education institutions or systems, such as the Nevada System of Higher Education, still apply a traditional "one size fits all" kind of approach to intellectual property, including distance education courseware. The policies do not necessarily differentiate between distance education and course development, but instead refer to creative works generically.

These policies suggest a bright line by which any work is either owned completely by the faculty member or the institution. This approach generally assumes that ownership of original works, including course materials, is retained solely by the faculty author/creator unless either, 1) there is a "substantial use" of institution resources in preparing the course materials or 2) the faculty member received special pay, including course release time, for development of the course based loosely on a concept of "work for hire." The "substantial use" terminology may be stated in other ways that reach the same result. For example, some institutions assign ownership to the faculty member as long as the faculty member makes only "minimal use" of institution facilities or resources.

The "bright line" test is not in fact a bright line. It is difficult to define "substantial use" or "minimal use," thereby potentially leaving significant opportunity for dispute. Many institutions have sought to define such terms by identifying what resource use will or will not constitute substantial use.

A few institutions have created separate comprehensive policies pertaining to instructional materials that are inclusive of distance education. For example, the University of Wisconsin System Copyrightable Instructions Materials Ownership, Use and Control Policy, available at [www.uwsa.edu](http://www.uwsa.edu), does not distinguish between distance education courseware and other instructional materials. The policy defines “minimal use” to include “the use of university laboratories or equipment, but does not include released time from regularly assigned duties.” Conversely, “substantial” is defined to include “released time from regularly assigned duties; direct investment by the university of funds or staff, or the purchase of special equipment for the project; use of multimedia production personnel and facilities; or extraordinary use of computing resources.” In the event substantial university resources are used, this triggers a requirement that the parties enter into a written agreement prior to beginning the project that addresses internal use, external use and revisions. A form agreement is attached to the policy.

As another example, Indiana University Purdue University Indianapolis has developed a “Memorandum of Understanding Assuring Rights of Use of Instructional Materials,” available at [www.copyright.iupui.edu](http://www.copyright.iupui.edu). The IUPUI approach is designed to not have to clearly differentiate rights dependent on use of university resources. Instead, the policy generally gives the university rights of internal use, requires agreement on other specific terms such as any limits on use, and grants the instructor full use to use his or her individual contributions in such works unless such use competes directly with the university’s actual or planned use of the course materials.

One of the more extensive definitions of substantial use, in which the institution retains title, is found in the Brigham Young University Intellectual Property Policy, available at <http://ipsinfo.byu.edu>. The BYU definition includes as substantial use:

1. Extended use of time and energy by the developer(s) in creating or promoting the work that results in reducing the levels of teaching, scholarship, or citizenship activities, so that anticipated performance in these areas is at a level significantly less than normal.
2. Substantial use of university facilities such as laboratories, studios, equipment, production facilities, or specialized computing resources.
3. University funding in support of the work’s creation.
4. Release time to develop or complete a work.
5. Paid professional development leave to develop or complete a work.
6. Direct assignment or commission from the university to undertake a creative project as a part of the developer’s regular appointment.
7. Substantial use of funding from gifts to the university to support creation of the works involved.
8. Production of the work under specific terms of a sponsored research grant or contract.
9. Substantial subvention by the university in the publication of a scholarly book or creative work.

10. Use of specifically designated university funds or extensive use of the services of a support unit financed by the university (e.g., Center for Instructional Design) for production of a creative work.
11. Use of university computers and servers for Web-based activities such as a distance-learning course.

With respect to distance education courseware, obviously this policy approach considers all such works as involving substantial use.

The definitions are evolving. While an institution may typically view use of an institution provided computer and office facilities (all of which would be included as part of the individual's employment in any event) as minimal use, the distinctions are more problematic as applied the expanded role of specialized distance education office personnel, expensive technology, software, graphics and other institution provided aides for distance education course development.

Some institutions maintain a traditional approach, but simply recognize that the definition of substantial use will change over time. For example, the Cornell University Copyright Policy, available at [www.policy.cornell.edu](http://www.policy.cornell.edu), separately defines "traditional works" and "encoded works." Encoded works are works that "include software and other technologies used to support electronic capture, storage, retrieval, transformation and presentation of digital data and information or to interface between digital forms and other communications and information media. The university asserts no interest in traditional works, but may assert an equitable interest in encoded works if there is a "substantial" use of university resources. The policy defines substantial as "use of university resources not ordinarily used by, or available to all, or virtually all, members of the faculty" and interestingly, recognizes the involving nature of this definition by authorizing the provost to refine the term "substantial use" based on changes in customary working environments. The Provost did just that in a 1990 Appendix to the Policy to define ordinarily available resources to include "office space and personal office equipment, office computer workstations, library and other general use information resources, and the means of network access to such resources," including the incidental involvement of students receiving funding from the university.

## **B. Distinguishing Distance Education Courseware in Intellectual Property Policies**

While many institution intellectual property policies treat distance education courseware the same as other instructional materials or intellectual property generally, relying primarily on "substantial use" to define a potential university interest in the intellectual property, a number of policies recognize distinctions.

The University of Illinois engaged in a significant examination of its intellectual property policies as applied to distance education. See Intellectual Property Subcommittee's Report on Courseware Development and Distribution, Revised May 1999, available at [www.vpaa.uillinois.edu/policies/courseware\\_report](http://www.vpaa.uillinois.edu/policies/courseware_report). While the subcommittee ultimately concluded that the University's IP policies were sufficient to address the distribution and development of web tools and course materials, the subcommittee also recognized that in many cases, substantial resources are used to develop such courses including grant funds, released time, hardware, software and use of professional staff. Where such use of resources occurs, the report encourages department and unit heads to claim the "minimum rights" needed to serve the

interests of the University and the public, which consist of licensing rights to use such works in its internally administered programs of teaching, research and public service on a non-exclusive, royalty free basis. To that end, the university developed a form agreement, “Agreement Between the Creator and the Academic Unit Head” available at [www.vpaa.uillinois.edu/policies/courseware\\_agreement](http://www.vpaa.uillinois.edu/policies/courseware_agreement).

One of the more comprehensive policies developed specifically for distance education is the University of North Texas Health Science Center “Distributed Learning Creation, Use, Ownership, Royalties, Revision and Distribution of Electronically Developed Course Materials,” available at [www.hsc.unt.edu/policies](http://www.hsc.unt.edu/policies). The UNTHSC approach is to categorize levels of rights. Category I involves electronic course materials generated solely from an individual’s efforts without any use of resources beyond those normally provide. Category II involves minimal use of the Center’s resources such as personnel assistance in creating and formatting the course, or use of digital recording equipment. Category III involves substantial use, described as release time, some payment for the course development, and purchase of specialized equipment. Category IV is a traditional work for hire.

Except for Category I, the Center retains a non-exclusive license to reproduce and use the course materials in teaching classes on or off campus. The other categories identified above effect compensation. For Category II, the instructor receives compensation per student enrolled in a course using the materials at a negotiated rate. For Category III, the creator may still receive negotiated compensation, but the Center also has the right to commercialize the course for use outside the Center with payment of a negotiated royalty. For Category IV, the Center owns all ownership rights.

Where the institution retains a license or ownership interest, there may also be a question of whether such rights are “perpetual.” Both the creator and the institution may soundly reason that for quality purposes, the course should be redeveloped at some point and therefore a perpetual license may be unnecessary.

### **C. The North Carolina State University “Shop Rights” Concept**

At NCSU, faculty and professional staff hold copyright ownership in their original works, but the university holds a “shop right” which is defined as a non-transferable, perpetual, royalty-free, non-exclusive right to use the work for teaching, research and public service. A shop right does not allow one to sell rights to the work or otherwise interfere with the copyright owner’s ability to commercialize the work.

If the work is created at the university’s direction pursuant to a specific job assignment, or the employee makes “exceptional use” of university resources in creating the work, then the tables are reversed. The university own the copyright and the employee receives a shop right. These shop rights are permanent, meaning that if the employee leaves the university, she may take the shop right with her.

The advantage of the North Carolina State approach is that it likely minimizes disputes with both the university and the faculty obtaining the primary rights each party requires with respect to course development.

