

**“Who Owns the Rights to Instructional Materials?”**

**Rethinking Intellectual Property at the University”**

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Research universities are increasingly called upon to foster, support, and manage teaching and learning environments that range from traditional programs to highly innovative delivery systems. Familiar models for managing the teaching environment do not necessarily translate well to the digital environment. Faculty, staff, and researchers are today developing not only new methods of delivering courses, but are transforming the nature of instruction and are relying more often on a team of support staff and colleagues across disciplines and from multiple institutions in order to develop multimedia teaching resources. The rapid adaptation of the academy to new modes of teaching and learning is causing a good deal of self-examination regarding optimal methods for managing our stewardship of the intellectual-property rights associated with the new works. Within the CIC, many member institutions have recently adopted new policies; others have proposed new policies; and still other members are beginning to explore options for policy revision. All CIC member universities—regardless of the status of policy development—find themselves in the position of responding to faculty inquiries regarding the allocation of rights surrounding the creation of new tools for teaching and learning. In this context of rapid change and adaptation, the CIC called together a conference to examine these issues critically and to explore the options for the most effective policy choices.

More than sixty representatives from twelve CIC member institutions participated in vigorous discussion and exploration of complex intellectual-property issues affecting instructional materials developed at our universities. While academics have struggled for many years with intellectual property, this conference underscored the need for creative and optimal stewardship of rights associated with instructional materials. University tradition long has allowed faculty members to hold all rights in their scholarly materials. Changes in the law and technology, however, are testing the viability of that tradition. For example, instructional materials are increasingly the product of collaborators who often have divergent interests; institutions seek to deploy technologies, such as the Internet, to reach a broader range of students with content created by instructors; instructors have new opportunities to work with their original content to create innovative materials in diverse media, often requiring specialized staff support and equipment. Simple edicts of the past that may have granted rights to one person or to one organization often generate conflicts of basic concerns and objectives among multiple interested parties.

This two-day conference included presentations of several existing university policies, analysis and critiques of policy options, and provocative presentations by two special guests. David E. Shulenburg, Provost of the University of Kansas, emphasized the need to provide creative management of the intellectual property associated with scholarly publications in order to assure their continued availability and wide dissemination for the benefit of teaching and research. Karen Hersey, Senior Intellectual Property Counsel at the Massachusetts Institute of Technology, recounted the protracted challenges in MIT’s effort to develop policy, and she focused on the importance developing centralized policy that responds to the inevitable legal environment but that serves the institution’s academic mission.

Conferees shared a common belief that university policy related to copyright, intellectual property, and the development of new courseware should be designed—first and foremost—to promote scholarship and to advance innovations in teaching and learning. While a role of

university administration is to provide stewardship of the assets of the university (physical and intellectual), all members of the academy share a mission to teach and promote scholarship. This shared mission underpins all university policy. Conferees returned repeatedly to this theme.

In addition to isolating issues for consideration, the presentations and discussions elucidated several fundamental principles emerging from the extraordinary challenge associated with policymaking on this issue. Here are the major observations:

- **The ideal policy is likely unattainable.** An ideal policy would be consistent with both the law and academic traditions. It would be equitable in its application and outcomes as well as uniform in its enforceability and comprehension within the institution. Yet, all policies are likely to be flawed and assailable and will include tradeoffs that result from negotiations, balancing of interests, and identifying priorities.
- **Striving for consistency in policymaking may well be “the enemy of progress.”** While general uniformity and equitable application are important, CIC members should not anticipate that they can or should develop fairly uniform policy among themselves, and individual universities may find that they need different policies for different types of works or for different programs within the one institution.
- **Simple assignments of all ownership rights to any party neglects the opportunity and need to “unbundle” the concept of ownership and to allocate specific rights of control and use to the various parties.** Multiple parties often have diverse interests in the future of a particular work that emerges from the scholarly enterprise. Effective policies can devise a sharing of rights among parties. By contrast, a grant of all rights to any one party can breed conflict and discourage quality scholarship.
- **The law applicable to copyrighted works is flexible, and agreements and institutional policies can advance a result that is mutually desirable, rather than legally mandated.** Therefore, policymaking and implementation must be driven by the academic mission of creating and disseminating scholarly works, rather than be directly shaped by the default framework of existing law.
- **Policy standards should avoid outmoded and unverifiable premises.** For example, policy decisions based upon creation of materials with the use of “substantial” university resources or based upon university “investment” in the project are often difficult to apply and may overlook that universities make major and expensive investments in all activities. Similarly, policies that apply only to certain media, such as software, fail to comprehend the mixed and creative utilization of media in all university work, and policies that apply different standards to “traditional works of scholarship” seem to ossify notions of scholarship at a time when university traditions are in upheaval.
- **The notion of “intellectual property” is expanding far beyond the traditional subjects of copyrights, patents, trademarks, and trade secrets.** Intellectual property law embraces rights of privacy, rights of publicity, database protections, technological protection systems, and copyright management information. Many of these bodies of old and new law are important in many different academic pursuits, and conferees heard specifically that patents for “methods of doing business” are now granted for technological innovations for education. Consequently, university delivery of the educational experience on the Internet may be governed not only by copyright protection for the content, but also patent protection for the means of

delivery. In some cases, the university may hold patent rights to its innovations; under other conditions the university may be an infringer of an existing patent.

