

Primer on Copyright Ownership

I. PURPOSE AND SCOPE.

The intent of the Primer on Copyright Ownership is to elaborate on the Copyright Use and Ownership Policy of the University of North Carolina, to provide examples to educate the reader about copyright ownership issues, and to aid the reader in applying the copyright ownership policies.

This primer is to be used in conjunction with the Copyright Use and Ownership Policy. The Policy takes precedence over everything written below. Because this primer cannot cover all situations, questions should be addressed to the delegated institutional administrator and institutional counsel.

II. OVERVIEW.

A. Intellectual Property.

Intellectual property can be anything resulting from intellectual activity that is original or unique (e.g., literature, inventions, advertising designs, manufacturing processes, music, and art). The term “intellectual property” normally is used to denote legal protection for the property. There are several methods used to protect the ownership of intellectual property and to prevent someone from using an author’s work or invention without permission or paying royalties. The two most common forms of legal protection are copyrights and patents.

Universities have treated copyright and patent very differently. Traditionally, faculty have owned their copyrighted works while patents on faculty-developed inventions have been owned by the institution. The reasons for this are both historical and economic. Traditionally, faculty have authored books and other intellectual property with comparatively little institutional support. Additionally, while some faculty earned significant income from book royalties, most faculty-generated copyrighted works have produced little or no income. Patented inventions, on the other hand, have often been supported by university-secured funding, and some, in fact, have produced significant income from licensing.

The adoption and use of technology to create copyrighted works and the potential for commercialization have caused universities across the country to examine the ownership issues. The Copyright Use and Ownership Policy of the University of North Carolina is consistent with the traditional ownership model for most faculty-generated copyrighted works. It does provide for institutional ownership where certain conditions are met and for directed and sponsored works. Even for these works, though, a different ownership model may be negotiated.

B. Copyright Ownership.

Copyright law protects an author’s original works fixed in tangible media of expression. It protects the *form of expression, but not ideas or facts* (e.g., the melody in its written form, the novel, the software, the course materials displayed on a web page).

1. When an author puts his or her original expression into a tangible form, it is automatically protected by federal copyright. Historically, the legal system and universities have permitted faculty to retain ownership of their copyrighted works including teaching materials (such as presentations, lecture notes, syllabi, and demonstration materials) even though under the “work for hire” doctrine, the university may have been legally entitled to the copyright in works created in the course of the author’s employment at the university. Universities traditionally have not exercised this right, however, and both the institutions and faculty have regarded faculty copyright ownership as one of the benefits of employment in an educational institution.

2. In non-educational settings, if the work is made "in the course of employment" or created under contract (a directed effort), the employer owns the copyright unless a prior agreement has been made between the author and the employer.

C. New Copyright Ownership Issues: Commercialization of Electronically Delivered Instruction and Material.

The potential for commercialization of distance learning courses, CD-ROM's, websites, and software has focused new attention on faculty members' creations which should be recognized in a copyright policy. In addition, the University policy must insure that the rights of employees and students as well as those of the institution are protected. Finally, the policy should recognize that the interests of both the University and the faculty are best served by maintaining an environment that provides opportunities for joint faculty-institutional commercialization of marketable works.

D. Patent Ownership.

A patent is a form of legal protection for inventions. A patent protects the embodiment of an idea; examples include machines, manufacturing processes, pharmaceuticals, and compositions of matter. Traditionally, the institution owns the patent right of the inventions of faculty members and the inventors earn a share of the royalties. Some works may be protected by both copyright and patent laws. For further information refer to the Patent Policy of the University of North Carolina.

III. COPYRIGHT OWNERSHIP ISSUES.

A. Author Ownership.

Under the Copyright Act the "author" of a work is owner of copyright in the work. Depending on the circumstances, the author will be either (1) the creator of the work or (2) the entity (e.g., educational institution) that employs the creator or that has contracted with the creator for creation of the work as a "work for hire." However, ownership may be further delineated based on what ownership rights are needed by the creator and which other rights might be transferred for a different purpose to another person or entity. Consider these ownership issues:

1. Ownership of copyrighted works by the "author" means that all of the exclusive rights provided under the Copyright Act are held by the owner. Section 106 of the Copyright Act lists the exclusive rights of the copyright holder: reproduction, distribution, adaptation, performance, display, and, for sound recordings, digital transmission. The copyright holder may exercise these rights, may transfer them, or license one or more of the rights to others.
2. In order to publish the work or commercialize it, often the author has to transfer the copyright to a publisher or the commercializing company. Thus, faculty ownership may mean that the author retains the copyright only until it is published or commercialized. In some cases, though, publishers need only limited rights and leave others with the author.
3. Control over the content of the work and the way it is used may be very important to faculty. Faculty want to make sure that the integrity of the work is not compromised by someone else adding to it, altering it, or not keeping it up-to-date. Typically, faculty want continuing control over the work as part of a career path, possibly writing a textbook based on the original material or teaching a course again, in another context.
4. The University has traditionally confirmed the right of faculty to produce scholarly works according to their convictions. Some faculty are concerned that if the institution owns a work, it could demand deletion of certain chapters or sections of a work to meet a marketing theme or to support a particular political position, thus overriding traditions of scholarly research and publication.
5. Conflicts of interest can arise if faculty exercise their copyright ownership rights in ways that compromise their ability to meet their responsibilities to the institution. Faculty should be cognizant of relevant policies on conflict of interest and

commitment. For example, faculty who want to teach an on-line course outside the institution that would compete with an on-line course offered by the institution or which would preclude their teaching a particular course for the institution, would face potential conflicts.

B. Institutional Ownership.

There are also important reasons that, despite the tradition of faculty ownership of copyright, the institution is now interested in copyright ownership, for certain types of works. The reasons include commercialization, return on investment, distribution of the work, and technology transfer. The change in the technological environment and concerns about distance learning have brought these issues to the forefront.

Open communication and clearly written agreements will help faculty and institutions to deal with copyright ownership in the digital age. Since most institutions and faculty lack experience in dealing with intellectual property issues, it will take time and openness to resolve the above concerns. If the University is to own the copyright in a work, the interest of the work's creator will be best served if the issues raised with respect to faculty ownership are included in any contract specific to the work (e.g., copyright ownership, control, academic freedom, and royalties or other incentives).

C. Joint Ownership or Shared Partnerships.

Copyright ownership need not be viewed as an all-or-nothing arrangement. Copyright consists of a set of rights that may be unbundled through creative sharing and licensing of specific rights.

Joint ownership shared partnerships in a directed work between the creator and the institution or multiple institutions may be negotiated. In such a case, one owner can commercialize the work and compensate the other(s). This arrangement should be put into a written agreement. (See Section V, "Special Considerations," below.)

D. Derivative Works.

A derivative work is based on or adapted from another work, such as an arrangement of an existing musical work, a motion picture script adapted from a novel, the translation of a foreign-language work, and the like. The speaker or the lecturer owns the copyright to any lectures or materials as long as they are original and are fixed in a tangible form of expression (e.g., written out in long hand or recorded on a computer disc). Student class notes may be derivatives of a faculty member's class lecture.

IV. APPLICATION OF THE UNC COPYRIGHT OWNERSHIP POLICY.

A. Authorship.

The first question to ask when determining copyright ownership of a work under the Copyright Use and Ownership Policy is, Who is the work's creator and what is his or her relationship with the University? The sections of the policy regarding ownership are organized by category of employment at UNC: (1) Faculty/ EPA Employee (Exempt Personnel Act [EPA] are usually salaried positions); (2) EPA / Non-Faculty Employees; (3) Staff (State Personnel Act [SPA] positions are usually hourly wage positions); (4) Independent Contractors; and (5) Students.

B. Faculty and EPA Employees.

1. Traditional Works owned by the creator. Traditional works are pedagogical, scholarly, literary, or artistic works originated by a faculty member or EPA employee resulting from *nondirected effort* (e.g., art works, audio recordings, films, lecture notes [fixed], manuscripts, musical scores, poems, scholarly works, tapes [audio or video], textbooks, distance learning materials, and videos not falling into other categories).

2. Traditional Works owned by the institution. Ownership of nondirected works involving *exceptional use* of institutional resources not routinely made available to faculty may be claimed by the institution. Examples of exceptional use of resources include:

- a. Waiver of fees normally required to use specialized facilities such as equipment, production facilities, service laboratories, specialized computing resources, and studios;
- b. Institutional funding or gifts in support of the work's creation; and
- c. Reduction in levels of teaching, service, or other typical university activities (e.g., course load, student advising responsibilities, division/department meetings, office hours, and administrative responsibilities) specifically to facilitate creation of the work.