### **D. The University of Texas Model Agreement Approach**

The University of Texas System, one of the leading websites devoted to user friendly higher education intellectual property policies, has developed sample agreements to assist in

allocating ownership rights in educational works. The three agreements include: “Faculty Sole Ownership Agreement,” “Work Made for Hire Agreement,” and a “Joint Creation and Ownership Agreement.” [www.utsystem.edu/ogc/IntellectualProperty/Contract](http://www.utsystem.edu/ogc/IntellectualProperty/Contract)

To assist users, a straightforward question and answer interactive tool assists the user in identifying the appropriate contract. [www.utsystem.edu/ogc/intellectualproperty/course](http://www.utsystem.edu/ogc/intellectualproperty/course)

Each of the model agreements contains additional optional clauses. For example, the “Faculty Sole Ownership Agreement” offers three alternatives as to how the University may use the work including 1) non-exclusive right to use for nonprofit educational purposes; 2) non-exclusive commercial license; or 3) exclusive commercial license. The agreement further requires the university to identify what resources it is providing.

#### **E. The North Carolina Community College System Ownership Policy**

The NCCCS has developed a different approach. In order to create more collaboration and broad based access to course materials, contributors are paid for all contributions to the “virtual learning community.” The NCCCS expressly requires contributors to sign a participation agreement whereby the creator assigns all contributions to the NCCCS and its participating colleges. As such, participating institutions of NCCCS enjoy exclusive rights to use and modify course content to suit the specific needs of students. The policy is available at [www.ncccs.cc.nc.us/Distance\\_Learning](http://www.ncccs.cc.nc.us/Distance_Learning).

#### **V. Implications of Ownership**

In connection with ownership, there may be corresponding duties of the institution to defend and/or potentially pay damages for copyright infringement claims against the work. The institution may be better positioned to minimize its exposure if it is solely a licensee, or if it has no rights in the work whatsoever.

#### **VI. Revision of Course Materials**

Another key issue associated with distance education courses, particularly where there are joint use rights, is the issue of the right to make revisions. This issue raises concerns about academic freedom and course quality. The institution policy should clearly define who has the right to modify or enhance the course.

A number of institutions take a similar approach to resolving these issues where the institution has an ownership or license interest. For example, the University of North Texas Health Sciences Center policy places the onus on the faculty member to update the work to maintain academic standards. However, if the UNTHSC believes a revision is necessary, and the faculty member fails to timely or appropriately revise the course, then the Center may employ someone else to make the revisions, and charge the cost against any royalties due to the author. The IUPUI approach is similar, except that no royalties are charged and the author has the right to have his or her name removed from the course. Likewise, the University of Wisconsin System policy provides that the creator should receive the first opportunity to make revisions, and if the

creator declines, for the institution to make the revisions without advertising the materials as the work of the faculty member, except appropriate to acknowledge the faculty member's participation in the original work.

## **VII. Use of a Course At Another Institution**

The AAUP cites to an incident in 1999 involving a dispute between Harvard Law School and professor Arthur Miller over his having provided videotaped lectures for Concord University School of law without Harvard's permission. This highlights the importance of establishing a clear policy, however ownership and license rights are established, whether it is permissible to use an on-line course at another institution while still a faculty member at your institution, and of course whether there are any limits on such use after the employment relationship is terminated.

If the author has an ownership or non-exclusive license to use course materials, most policies would permit such use at another institution if the faculty member leaves. Indeed, such ability to use the work for other employment is central to faculty member's concerns. Many policies do not directly address the issue of competing use of the course while the faculty member is still employed by an institution. Nevertheless, while it may raise thorny issues, it may be wise to clearly establish the expectations of the institution and its faculty with respect to such competing interests.

## **VIII. Related Important Considerations**

A paper presented by David Drooz of North Carolina State University in conjunction with this same session identifies a few of the issues that distance education courses face in addition to ownership issues. See also "Accessibility of Instructional Websites in Higher Education," Kay Lewis, Diane Yoder, Elizabeth Riley, Yvonne So, and Sarah Yusufali, *Educause Quarterly*, Vol. 30, No. 3 (2007). Course designers will, of course, have to consider these issues such as FERPA and disability accessibility issues.

The American Council on Education published a thoughtful paper on this topic in March 2000, "Developing a Distance Education Policy for 21<sup>st</sup> Century Learning." In addition to ownership, the paper identifies a number of other related considerations that should be included in the institution's intellectual property policies with respect to distance education including the following:

institutional and faculty rights and responsibilities after a course is created; faculty compensation; teaching-load and acceptance; student access and privacy; potential liabilities associated with distance education courses (including copyright infringement liability); and accreditation and approvals beyond state and national borders.

See [www.acenet.edu](http://www.acenet.edu)

The AAUP Statement on Distance Education also identifies a number of other items to address as part of the "whole picture" of a distance education policies. The matters that are identified include such concerns as academic freedom, working conditions, workload (including compensation, appointment and evaluation), and technical support.

Most institution policies appear to compartmentalize intellectual property policies separately from employment related concerns, but these are valid issues that ought to be addressed in some form in the institution's policies.

Kenneth D. Salomon of Dow, Lohnes & Albertson, PLLC in Washington, DC, a frequent contributor to NACUA, has developed an aptly titled "Checklist of Issues for Evaluating the Adequacy of Institutional Intellectual Property and Employment Policies and Procedures for Electronic Courseware." The checklist is attached for your reference. Among the unique considerations identified in the checklist include:

- Creating a policy that qualifies the institution for the liability safe harbor provisions of the Digital Millennium Copyright Act
- Provisions dealing with course modification and updating
- How the policy deals with works created under grants and works created under contracts with third parties
- Addressing whether the faculty "creator" has the first option to teach the course

## **IX. Conclusion**

Embarking on the creation or revision of policies pertaining to distance education courses is a daunting task. Fortunately, there are a significant amount of resources easily available to assist you in the task. Lining up the key policy options as you get started should help facilitate the discussion. Above all, the key policy driver should be the desire of your institution to create adequate incentives for faculty to develop quality distance education courseware, while accounting for the institution's legitimate objective to recoup its significant investments in technology and facilities by allowing continued use of the course.

## **Reference Sources for Creation of Intellectual Property Policies**

“Legal Issues in Distance Education,” edited by Deborah C. Brown, John R. Przepyszny and Katherine R. Tromble. September 2007 NACUA Publication. [www.nacua.org](http://www.nacua.org)

“Campus Copyright Rights & Responsibilities: A Basic Guide to Policy Considerations,” Association of American Universities, Association of Research Libraries, Association of American University Presses and Association of American Publishers

“Developing a Distance Education Policy for 21<sup>st</sup> Century Learning, March 2000. American Council on Education, [www.acenet.edu](http://www.acenet.edu)

“Sample Intellectual Property Policy & Contract Language” and “Sample Distance Education Policy & Contract Language” (undated). American Association of University Professors. [www.aaup.org](http://www.aaup.org)

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**CHECKLIST OF ISSUES FOR EVALUATING THE ADEQUACY OF  
INSTITUTIONAL INTELLECTUAL PROPERTY AND EMPLOYMENT POLICIES  
AND PROCEDURES FOR ELECTRONIC COURSEWARE**

KENNETH D. SALOMON  
DOW, LOHNES & ALBERTSON, PLLC  
Washington, DC

- Does your institution have an Intellectual Property ("IP") policy? If so, when was it last reviewed and updated?
- Does your IP policy qualify the institution for the Liability Safe Harbor protections of the Digital Millennium Copyright Act?
- Does your IP policy address the issue of faculty ownership of and economic interest in courseware?
- Do the terms and conditions of faculty employment address the issue of faculty ownership of and economic interest in courseware?
- Is your faculty organized? If so, does the collective bargaining agreement address the issue of faculty ownership of and economic interest in courseware? Has the matter been a formal subject of collective bargaining negotiations?
- Does your IP policy and your terms and conditions of faculty employment distinguish between ownership of traditional academic works (books, articles, lecture notes, syllabi, etc.) and ownership of electronic courseware (Internet, video based, etc.) created by faculty? If so, how and where does your institution implement the distinction?
- Does your IP policy and your terms and conditions of faculty employment distinguish between courseware that is created by faculty independently and that which is created within the scope of employment? Does the policy provide clear guidance as to when a work is considered produced within the scope of employment?
- Does your IP policy and your terms and conditions of faculty employment distinguish between works created under grants and those created under contracts with third parties? Does your sponsored research office review all external agreements for IP issues?
- Do your faculty employment policies (or collective bargaining agreement) allow faculty to create courseware for other institutions? If so, does the policy define what role faculty may play in the delivery, promotion and maintenance of such courseware?
- Does your IP policy and your terms and conditions of faculty employment take into consideration the level of institutional financial, technological and staff resources used by the faculty member to design and create the electronic work in determining ownership and economic interests?