- **An approach to policymaking under the sweeping rubric of “intellectual property” is likely to be too ambitious for any institution to pursue comprehensively.** Consequently, conferees spoke often of the need to “unbundle” the specific issues and rights and allocate them individually, but universities also need to “unbundle” some of the broader issues under the law and address only certain of those issues that may be particularly problematic. For example, a new policy may focus on copyright, but related issues of trademark or student privacy may need to be managed separately with the institution.

Based on these fruitful and dynamic discussions and observations, the Copyright and Intellectual Property Committee of the CIC has evaluated major themes presented throughout the conference and accordingly makes the following recommendations to the CIC and to its individual member institutions:

#### **At the consortium (CIC) level:**

- 1) Due to the dynamic and uncertain nature of current law, the provosts should authorize the CIC Copyright and Intellectual Property Committee to continue its service until at least December 2000. A principal objective of the committee would be to monitor and respond to emerging copyright and intellectual property issues, and to inform CIC members about related developments.
- 2) The CIC Copyright and Intellectual Property Committee should investigate and, if appropriate, initiate the development of a “toolkit” that can be used on each campus for educating faculty and staff about copyright and IP issues. Such a toolkit might include sample program agendas and suggested speakers for on-campus seminars, best practice documents, guidelines, and related materials.
- 3) The CIC Copyright and Intellectual Property Committee should develop a web-based clearinghouse of IP and copyright issues and policies from around the CIC, and publicize the existence of the clearinghouse to appropriate parties in the CIC (e.g., academic officers, university counsel, faculty senate, university librarians, university press directors, learning technologies coordinators).
- 4) The CIC Headquarters should develop and maintain a CIC-wide listserv for sharing information about intellectual property, copyright and related matters among interested parties.

#### **At the individual, university level:**

As universities expand the delivery and communication of instructional works, they need to realize that they are moving into the realm of serving as publishers of intellectual property, and as publishers they have responsibilities of publishers with respect to intellectual property and other legal rights. Universities also have primary responsibility for creating an environment that fosters innovation among creative people and that assures a productive learning among students. To that end, universities should consider the following actions:

- 1) Each university should articulate its “vision” for developing distance-learning initiatives, and policies must be consistent with, and support the attainment of, this vision (e.g., Does the university wish to enter the distance-learning marketplace as a unified organization, or encourage departments or individual faculty to be entrepreneurial in seeking other partnerships and means?).
- 2) Each university should consider issues of scale that will affect the long-term management and viability of policies. For example, at Pennsylvania State University, certain types of patents sought by the university have doubled in just two years; at all universities the growth of copyrighted works has accelerated with the use of new technologies and with the law now granting automatic legal protection for new works.
- 3) Universities should develop policies, contracts, or other instruments for effectively addressing the allocation of rights associated with new instructional works, and provide guidance and assistance to faculty who may need to secure permissions from copyright owners when activities exceeds the boundaries of fair use.
- 4) Each CIC university should initiate an educational effort to inform faculty about local policy related to the creation of new instructional tools, and to provide sound guidance regarding such issues as the allocation of rights when multiple individuals from multiple institutions are contributing to a project.

This report is respectfully submitted to the CIC and its Director, Barbara McFadden Allen, by the CIC Copyright and Intellectual Property Committee. Kenneth D. Crews, Committee Chair, Indiana University/Purdue University Indianapolis.

### **Members of the CIC Copyright and Intellectual Property Committee**

Kenneth D. Crews, Committee Chair, Director, Copyright Management Center, Indiana University/Purdue University Indianapolis.

Barbara Allen, Director, CIC

Fred Cate, Professor of Law, Indiana University

Kathleen Christoph, Director, Learning Technologies, University of Wisconsin-Madison

Colin Day, Director, University of Michigan Press

Peter Dunn, Assistant Vice President for Research, Purdue University

Kenneth Frazier, Director, General Library System, University of Wisconsin-Madison

Greg Jackson, Associate Provost, University of Chicago

Thomas Monahan, Director, Intellectual Property Office, Pennsylvania State University

Bruce Wheaton, Director Technology Innovation Center, University of Iowa

## Key Points to Consider When Drafting University Policy on the Ownership of Instructional Materials

### Scope of policy:

- Faculty (including FT/PT)
- Staff
- Students (including undergraduates, graduates, T.A.s)
- Public and visitors

### Applied to:

- University resources
- Grant projects
- Commissioned works/contracts

### Interested parties/stakeholders include:

- The University
- Departments within the University
- Creators of the works
- Third parties such as grantees, licensees, government
- Public

### Future uses to be considered:

- Derivative works (scholarly/commercial)
- Updates/corrections (by whom, at what cost)
- Shop rights

- Credit (intellectual, monetary) to creators, owners, partners
- What happens when the faculty member leaves?
- Can faculty “sell” the course to other universities while still employed at “home” university?
- Potential ramifications for trade secrets, patents