Resources *not considered exceptional* include ordinary or limited use of desktop computers, FAX machines, laboratory space, libraries, office space, photocopiers, normal secretarial services, telephones, and other informational resources.

3. Other Traditional Works owned by the institution. Works where authorship cannot be attributed to one or a discrete number of authors but instead result from simultaneous or sequential contributions over time by multiple authors (e.g., laboratory manuals, tests, and self-paced learning modules, either printed or in digital format) are often claimed by the institution.

4. Directed Works owned by the institution. Works that *are specifically funded by, or created at the direction of, the institution* are owned by the institution. Examples can include any item listed in section B1, above, but most often include distance learning materials / modules, lab manuals, databases, textbooks, software, and videos.

- a. These directed works should be preceded by a clear agreement between the works' creator and the institution. The creator, where practical, is assigned a "shop right" (i.e., the right to use the work within the institution without the payment of royalties).
- b. The creator and the institution may negotiate a different agreement to:
 - Transfer the copyright ownership to the creator; or
 - Transfer the copyright ownership to the creator with provisions for reimbursement or income sharing from the creator to the institution if the work produces income for the creator; or
 - Provide for joint ownership.

5. Sponsored or externally contracted works. These include any copyrighted work that is developed with funds from a contract, grant, or other arrangement between the institution and third parties, including sponsored research agreements. These works are owned by the entity designated in the agreement/contract or grant guidelines. If not stated, the work is owned by the creator. Examples include course materials, data, reports, and software. Sponsored works do not include traditional works created through independent academic efforts and based on the findings of the research project, unless the sponsored agreement states otherwise (e.g., books, journal articles, and lectures).

C. SPA Employees.

Works prepared by a staff employee within the scope of his or her employment are "works for hire."

D. Contracts to Complete Specific Work (Independent Contractors)

When the institution enters into an agreement with an independent contractor and the work is specially ordered or commissioned

as part of the agreement, the work is a work for hire. It is advisable in all cases to have a written agreement, signed by both parties, that acknowledges the work is owned by the institution. Examples of such works might include compilations; contributions to a collective work (parts of an audiovisual work, parts of a book, parts of a display or advertisement, parts of a distance learning course, parts of a motion picture, parts of a web page); instructional text; drawings, maps, or an atlas; supplementary work; tests (and/or answer material for a test); and translations.

E. Students (including Teaching, Research, and Graduate Assistants).

Students may produce works while carrying out activities related to their enrollment at the institution or while under employment as a student research assistant, teaching assistant, or graduate assistant. Papers, computer programs, theses, dissertations, artistic works, and musical works are potential examples of student works. Copyright in these works belongs to the student—unless the employment status of the student or other special circumstances alter the ownership rights. Consider these examples:

1. **Sponsored or Externally Contracted Works.** Sponsored or externally contracted works include any copyrighted work developed with funds from a contract, grant, or other arrangement among the institution, the author, and third parties. These works are owned by the entity designated in the agreement /contract or grant guidelines. If ownership in the work is not stated, the work is owned by the creator. Student examples include reports, data, and software.
2. **Works for hire.** Works prepared by a student within the scope of his or her employment or a work specifically ordered or commissioned by the institution is a work for hire and is owned by the institution.
3. **Derivative works.** Works based on or are derived from another work may be derivative works. If so, they may infringe the copyright of the original work's owner. Thus, classroom notes, drawings, and diagrams taken directly from lectures may be derivative works. If so, they may infringe the faculty member's ownership rights.
4. **Student-created works.** Copyright in a student-created work is owned by the originating student; but a work that is merely derivative of another's work may be infringing. For example, a student's simple reordering of the content of a professor's lecture would constitute a derivative work of the professor. However, reference to and quotation from a professor's prepared lecture in a student's paper, like any other scholarly reference, could qualify as fair use.

V. SPECIAL CONSIDERATIONS.

A. Distance Learning / E-Learning.

Providing college courses via electronic means has given copyright issues a high profile. On the one hand, it is now possible to produce a course, reproduce it exactly, and disseminate it to learners at remote locations, paced to the students' individual needs. On the other hand, the digital process enables unauthorized duplication, alteration, and dissemination. It is also possible for multiple authors to work together in creating and presenting a course online and in commercializing the product. Factors such as return on investment of university resources, technological teamwork, and benefits of offering courses on-line must be considered in developing copyright ownership agreements that are appropriate to E-learning or distance education courses.