- Do your institutional policies deal with the circumstances under which the institution and the faculty member are permitted to use an electronic course after the faculty member leaves the institution? If continued use of electronic courses by the institution and the faculty member is contemplated, what mechanism has been adopted to effectuate that policy?
- Does your IP policy and your terms and conditions of faculty employment deal with the sharing of revenue between the institution and the faculty member generated by the internal use of course materials?
- Does your IP policy and your terms and conditions of faculty employment deal with the sharing of revenue between the institution and the faculty member generated by the external use of course materials?
- Does your IP policy and your terms and conditions of faculty employment define who has the right (and how often) to update or modify an electronic course, and who may expand upon electronic courses? Does the institution and/or the faculty member have the right to require updating of electronic courses? Do your policies cover updating course materials after the faculty member is no longer at the institution?
- Does a faculty member who created an electronic course have the right of first refusal for the teaching of that course?
- Have the institution's copyright site rights licenses been reviewed to determine whether the rights granted under the licenses cover the specific technologies employed by the institution for delivery of electronic courses?
- Is your IP policy coordinated with your patent policy?
- Does your institution aggressively protect the use of its name and logo?
- Does your IP policy control the use of the institution's name and logo on electronic courseware?
- Is there a single office responsible for administering your IP policy and providing guidance to faculty on the policy and on copyright and licensing issues?

## Section III: Online Course Hosting

### ONLINE COURSE HOSTING — A CASE STUDY

November 7–9, 2007

**David Drooz**  
North Carolina State University

#### I. Background Facts

A colorful and anti-authoritarian professor decided to host his distance education Sociology course online at [www.myspace.com](http://www.myspace.com) instead of using the university's Internet domain and servers and distance education software. He posted readings and conducted class discussions via the myspace.com Website.

The professor's style appears on two of his current Websites:  
<http://www.myspace.com/hiphappy> and <http://www.hiphappy.com/>

The Dean and the Vice Provost for Distance Education asked the professor to stop using the myspace.com site for teaching the course. The professor felt this was censorship, and a violation of his rights. He began a media campaign. See, e.g., <http://www.indyweek.com/gyrobase/Content?oid=oid%3A38223> and <http://media.www.technicianonline.com/media/storage/paper848/news/2006/10/03/News/Myspace.Coursework.Under.Microscope-2327090.shtml>

His principal claim was that social networking was an essential component of the course, one that could not be accomplished with the university's distance education platforms. He wanted students to build friendships through the online medium, not just serve as empty vessels into which learning could be poured.

#### II. Academic Freedom

##### a. The Law for Public Universities

Although the professor stated to the press that the administration's position interfered with his academic freedom, that turned out not to be an issue when people sat down face-to-face and discussed their concerns. Nonetheless, it may be useful to prepare for this issue. A brief sampling of case law is noted below.

The Fourth Circuit has perhaps the starkest position, holding that if there is any right of academic freedom, it belongs to the institution and not to individual faculty members.

Our review of the law, however, leads us to conclude that to the extent the Constitution recognizes any right of "academic freedom" above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors, and is not violated by the terms of the Act.

....

Appellees' insistence that the Act violates their rights of academic freedom amounts to a claim that the academic freedom of professors is not only a professional norm, but also a constitutional right. We disagree. It is true, of course, that homage has been paid to the ideal of academic freedom in a number of Supreme Court opinions, often with reference to the First Amendment. See, e.g., [Regents of the Univ. of Mich. v. Ewing](#), 474 U.S. 214, 226 & n.12, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985); [Regents of the Univ. of Cal. v. Bakke](#), 438 U.S. 265, 312-13, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (opinion of Powell, J.); [Keyishian v. Board of Regents](#), 385 U.S. 589, 603, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967); [Sweezy v. New Hampshire](#), 354 U.S. 234, 250, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957) (plurality opinion); [id. at 261-63](#) (Frankfurter, J., concurring in the result). Despite these accolades, the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom. Cf. [Minnesota State Bd. for Community Colleges v. Knight](#), 465 U.S. 271, 287, 79 L. Ed. 2d 299, 104 S. Ct. 1058 (1984) (stating that the Court has not recognized a First Amendment right of faculty to participate in academic policymaking).

....

Appellees ask us to recognize a First Amendment right of academic freedom that belongs to the professor as an individual. The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.

*Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir., 2000) *cert. den.* 531 U.S. 1070 (2001). This holding is noteworthy beyond the Fourth Circuit for two reasons. First, the Supreme Court declined to review the Fourth Circuit's holding when plaintiffs petitioned for *certiorari*. Second, the Fourth Circuit paired its reasoning on academic freedom with another rationale: faculty at state universities do not have constitutional free speech rights when they are speaking in their capacities as public employees instead of as private citizens.

In *Garcetti v. Ceballos*, 126 S. Ct. 1951 (May 30, 2006), the Supreme Court accepted the interpretation that public employees have little in the way of a First Amendment right when speaking in their capacities as employees:

We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

....

Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.

However, the Court also declined to take up the question of whether this rule would apply to faculty claims of academic freedom:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

Earlier cases indicate the courts tend to allow broad university control over curriculum and grading policy, but often do not allow restriction of controversial classroom comments or discussion. A sampling of cases is noted below.

*Keyishian v. Board of Regents*, 385 U.S. 589 (1967)

*Pickering v. Board of Educ.*, 391 U.S. 563 (1968)

*Edwards v. California Univ. of Pa.*, 156 F.3d 488 (3d Cir. 1998), *cert. den.* 119 S. Ct. 1036 (1999)

*Lovlace v. Southeastern Massachusetts Univ.*, 793 F.2d 419 (1st Cir. 1986)

*Hetrick v. Martin*, 480 F.2d 705 (6th Cir.), *cert. den.* 414 U.S. 1075 (1973)

*Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. den.*, 411 U.S. 972 (1973)

*Bradley v. Pittsburgh Bd. Of Educ.*, 910 F.2d 1172 (3d Cir. 1990)

*Evans-Marshall v. Board of Educ.*, 428 F.3d 223 (6th Cir. 2005)

*Dube v. State Univ.*, 900 F.2d 587 (2d Cir. 1990) *cert den.* 501 U.S. 121 (1991)

*Parducci v. Rutland*, 316 F.Supp. 352 (1970)

*Cohen v. San Bernardino Valley College*, 883 F.Supp. 1407 (C.D. Cal. 1995), *rev'd*, 92 F.3d 968 (9th Cir. 1996) *cert. den.* 117 S.Ct. 1290 (1997)

While First Amendment jurisprudence can be notoriously unpredictable, it is reasonable to conclude that public universities may regulate the manner in which online courses are presented, particularly where the university's interest is clearly articulated.

#### **b. Professional Norms**

Accrediting organizations may take a broader view of academic freedom than federal courts. Or they may incorporate academic freedom as a factor in accreditation decisions without defining what it means. For example, one of the accrediting principals of the Southern Association of Colleges and Schools (SACS) is that: "3.7.4 The institution ensures adequate procedures for safeguarding and protecting academic freedom."

Equally important is the relationship between faculty and administration. Excessive restraints on or micro-management of teaching styles may result in a political backlash.

The American Association of University Professors views academic freedom as relevant to electronic teaching, but also notes greater privacy concerns than in physical classrooms:

A basic tenet of the 1940 *Statement of Principles* is that “teachers are entitled to freedom in the classroom in discussing their subject.” The scope of that principle is clear enough in the traditional physical classroom with four walls, a floor, and a ceiling. Increasingly, however, the “classroom” may be a Web page, an electronic bulletin board, a news group, or other electronic medium that clearly has no physical boundaries. Not only do students and professors communicate regularly through e-mail, but much of the material related even to face-to-face classes appears on, and is exchanged through, electronic media. Thus the concept of “classroom” must be broadened to reflect these realities. The “classroom” must indeed encompass all sites where learning occurs—Web sites, home pages, bulletin boards, listservs, etc.

There is, however, one legal caution: A recent state court case (decided on other grounds) raised the potential of professorial abuse of the student-teacher relationship through digital means. Professors might be tempted to post student papers on course Web sites—a practice that should require permission even for print copying and dissemination—and must be sensitive to the vastly greater potential for embarrassment (or worse) to the author by making sensitive personal opinions or information instantly available to a far larger audience. Such risks are magnified many times by an Internet posting, a potential that may warrant one of those few “special rules” for academic discourse in cyberspace.

See <http://www.aaup.org/AAUP/pubsres/policydocs/default.htm> (footnote omitted). One may infer from this statement that a university has a heightened interest in regulating online teaching with respect to safeguarding student privacy.

The professional expectations for academic freedom may constrain university regulation of online courses more than the law. Nonetheless, it’s hard to imagine this becoming an issue if the regulations are grounded in legal requirements or in university policies that already apply in the physical classroom or in computer use rules.

### **III. Accessibility for Students with Disabilities in Distance Education Courses**

#### **a. Accessibility Law**

Online courses may present obstacles to students with hearing loss (where there are audio components), vision loss, or other disabilities. Assistive technologies exist to help overcome these obstacles. However, online materials must be properly designed or coded to make some

assistive technologies effective. For instance, text-to-speech software on a computer for a student with blindness will not help with photos or graphics on a course Web page unless the images are “tagged” with descriptive text.

This paper does not attempt to review disability law or assistive technologies. The intent is simply to identify accessibility as an issue that must be addressed in online courses. Universities should have existing online course management and Web-authoring tools, and advice on how to use them, that will enable faculty to generate accessible online course content. It may not always be feasible to use these tools to modify Websites and other electronic resources outside the university domain -- a potential issue with hosting courses on external servers such as the social networking sites and especially with linking to content on external sites (e.g., Youtube.com).

Applicable disability laws can be found at the U.S. Department of Education, Office for Civil Rights (OCR), Website beginning at <http://www.ed.gov/policy/rights/guid/ocr/disability.html> In brief, Section 504 of the Rehabilitation Act of 1973 applies disability non-discrimination requirements to recipients of federal grants; Title II of the Americans with Disabilities Act does the same for public entities.<sup>6</sup> The corresponding regulations are at 34 CFR 104 [http://www.access.gpo.gov/nara/cfr/waisidx\\_99/34cfr104\\_99.html](http://www.access.gpo.gov/nara/cfr/waisidx_99/34cfr104_99.html) (for Section 504) and 28 CFR 35 [http://www.access.gpo.gov/nara/cfr/waisidx\\_99/28cfr35\\_99.html](http://www.access.gpo.gov/nara/cfr/waisidx_99/28cfr35_99.html) (for ADA Title II).

OCR will enforce these laws with respect to online course offerings of universities. In other words, universities must provide reasonable accommodations to qualified students and program participants who wish to take advantage of online course offerings. Accommodations should be made in the most integrated setting possible, and the students with disabilities may not be charged for accommodations or accessibility features.

## **b. Accessibility Resources**

In 1998 Section 508 of the Rehabilitation Act was amended to require that federal government agencies must provide “accessible electronic and information technology.” While this applies only to federal agencies, it sets standards that would undoubtedly satisfy OCR if used by universities. The Department of Education list resources on how to use assistive technology for Section 508 compliance at <http://www.ed.gov/policy/gen/guid/assistivetech.html>

Another resource is the Website development guidelines published by the Chief Information Office for the State of North Carolina at <http://www.ncsta.gov/docs/White%20papers/general/Web%20Site%20Development%20Guidelines.pdf>

NC State University’s requirements for Web accessibility are at [http://www.ncsu.edu/policies/campus\\_environ/non-discrimination/REG04.25.5.php](http://www.ncsu.edu/policies/campus_environ/non-discrimination/REG04.25.5.php) The

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<sup>6</sup> In addition, Title III of the ADA applies to “places of public accommodation.” One court has held that a retailer’s Website is a service subject to Title III when it has sufficient nexus to the retailer’s physical store; e.g., where the Website offers coupons that can only be redeemed at the physical stores. *National Federation of the Blind v. Target*, 452 F. Supp. 2d 946 (2006).

university made a policy decision to incorporate the Section 508 standards for the most part. Software tools and tutorials are posted at <http://ncsu.edu/it/access/development/services/index.php>, while additional resources are listed by the NC State Disability Services Office at <http://www.ncsu.edu/dso/at/>. The Distance Education unit at NC State has a Web accessibility primer and checklist at [http://delta.ncsu.edu/docs/teach/accessibility\\_primer\\_checklist.pdf](http://delta.ncsu.edu/docs/teach/accessibility_primer_checklist.pdf) (see Attachment 1 to this paper).

Other sources include the Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C) at <http://www.w3.org/WAI/guid-tech.html>

The foregoing resources include references to software tools that quickly assess Website accessibility. For universities that allow faculty to use external Websites for online education purposes, these tools can let you know if the external sites are useable by students with disabilities, or if you need to devise other accommodations. Of course, all electronic components of distance education should be accessible, not just Web pages.

### **c. Accessibility Policy Issue**

A difficult policy question with online courses is whether you require faculty to implement accessible design when they create the course. This is not so much an issue with designing the course Web pages -- according to the leader of our Distance Education unit, that part is not hard to do. The challenge is when faculty want to link to certain types of electronic resources, such as audio or video clips, graphs, or data tables..

On the one hand, if accessibility is built into a distant education course as it's created, the problem is solved before it becomes a problem. That is, the university does not have to scramble to figure out a reasonable accommodation at the last minute when a student with a disability joins the course. It may take some time to add closed captioning for audio, or thorough text descriptions of video, or find a different resource that has similar educational value yet is still accessible, and the delay may impact a student's ability to participate fully in the course.

On the other hand, federal disability law does not require accessible design be built into online courses at the time of their creation (except for federal agencies). An analogy is that you need not provide a sign language interpreter in a class where there are no students with deafness. The extra work of up front accessible design for some types of electronic resources can be considerable, and it can be avoided for the many online courses that have no students with disabilities. If a student with a disability wants to take an online course, however, the instructor would then have to retrofit the course for accessibility or provide an effective alternative accommodation. This raises the timing problem noted above, and therefore may become a serious compliance challenge when the accommodation request comes at or after the date the class starts.

Universities that choose not to require accessible design up front should have a procedure and resources that will enable them to make last minute accommodations, or be prepared to replace inaccessible components of the course.



#### IV. Privacy

The Family Educational Rights and Privacy Act (FERPA) creates limited nondisclosure obligations with respect to the education records of students. This paper does not examine FERPA in depth. More information, including the law at 20 USC 1232g and the FERPA regulations at 34 CFR part 99, can be found at the Website of the enforcement agency, the Family Policy Compliance Office in the U.S. Department of Education. See <http://www.ed.gov/policy/gen/guid/fpco/index.html?exp=0>

“Education records” consists of most information that is recorded (paper, electronic, film, etc.), is directly related to a student, and is “maintained” by the university or persons acting on its behalf. See 34 CFR 99.3. The records are “maintained” during whatever time period the university or person acting on its behalf has custody or control of them -- a somewhat elusive concept in the electronic realm.

The Family Policy Compliance Office (FPCO) takes a broad view of what constitutes an education record “maintained” by the institution and therefore subject to FERPA. FPCO has indicated in discussions with the author that FERPA applies in an online course where student work or comments are posted electronically and can be accessed by other students, even if access is limited to those enrolled in the course.

The privacy issue is magnified when a course Website or other online components are open to persons outside the course. Sometimes access to external Websites can be restricted, but employees and agents of the company hosting a Website will still have access in addition to the students enrolled in the course and the instructor. The best path to FERPA compliance with external Websites is to get a contractual commitment of FERPA compliance from the company hosting the site. However, (1) sometimes this will not be a negotiating option, and (2) this still leaves the question of FERPA compliance when students share personally identifiable course postings among themselves (an issue whether the course is hosted on university servers or external servers).