Traditional academic works are considered to belong to their creator. However, because of increased production costs, the possibility of multiple authors, and the potential for revenue, universities may require different approaches to copyright ownership of distance education courses and related materials. Generally, these policies are similar to those that apply to technology transfer in that the institution assumes responsibility for the costs of commercialization in exchange for assuming joint or complete ownership. The faculty member typically receives a share of any proceeds in exchange for transfer of ownership rights.

Considerations in shaping ownership include the following:

1. **Joint Ownership** may be the most appealing approach to copyright ownership of distance learning products; however, since joint ownership complicates management of the product, third parties interested in marketing the product may not be

attracted by a joint ownership arrangement.

2. The absence of a Claim of Copyright does not place a work in the public domain, but an author could decide not to exercise his or her rights or to distribute the work free of charge, thereby achieving the same result. This approach, though, may reduce the author's incentive to continue developing the work into a textbook or other form, as the material will already be free to anyone. Because the material can be changed, altered, or attributed to another, the work may also lose its integrity and reliability.
3. Sharing of Profits may be appropriate in works in which the institution has contributed exceptional resources.
4. Unbundling of rights shifts the issue from ownership of the copyright to issues that are important in the use of the product. These can be worked out in individual agreements or on a case-by-case basis as institutions develop some experience in the use of these products. Some issues are of concern to both the work's creator and the university, while others are unique to only one party:
 - a. Both the creator and the institution may want to share in any revenues; to have the opportunity to make copies for institutional or personal use; to be kept informed of uses of the product; and to control the use of the institution's logo or the author's name on the product if the content is changed.
 - b. A creator may want the right to use portions of the work in other "derivative works" (e.g., journal articles, books, other distance learning courses, revisions, and new versions) or may want to take the product if he or she moves to a new employment situation.
 - c. Both the creator and the institution may want the right to sell, license, or assign rights to third parties; to use the materials in future classes; or to combine the product with other course material and offer a new program.

B. Patent vs. Copyright.

There are several types of work for which both patent and copyright protection are available. Examples include software, sculptural works (jewelry and other artwork), designs, plant varieties, and business and other algorithms. Both patent process and the Semiconductor Chip Protection Act, which provides protection similar to copyright, can protect semiconductor circuits. Computer software is the primary example of this type of work, for which dual protection may be available. Several issues need to be considered in determining whether to seek both forms of protection.

1. Software that is protected solely by copyright. There are some benefits to selecting copyright protection over patent for software. For example, it is far less costly to obtain a copyright than a patent. In fact, copyright protection exists upon creation of the software, even without registering the copyright. If the author chooses to apply for a patent, then he or she transfers ownership to the University. Further, some campuses have a policy that requires staff to disclose if they have developed a patentable product.
2. Software for which the institution seeks a patent. Because of the cost of applying for, protecting, and licensing a patent, institutional ownership is generally to the faculty member's advantage. If patent protection is sought for the software, the institution owns the work. Typically, royalties are shared according to the institution's policies. (Patent policies at individual institutions can provide further guidance.)

VI. WRITTEN AGREEMENTS.

Throughout the copyright policy and this primer, the reader has been encouraged and directed to put all agreements about copyright ownership into writing. Verbal (oral) agreements and "assumed" agreements may have served business in the past. Today a different procedure is needed: *Put It in Writing!* The open discussion and agreement will enable all parties to have a clearer understanding of who owns the work. A sample Copyright Assignment Agreement related to software is attached to the end of this primer.

VII. ADMINISTRATION.

The policy requires that each institution designate an administrative unit (person or office) to implement the copyright policy.

Issues that such units may address include:

- Providing guidance on the ownership of specific works;
- Releasing institutional rights to a work's creator,
- Accepting an assignment of rights to the institution from an author;
- Developing sample contracts or agreements;
- Offering guidance on ownership of already created works and those contemplated;
- Participating in dispute resolution when there is conflict between the copyright ownership policy and the campus patent policy; and
- Serving as liaison with the University's Office of the President.

VIII. DISPUTE RESOLUTION.

The policy requires that each institution include a dispute resolution mechanism to resolve copyright ownership disputes that may arise between a work's creator and an institutional official or office. The dispute resolution process should include a provision in which the institution or the creator may:

- Request assistance in negotiating an agreement;
- Request a review of an ownership determination;
- Submit a dispute arising from the application or interpretation of the policy; and
- Coordinate the determination of what constitutes exceptional use of University resources, with involvement of the creator's department head, if necessary.

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