There are three possible solutions. None of them are ideal.

First solution: the instructor could seek FERPA waivers, or “consents,” from the students in the course. A written, signed, dated consent that says what education records may be disclosed, to whom they may be disclosed, and the purpose of the disclosure would satisfy FERPA. This imposes extra paperwork and record-keeping on faculty, which means it may not be universally used. Another problem arises when some students refuse to sign the consent form. Consent must be voluntary to be valid. It’s unlikely that consent would be viewed as voluntary if required as a condition of taking the course.<sup>7</sup>

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<sup>7</sup> Taken to its logical end, requiring FERPA consent as a condition of enrollment in courses or attendance at the institution would render FERPA privacy meaningless -- each school could effectively repeal the federal law.

Second solution: a university could argue that online postings by the students are not “maintained” by the university within the meaning of FERPA, and therefore are not subject to FERPA requirements. This approach could have unintended consequences for universities subject to state public records or freedom of information laws, as lack of FERPA coverage means anyone could demand copies of the student postings.

Moreover, this approach is an untested theory and may be opposed by FPCO, so anyone bold enough to take it should be prepared to litigate a test case. There is, however, some indication that courts may be sympathetic. In *Owasso Independent School District v. Falvo*, 534 U.S. 426 (2002), the Supreme Court addressed what it means for a record to be “maintained” by a school in the context of peer grading:

Two statutory indicators tell us that the Court of Appeals erred in concluding that an assignment satisfies the definition of education records as soon as it is graded by another student. First, the student papers are not, at that stage, "maintained" within the meaning of § 1232g(a)(4)(A). The ordinary meaning of the word "maintain" is "to keep in existence or continuance; preserve; retain." Random House Dictionary of the English Language 1160 (2d ed. 1987). Even assuming the teacher's grade book is an education record -- a point the parties contest and one we do not decide here -- the score on a student-graded assignment is not "contained therein," § 1232g(b)(1), until the teacher records it. The teacher does not maintain the grade while students correct their peers' assignments or call out their own marks. Nor do the student graders maintain the grades within the meaning of § 1232g(a)(4)(A). The word "maintain" suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled. The student graders only handle assignments for a few moments as the teacher calls out the answers. It is fanciful to say they maintain the papers in the same way the registrar maintains a student's folder in a permanent file.

The Court of Appeals was further mistaken in concluding that each student grader is a person acting for" an educational institution for purposes of § 1232g(a)(4)(A). 233 F.3d at 1216. The phrase "acting for" connotes agents of the school, such as teachers, administrators, and other school employees. Just as it does not accord with our usual understanding to say students are "acting for" an educational institution when they follow their teacher's direction to take a quiz, it is equally awkward to say students are "acting for" an educational institution when they follow their teacher's direction to score it. Correcting a classmate's work can be as much a part of the assignment as taking the test itself. It is a way to teach material again in a new context, and it helps show students how to assist and respect fellow pupils. By explaining the answers to the class as the students correct the papers, the teacher not only reinforces the lesson but also discovers whether the students have understood the material and are ready to move on. We do not think FERPA prohibits these educational techniques. We also must not lose sight of the fact that the phrase "by a person acting for [an educational] institution" modifies

"maintain." Even if one were to agree students are acting for the teacher when they correct the assignment, that is different from saying they are acting for the educational institution in maintaining it.

....

We doubt Congress meant to intervene in this drastic fashion with traditional state functions. Under the Court of Appeals' interpretation of FERPA, the federal power would exercise minute control over specific teaching methods and instructional dynamics in classrooms throughout the country. The Congress is not likely to have mandated this result, and we do not interpret the statute to require it.

For these reasons, even assuming a teacher's grade book is an education record, the Court of Appeals erred, for in all events the grades on students' papers would not be covered under FERPA at least until the teacher has collected them and recorded them in his or her grade book. We limit our holding to this narrow point, and do not decide the broader question whether the grades on individual student assignments, once they are turned in to teachers, are protected by the Act.

One could argue that work posted by students online for each other to read is similar to the exchange of written assignments in the *Falvo* case. It's part of the educational process, the pedagogy, that the Supreme Court wanted to protect from federal interference. Particularly where personally identifiable information on a course Website is kept just during the duration of the course, with the intent of being a temporary forum for dialogue rather than an archive, one can question whether it meets the Supreme Court understanding of "maintained." Another question is whether an independent external Web hosting company is "acting for" the university when it just provides server or software tools without any role in examining or evaluating content. (An analogy: is the Post Office "acting for" a university when it delivers a letter from a student to a professor's mailbox?) And given there is an open question as to whether a teacher's grade book is an education record under FERPA, there is an open question whether student work on a computer server is an education record. On the other hand, student work that is stored electronically on a university server, or a server of a party acting on behalf of the university, is more like a central record repository "maintained" by the institution than student papers that are exchanged among and graded by students prior to being delivered to the teacher.

Third solution: the university may be able to impose privacy restrictions on the online coursework in lieu of individual student consents. Several years ago NC State received informal approval from FPCO to proceed with online courses where students exchanged personally identifiable information, without individualized consents, provided the following conditions are met:

- (1) electronic postings of student work do not contain grades or comments of the professor,
- (2) the students perform the posting rather than the professor,
- (3) students are notified prior to or at the time of enrollment that posting of their work is a course requirement, and
- (4) the posted work is available only to members of the class.

Essentially this is implied-consent-with-extra-privacy-safeguards. It's an effort to be flexible enough to allow technology to be used to facilitate teaching while at the same time adhering to the spirit of FERPA privacy principles. It's a compromise. This is not entirely unprecedented: FPCO has long recognized that student theses and dissertations could be kept in university libraries for public access under an implied consent theory.

The informal approach to implied consent for electronic exchange of student work could be improved. The last two requirements make sense: notify the students in advance and limit access to members of the class.

The first two requirements seem much less useful. As for barring faculty comments on student postings, a Web-based discussion among members of the class may benefit from faculty participation -- it can have real educational value and FERPA should not be interpreted in a way that prevents such a teaching method. At the same time there does not appear to be sufficient pedagogical reason to post a student's grades where other students in the class can view them.

Nor does there seem to be much reason to require the postings come from the students instead of the faculty member. This requirement may be a holdover from the thinking that a record falls under FERPA once it is "maintained" by a school official. That may have currency in the paper world, but where the record is posted to a Website or other electronic forum maintained or under the control of a university official, it would not seem to matter who sent it. Also, if one is going to allow an implied consent, it should not matter that the record is "maintained" by the instructor.

In any event, the primary issue with online course hosting via external servers is that the owner or manager of the servers is not under university control, even if the Website content is supervised by the faculty member. Typically external Websites, like social networking sites, are not going to negotiate terms of use with faculty or universities. You use the sites according to their boilerplate terms or not at all. Those boilerplate terms are not likely to contain a promise to comply with FERPA. Indeed, the nature of social networking sites is to disclose personal information to other people. This suggests that universities should alert faculty to the privacy issues that can arise with use of external Websites for teaching.

## **V. Other Issues**

### **a. User Agreements**

External Websites may require users to "click through" (accept) agreements that specify terms of use. These are typically adhesion contracts with no room for bargaining. Student users may be required to agree in addition to the faculty member. Fairly onerous terms are likely, including indemnification, foreign law and jurisdiction, and loss of copyright in whatever is posted.

Do you want your students to agree to such terms with an outside party as a condition of receiving their education? Do you want your faculty to agree to such terms when they may be creating liability for the university as employer?

## **b. Commercial Advertising**

If your faculty are delivering online education via an external Website, chances are that it will contain commercial promotions. Because ownership of the Website is outside the university, and you have little or no bargaining power, you probably will not have control over the content of the promotions. This raises questions that are more policy-related than legal.

Do you want to subject your students to commercial advertising as a byproduct of their education? Do you want your university name used as leverage for and tied to commercial promotions; that is, to what degree should you protect the objective truth-seeking reputation of your institution versus appearing as a commercial shell? Does the content of the ads matter -- what if there are ads for alcohol, tobacco, pornography, or plagiarism sites?

## **c. IT Security**

It may be difficult to assess whether online courses have adequate computer security if they are hosted outside the university. *USA Today* reported on August 7, 2007, that hackers at the Black Hat and Defcon conferences were demonstrating vulnerabilities in social networking sites such as MySpace.com. The security flaws could allow unauthorized persons to expose sensitive personal information, take over personal Websites, and add malicious code.

It's possible that some external Web hosts are more secure than university networks. The problem is the difficulty in knowing if the opposite is true. University IT security should be the benchmark, and if there is no assessment of an external site's security then using it exposes one to unquantified risk.

## **VI. Conclusion**

Many universities already have ways to achieve compliance with FERPA privacy and Section 504/ADA accessibility when they deliver distance education. There may be software tools or distance education staff support to assist with compliance. When faculty want to host online courses at sites external to the university, or use external course components like video or audio clips, compliance becomes more complicated. The external host or source of the external components may not have the capacity or the interest in compliance. In addition, external hosts present new issues of IT security, commercial promotion, and adhesion contracts for users.

A university policy that addresses these issues can ease or avoid the problems. If the policy informs faculty about compliance requirements and offers solutions, the academic freedom dispute may fall by the wayside. The NC State policy (Attachment 2) shows one way these issues can be addressed with the twin (and sometimes competing) goals of providing faculty with options for using new technology to teach while at the same time achieving compliance with federal law and with university policy goals on appropriate computer use.

**Attachment 1**

from [http://delta.ncsu.edu/docs/teach/accessibility\\_primer\\_checklist.pdf](http://delta.ncsu.edu/docs/teach/accessibility_primer_checklist.pdf)

**Instructional Services Accessibility Primer & Checklist Instructional Services**  
March 2007

**Table of Contents**<sup>8</sup>

**Introduction..... 78**

**Overview ..... 78**

**Checklist for Creating Accessible Web Content..... 79**

**Validation ..... 79**

**Text:..... 79**

**Images..... 80**

**Image maps ..... 81**

**External files..... 81**

**Multimedia..... 81**

**Forms ..... 82**

**Frames ..... 83**

**JavaScript ..... 83**

**Word..... 84**

**PowerPoint..... 84**

**Alternatives..... 85**

**Assistance..... 85**

**Section 508 Guidelines ..... 86**

**Section 508 (a): Text Equivalents..... 86**

**Section 508 (b): Multimedia Presentations..... 86**

**Section 508 (c): Color..... 86**

**Section 508 (d): Readability..... 86**

**Section 508 (e): Server-side image maps..... 86**

**Section 508 (f): Client-side image maps..... 86**

**Section 508 (g): Simple Data tables..... 86**

**Section 508 (h): Complex data tables..... 86**

**Section 508 (i): Frames..... 86**

**Section 508 (j): Flicker rate..... 86**

**Section 508 (k): Text-only alternative..... 86**

**Section 508 (l): Scripts..... 86**

**Section 508 (m): Applets and plug-ins..... 86**

**Section 508 (n): Electronic forms..... 87**

**Section 508 (o): Navigation links..... 87**

**Section 508 (p): Time delays..... 87**

**Additional Resources: ..... 87**

<sup>8</sup> Page numbering has been modified for purposes of adding the Attachment to the NACUA conference paper.

## **Introduction**

To accommodate our diverse campus community, North Carolina State University is obligated and required to make all official university Web pages, including course materials, accessible to all of our audience, including people with visual, aural, mobility, color, learning, and other impairments. According to the North Carolina State University Web Accessibility Regulation, [http://www.ncsu.edu/policies/campus\\_environ/non-discrimination/REG04.25.5.php](http://www.ncsu.edu/policies/campus_environ/non-discrimination/REG04.25.5.php):

“North Carolina State University (hereinafter, NC State) is required to provide reasonable access to its educational services, programs and activities in accordance with Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA) of 1990, and North Carolina state law (N.C. Gen. Stat. § 168A-7). Accordingly, official NC State Web pages and online instructional material should be accessible to disabled persons where possible, or a reasonable alternative accommodation should be offered.”

According to the Regulation, University Web pages must meet the standards created by the (Federal) Access Board, commonly known as the Section 508 Guidelines. These Guidelines address Web pages that include images, multimedia, style sheets, data tables, frames, scripts, forms, links to external files (e.g., PDFs), as well as other elements. Please see the following checklist for information about meeting these requirements.

Resources for training on accessibility issues are available through Distance Education and Learning Technology Applications (DELTA) and the Information Technology Division. Consultation services are also available through DELTA. Contact the LearnTech help desk at [learntech@ncsu.edu](mailto:learntech@ncsu.edu), for an instructional house call, email assistance, or to request custom training. For tools and resources available on the Web, please see the Additional Resources section of this document.

## **Overview**

These tip sheets are created to provide the faculty members and other professionals at North Carolina State University with an overview of important points to consider when developing an accessible course site and Website as well as other resources created for online use.

The first section of this document, “Checklist for Creating Accessible Web Content”, is the Section 508 Guidelines in a Frequently Asked Questions format plus several components from the Web Content Accessibility Guidelines as recommended by the W3C. In the second section of this document, “Section 508 Guidelines”, you will find listed the full Section 508 Guidelines which you must take into consideration while creating any material for the World Wide Web.

## Checklist for Creating Accessible Web Content

*Validation: How do I check to see if my Web pages are accessible?*

- Run your page through an accessibility validation tool like WebXACT (<http://www.Webxact.com>), which is a free online service that lets you test single pages of Web content for quality, accessibility, and privacy issues.
- Use validation tools like LIFT for Dreamweaver or AccVerify/Repair to monitor, evaluate, and retrofit Web content against Section 508 accessibility standards.
- For more information on software tools to validate and retrofit Web content, see <http://ncsu.edu/it/access/software/tools.php>

*Text: What do I need to do to make my Web pages accessible if I am only using text?*

- Give each page a unique title.
- Use Heading tags to indicate headings and subheadings. Screen reader users tab through the headings to quickly navigate through content.
- Use relative rather than fixed font sizes, (e.g., ems or percents, instead of pixels or points).
- Design your site with consistent navigation.
- Provide a link for users to skip over repetitive site navigation (“skip to content”), allowing them to get directly to the content. For those who use screen readers or other types of assistive technology, it can be a tedious and time-consuming chore to wait for the assistive technology to work through and announce each of the standard navigational links before getting to the intended location.
  - For more information about ways to create links to skip navigation menus, see <http://www-03.ibm.com/able/guidelines/Web/Webskip.html>
- Clearly identify the target of your links with text other than “Click Here”. Avoid multiple links with the same name. Screen reader users can list the links from a Webpage and navigate through a site in this way. Links that say “Click Here” or “More” do not contain enough information when removed from context.
- Use means other than color to distinguish one type of information from another.



- For example, in a data table with negative values, do not only indicate them in red, also include a minus sign or parentheses.
- Avoid red/green and blue/yellow combinations, as distinguishing these colors can be problematic for those with color-blindness.
- Make sure there is adequate contrast between your text and your background colors.
- For more information about color and contrast, see <http://www-03.ibm.com/able/guidelines/Web/Webcolor.html>
- Use Cascading Style Sheets (CSS) to provide a better solution for formatting the layout of text, but ensure that the page is still readable without them. This allows users to substitute their own style sheet to accommodate their own needs.
  - For more information on using CSS, see <http://www-03.ibm.com/able/guidelines/Web/Webcss.html>
- Do not use moving text or other elements that cannot be stopped by the user.
- Do not use any features that cause all or part of your text to blink or flash. It may cause seizures in some people.
  - For more information on blinking, moving, or flickering content, see <http://www-03.ibm.com/able/guidelines/Web/Webblinking.html>
- Avoid opening new windows. When opening a new window, warn the user by defining the target window with a unique name (e.g., target="Calendar").

*Images: What if I include images in my Web page?*

- Add appropriate alternative text ("alt attribute") for images. Add null alternative text (alt="") for decorative and spacer images. This applies to all Web content including HTML, Word documents, and PowerPoint files.
- Summarize the content of graphs, charts, or complex images. Use the letter "D" ("D-link") to link to an HTML page with the description or data.
  - For information on making graphs and charts accessible, and on how to use D-links, see <http://www-03.ibm.com/able/guidelines/Web/Webgraphs.html>.
- Avoid using animated graphics, or make sure the animation interval is 3 seconds or more to avoid causing seizures in some people with Photosensitive Epilepsy.

- For more information about creating accessible images, see <http://www-03.ibm.com/able/guidelines/Web/Webimages.html>

*Image maps: What if I am using an image map?*

An “image map” is a picture or graphic that provides multiple links to other Web pages, from the same image, depending on where a user clicks on that image.

- Use image maps which allow an author to assign alternative text to each image map “hot spot” link area.
- Provide alternative text for the base image.
- For more information about creating accessible image maps, see <http://www-03.ibm.com/able/guidelines/Web/Webmaps.html>

*External files: What do I need to do if I link to files like PDFs, Word documents, PowerPoint files, or multimedia files that require a Browser plug-in or external viewer?*

- When a Browser plug-in (e.g., Acrobat Reader or QuickTime Player) or external viewer (e.g., Word Viewer or PPT Viewer) is required in order to view content, you should inform your users by providing a link to a source that provides a free download for the plug-in.
- *Note: See the last two sections for making Word and PPT files accessible.*

*Multimedia: What do I need to do to make my multimedia files accessible?*

- Create a text transcript for audio content (e.g., podcasts).
- Provide synchronized text transcripts (captions) for videos that have an audio component.
- For strictly video content, provide text alternatives or have a D-link to a description (for an explanation of D-link, see the Images section).
- For more information on making multimedia accessible, see <http://www-03.ibm.com/able/guidelines/Web/Webmultimedia.html> and <http://ncsu.edu/it/access/Webaccess/nontext/caption.php>

*Data tables: What if I am including data tables in my Web page?*

- Use proper HTML labeling of data tables to indicate which rows and/or columns contain heading information. This will assist those who cannot see the table make sense of the data.
- Provide either a table summary or a caption describing the type of information within the data table.
- Try to avoid using tables for layout; use CSS for positioning instead. Make sure the page is readable without the style sheet attached.
  - For more information about coding for data tables, see <http://www.Webaim.org/techniques/tables/data.php#th>
  - For an example of coding complex data tables (those with two or more levels of headings), see <http://www.Webaim.org/techniques/tables/data.php#id>
  - For more information about creating accessible tables, see <http://www-03.ibm.com/able/guidelines/Web/Webtableheaders.html>

*Forms: How do I make online forms or surveys accessible?*

- Explicitly associate form labels with input elements. Some additional coding is usually required to make online input forms user-friendly.
  - For example, if a form is asking for the user to input a name (Name: ) use the “Label” tag to associate the word “Name” with the input text box.
- If a form is going to “time out,” make sure to provide a way for the user to extend the time period.
  - For more information on accessible use of Timed Responses, see <http://www-03.ibm.com/able/guidelines/Web/Webtiming.html>
- Consider making an untimed version of timed quizzes if needed.
- For more information about creating accessible forms, see <http://ncsu.edu/it/access/Webaccess/forms/forms.php>

*Frames: What if my site is using frames?*

- Minimize the use of frames. The frames layout for a Website is more difficult to create and maintain. Frames also are much more difficult for users who are viewing the page with a screen reader, because the user must jump back and forth from different windows to navigate through the site.
- Do not make content in one frame dependent on another (e.g., navigation).
- For more information about coding for frames, see <http://www-03.ibm.com/able/guidelines/Web/Webframes.html>

*JavaScript: What if I want to include JavaScript elements in my Web page?*

- Features such as “fly-out” menus that appear only when you “mouse over” the menu can be a problem for the user who does not have/cannot use a mouse. Make sure that mouse over features can also be triggered by keyboard entries.
  - For information on creating accessible dynamic menus, see <http://cita.uiuc.edu/html-best-practices/nav/dmenus.php>
- Provide alternative standard links for links activated only by JavaScript.
- Do not use “onChange” in form drop-down menus; provide a “go” button instead.
- Include a “Noscript” tag to provide alternative content so that the page will make sense and can still be used when scripts are turned off or not supported.
  - For more information on using “noscript” tags and JavaScript accessibility, see <http://ncsu.edu/it/access/Webaccess/scripts/scripts.php>
  - For more information about creating accessible scripts, see <http://www-03.ibm.com/able/guidelines/Web/Webscripts.html>

*Word: What do I need to do to make sure my Word files are accessible?*

- When creating Word docs for the Web it is best to avoid complex formatting. Specific suggestions follow:
  - Use standard fonts.
  - Use the Style feature to indicate section headings.
  - Use Word's "Create Tables" to display multiple columns of data. (Do not use tabs to format data.) Avoid merging cells, and add column/row heading information when applicable.
  - Avoid graphics created with Word's "Drawing" feature.
  - "Chunk" your content into relatively short paragraphs and try to place the key points near the beginning of the paragraph.
  - Avoid using text boxes as they tend to "float" when displayed in a Browser.
  - Use the bulleted list feature of Word as opposed to creating your own numbering or using tabs.
  - If you want multiple columns use Word's built-in column feature as opposed to a layout table.

*PowerPoint: What do I need to do to ensure my PowerPoint files are accessible?*

- When creating PPT files that will be viewed on the Web there are several considerations:
  - Be aware that the order in which your bulleted lists will appear with a screen reader is the order in which you added the items to the slide and NOT necessarily the order that you see within PPT.
  - Avoid using text boxes as they tend to "float" when displayed in a Browser.
  - Placing a description of any charts or graphics within the Speaker's Notes section will provide the required "alternate text" for these types of content.
  - Use LecShare (<http://ncsu.edu/it/access/software/lecshare/lecshare.php>) to create accessible Web presentations from PowerPoint files.

*Alternatives: What if I can't make my page accessible?*

- If accessibility cannot be accomplished any other way, provide a text-only page with equivalent information or functionality. Use LIFT Assistive (<http://ncsu.edu/it/access/software/lift/texttranscoder.php>) to generate a text-only version of your Web page.
- Alternative text and the ability to skip the navigation are still required for an accessible text-only page.
- For more information on text-only pages, see <http://www-03.ibm.com/able/guidelines/Web/Webtext.html>

*Assistance: How do I get help making my pages accessible?*

- See the Accessible IT @ NC State Website (<http://ncsu.edu/it/access/>) for resources and tutorials for creating accessible Websites and electronic documents.
- Attend accessibility workshops available from Distance Education and Learning Technology Applications (DELTA) (<http://delta.ncsu.edu/workshops>) and the Information Technology Division (ITD) (<http://itd.ncsu.edu/education/>).
- Request Custom Training sessions available from DELTA ([http://delta.ncsu.edu/learn/instructional\\_house\\_calls/custom\\_training/](http://delta.ncsu.edu/learn/instructional_house_calls/custom_training/)), as well as Instructional House Calls ([http://delta.ncsu.edu/learn/instructional\\_house\\_calls/](http://delta.ncsu.edu/learn/instructional_house_calls/)) and email support ([learntech@ncsu.edu](mailto:learntech@ncsu.edu)).
- Contact DELTA's Instructional Services Help Desk at [learntech@ncsu.edu](mailto:learntech@ncsu.edu) for more information.

## **Section 508 Guidelines**

### *Section 508 (a): Text Equivalents.*

A text equivalent for every non-text element shall be provided (e.g., via “alt”, “longdesc”, or in element content).

### *Section 508 (b): Multimedia Presentations.*

Equivalent alternatives for any multimedia presentation shall be synchronized with the presentation.

### *Section 508 (c): Color.*

Web pages shall be designed so that all information conveyed with color is also available without color, for example from context or markup.

### *Section 508 (d): Readability.*

Documents shall be organized so they are readable without requiring an associated style sheet.

### *Section 508 (e): Server-side image maps.*

Redundant text links shall be provided for each active region of a server-side image map.

### *Section 508 (f): Client-side image maps.*

Client-side image maps shall be provided instead of server-side image maps except where the regions cannot be defined with an available geometric shape.

### *Section 508 (g): Simple Data tables.*

Row and column headers shall be identified for data tables.

### *Section 508 (h): Complex data tables.*

Markup shall be used to associate data cells and header cells for data tables that have two or more logical levels of row or column headers.

### *Section 508 (i): Frames.*

Frames shall be titled with text that facilitates frame identification and navigation.

### *Section 508 (j): Flicker rate.*

Pages shall be designed to avoid causing the screen to flicker with a frequency greater than 2 Hz and lower than 55 Hz.

### *Section 508 (k): Text-only alternative.*

A text-only page, with equivalent information or functionality, shall be provided to make a Web site comply with the provisions of these standards, when compliance cannot be accomplished in any other way. The content of the text-only page shall be updated whenever the primary page changes.

### *Section 508 (l): Scripts.*

When pages utilize scripting languages to display content, or to create interface elements, the information provided by the script shall be identified with functional text that can be read by assistive technology.

### *Section 508 (m): Applets and plug-ins.*

When a Web page requires that an applet, plug-in or other application be present on the client system to interpret page content, that page must provide a link to a plug-in or applet that complies with Section 508 (a) through (l).

*Section 508 (n): Electronic forms.*

When electronic forms are designed to be completed on-line, the form shall allow people using assistive technology to access the information, field elements, and functionality required for completion and submission of the form, including all directions and cues.

*Section 508 (o): Navigation links.*

A method shall be provided that permits users to skip repetitive navigation links.

*Section 508 (p): Time delays.*

When a timed response is required, the user shall be alerted and given sufficient time to indicate more time is required.

**Additional Resources:**

DELTA Instructional House Call Request:

[http://delta.ncsu.edu/learn/instructional\\_house\\_calls/](http://delta.ncsu.edu/learn/instructional_house_calls/)

Accessible IT @ NC State:

<http://ncsu.edu/it/access/>

Software Tools for Validation, Repair and Authoring of Accessible Content:

<http://ncsu.edu/it/access/software/>

Designing for Accessibility – Best Practices:

<http://ncsu.edu/it/access/Webaccess/bestpract.php>

Access Board Section 508 Guide:

<http://www.access-board.gov/sec508/guide/1194.22.htm>

IBM Human Ability and Accessibility Center: Developer Guidelines for Web Accessibility:

<http://www-03.ibm.com/able/guidelines/Web/accessWeb.html>

Web Accessibility Best Practices from the University of Illinois Urbana/Champaign:

<http://www.cita.uiuc.edu/html-best-practices/>

WebAIM Accessibility Checklist:

<http://www.Webaim.org/standards/508/checklist.php#one>



## Attachment 2

### **NCSU Web Hosting Policy**

from <http://www.ncsu.edu/policies/informationtechnology/pdf/REG08.00.11.doc>



Authority	<b>Provost</b>
Title	<b>Online Course Material Host Requirements</b>
Classification	<b>REG08.00.11</b>
PRR Subject	<b>Information Technology</b>
	<b>Contact</b> Vice Provost for Distance Education and Learning Technology Applications 919-513-5006)

**History:** First Issued: April 24, 2007.

**Related Policies:**

[REG 04.25.05 Web Page Accessibility](#)

[REG 02.20.01 Academic Accommodations for Students with Disabilities](#)

[POL 08.00.01 Computer Use Regulations](#)

[REG 11.00.1 - Family Educational Rights and Privacy \(FERPA or Buckley Amendment\)](#)

**Related Information:**

[Family Educational Rights and Privacy Act \(FERPA\)](#)

[Americans with Disabilities Act \(AD\) of 1990](#)

[Section 504 of the Rehabilitation Act of 1973](#)

[North Carolina General Statute § 168A-7](#)

[FERPA Privacy Checklist for Online Course Hosting](#)

[Accessibility Primer and Checklist](#)

[Web Page Accessibility Regulation Implementation Guidelines](#)

[FERPA Forms for Online Courses](#)

[LMS Services home page](#)

[LearnTech help desk](#)

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## **1. Introduction**

When teaching in an on-line environment, it is essential that courses are delivered in compliance with applicable laws and university policies; in particular, those laws and policies designed to protect the student's rights to privacy and accessibility. The purpose of this regulation is to

provide methods for achieving compliance when courses, or components of courses, are electronically hosted.

## **2. Definitions**

2.1 Electronically hosted course . An electronically hosted course is one for which some or all of the required components of the course are provided to the students electronically, through the university's internal data network, or externally via the Internet.

2.2 Course component . A course component is a resource utilized by students in a course; for example, the course home page, the course syllabus, lecture notes, online quizzing system, discussion board, etc.

2.3 NC State credit course . An NC State credit course is a course offered by NC State for academic credit. This regulation is applicable to all NC State credit courses with electronically hosted components.

2.4 Course home page . A course home page is the primary URL for the electronically hosted course components, to which students enrolling in the course are initially directed.

2.5 LMS platform . A "Learning Management System," or "LMS," is a software platform for electronic course hosting. The LMS provides a course home page for each course hosted. See the LMS Services homepage.

2.6 Internally hosted course component . A course component is "internally hosted" if the server which hosts the component resides within the Internet address space allocated to NC State University. (Note: The Internet domain name of a server residing within NC State's address space usually ends with "ncsu.edu," but this is not always the case.)

2.7 Externally hosted course component . A course component is "externally hosted" if the server which hosts the component resides outside of NC State's Internet address space. In general, the server's domain name will not end with "ncsu.edu."

2.8 Student education records . "Student education records" are any personally identifiable records (1) about a student or former student, and (2) made, received or maintained by someone acting on behalf of NC State. Examples include

- student test scores or grades;
- assignment submissions, class discussions or comments (where recorded), or other materials produced by students in which the student can be identified; and
- names of students or other identifying information that is linked to non-directory information such as the course(s) the student is taking.

## **3. Basic Requirements**

3.1 The course home page for each electronically hosted NC State credit course must be internally hosted. The Distance Education and Learning Technology Applications (DELTA) office will ensure that the supported LMS platforms provide the software and user interfaces to allow instructors to meet all applicable privacy and accessibility requirements. Questions concerning the proper use of these platforms should be directed to the LearnTech help desk.

3.1.1 For course home pages hosted on a server other than the supported LMS platforms, it is the responsibility of the instructor to ensure that the server software protects the privacy of student education records and meets accessibility standards as required by university policy and state and federal law.

3.2 Apart from the course home pages, electronic course components that store student education records should be hosted on the NC State supported LMS platforms unless there are pedagogical reasons to host them elsewhere. For example, a math-intensive course may benefit from an external on-line quizzing and testing tool that has more math capability than the tools provided the supported LMS platforms. Similarly, Web tools provided by a publisher specifically to support the course textbook may provide pedagogical resources important to the course.

3.2.1 For externally hosted course components where there is a contractual agreement between the provider of the external component and the university, for example WebAssign, the contract must include a provision binding the external provider to meet applicable privacy and accessibility requirements.

3.2.2 For externally hosted course components where there is no contractual agreement between the provider and the university, the instructor is responsible for ensuring that the provider meets applicable privacy and accessibility requirements. See Section 4.2.1 below. If the externally hosted component does not store student education records (that is, privacy is not an issue), only accessibility requirements need be considered.

#### **4. Procedures**

4.1 Instructors may request a course home page on a supported LMS platform at the LMS Services home page. For questions related to any supported LMS platform, contact the LearnTech help desk.

4.2 Instructors planning to use externally hosted course components may contact the LearnTech help desk to learn whether or not NC State has a contractual agreement with the provider to meet applicable privacy and accessibility requirements.

4.2.1 For externally hosted course components for which there is not a contractual agreement between the university and the provider, the instructor may use the checklists hyperlinked under "Related Information" at the beginning of this Regulation to work with the external resource provider to ensure compliance with applicable privacy and accessibility requirements.

4.2.2 In cases where the pedagogical use of an external course component is such that certain privacy requirements can not be met (e.g., the students are posting material on a public Web site

and their identities are exposed) a limited release form is available to allow students to voluntarily waive certain privacy rights -- see the form hyperlinked under "Related Information". Instructors are advised, however, that students cannot be required to waive their rights, and should be prepared to offer alternative pedagogical approaches that do not require privacy waivers if necessary.

4.2.3 Accessibility of electronically hosted course components is required as specified in the Implementation Guidelines of the NC State Web Page Accessibility Regulation. Where externally hosted course components may present accessibility challenges, instructors should be prepared to use alternative pedagogical approaches that are accessible.

4.3 Instructors should list electronically hosted course components in the course syllabus, and should identify any components that may present privacy or accessibility issues for the student so that these issues can be worked out.