



**Statement of Copyright Committee Co-Chairs, Professor of Sociology Robert Wood
(Camden) and University Librarian Marianne Gaunt, Regarding Proposed Draft
Copyright Policy
April 24, 2003**

In fall 2000, University Vice President for Academic Affairs Joseph J. Seneca appointed a committee of faculty and administrators to draft a proposed copyright policy for Rutgers that addresses issues in higher education created by the technological revolution. The Committee to Review University Copyright Policy comprises a large and diverse group of members of the university community who have the variety of perspectives necessary to balance the rights of all stakeholders--creators, users, the institution and the public. This group has carefully considered how best to adjust the university copyright policy to encourage and support the creation and use of scholarly and instructional works in a broad technological context. We have arrived at a proposal which we believe upholds the fundamental expectations and traditions of higher education and provides a supportive environment to further the missions of research, education, and service to the public.

Recent and ongoing developments in digital technology have created new venues for the creation, distribution, and use of copyrighted materials in the academy. The traditional works created within the academy, the monograph, journal, musical score, poem, play, painting, have been expanded to include such items as the website, home page, interactive tutorial, electronic journal, digital music, CD-ROM, and multi-media work.

These new works extend the traditional forms of scholarship with which we are familiar and about which we have a common understanding of copyright ownership, use, and attribution. These new forms present unprecedented possibilities for the dissemination of works of authorship. The expanding means of creating and disseminating digital works have led to a heightened interest in copyright law and its applications around the world.

The members of the Committee have reviewed voluminous material to educate themselves about the various roles of copyright in higher education and have familiarized themselves with policies of other institutions. The Committee has focused on the policies of the public institutions of higher education in the Association of American Universities and found the AAU policy guidance document to be of assistance in articulating the various goals that a modern copyright policy should take into consideration.

The Committee wishes to express its gratitude to the New Brunswick Faculty Council, which reviewed an earlier draft of the proposed policy. The comments of the Council were very helpful in providing assurance that the Committee and Council share the same essential view as to the values and practices that a policy should support. At the same time, the comments underscored to the Committee that it is inherently difficult to understand the somewhat terse and interlocking provisions of any copyright policy.

After reflecting upon the comments received, the Committee made changes to the text of

the policy that we hope make the document clearer. We have prepared a separate document that addresses what we anticipate will be frequently asked questions; it provides basic information about what a copyright is and answers questions concerning the provisions of the policy and how they apply to common situations. This statement of the committee co-chairs provides a narrative overview regarding the purposes that this policy is intended to serve, some comments on the differences between patents and copyrights, and a brief synopsis of the provisions of the policy. While this synopsis cannot substitute for review of the policy itself, which is the controlling document, we believe that this may assist the reader in coming to a quicker understanding of the policy.

At this time, the Copyright Committee is releasing for review and comment the proposed policy.

As comments are received we will consider the advisability of modifications to the proposed policy, the FAQs, and this narrative.

I. Principles and Policy Goals for a Copyright Policy

The committee first agreed that the copyright policy of Rutgers University should uphold the basic principles embodied in copyright law and those that are fundamental to a public research university. These include the following:

- 1) *The purpose of the copyright act is to promote the progress of science and the useful arts.* Copyright law exists to support the public good by encouraging creators to disseminate the results of their work so that arts and sciences (in the broadest sense) may be advanced through the application of new knowledge. The mission of public research institutions includes the creation and dissemination of new knowledge for the public good. The university's policy must ensure that the public benefits from work done at the University.
- 2) *The ability of the faculty to publish the results of their scholarship freely and at their discretion is paramount.* A central purpose of the university is to create and disseminate new knowledge. The university copyright policy must affirm this principle.
- 3) *Rutgers should support and encourage appropriate application of the "fair use" provision of United States copyright law.* The university's copyright policy should also include statements appropriate to the use of copyrighted materials. The "fair use" provision of US copyright law allows the quotation of limited excerpts of copyrighted material for criticism, research, and educational purposes without prior permission of the copyright owner.
- 4) *The university encourages the use of information technology for research and instruction.* The university has constructed a state of the art computing network and provided facilities and services that are available to faculty for research activities and the development of course-related materials. Use of these resources available to all

faculty is not the basis for a claim of university ownership of these course-related materials, and, therefore, should encourage use of this technology for its intended purpose. For example, faculty members who post on the university network course syllabi, course outlines, or lecture notes which they have authored retain ownership of these materials.

- 5) *The university intends that the use of substantial resources including research funding be devoted to the creation of scholarly or instructional works for the broadest public good.* There are times when the contribution of substantial public resources to the creation of a work will justify university ownership of certain copyrighted materials. University ownership does not interfere with the ability of faculty members to publish freely the results of their scholarly work. The purpose of university ownership under these circumstances is to ensure that the works created are used for the broadest public good. For example, this assures availability for faculty and students within the university for teaching and research. On occasion, income associated with some of the works can support further university research and instructional efforts.

II. Some Observations on the Differing Roles of Patents and Copyrights In Higher Education.

It is useful to understand some differences between patents and copyrights. Many faculty members, especially those in the sciences, may be more familiar with the patent area. While patents and copyrights both are forms of intellectual property, the patent law and copyright law are very different.

A. Patents

Patents, in essence, provide protection to new ways to accomplish some practical objective. Among other requirements, the invention must be new in the sense that there are no publications anywhere before the invention, and in no event more than one year before the patent application was filed, that contain the same essential ideas described in the patent. Most research does not generate patents, nor is it intended to do so. Patents, therefore, are occasional byproducts of research that may have a practical application. Once a patent application has been filed, the researcher is free to publish material that relates to the patent without affecting the validity of the patent. Publication prior to the filing of some sort of application with the United States Patent Office precludes patentability.

Patents are exploited outside of the traditional academic enterprise since their practical application can only be obtained from a commercial application that is pursued by a business; the business, in order to succeed, must be able to make money from that application.

The almost universal practice in higher education is that the institution owns patents

invented in the course of university work. The university undertakes the work of licensing the patent to commercial enterprises; and if there is net monetary recovery then those funds are divided among the inventor, the department or unit and the university.

The development of a commercial product is not an academic activity and generally would not be an appropriate topic for an academic publication. Sometimes the faculty inventor has no further involvement in the development of the commercial application. Sometimes the faculty inventor provides to the licensed company private consulting services that may, for example, consist of product design. Apart from the possibility of recovering funds to support future research, the patenting process serves to benefit the public by allowing innovations to find practical benefits to society. University patent policies set forth a standard procedure for how all of this is handled at any particular institution.

B. Copyrights

Copyrights, in essence, apply to any “tangible” means of expression that has at least a modicum of creativity; “tangible” means that your work exists in a fixed form that makes it reproducible (such as a writing, recording, or stored on a computer). While patents in a loose sense protect new practical ideas, copyrightable subject matter does not include the facts or ideas that are contained in writing. While a patent holder’s authorization is required to use the practical idea claimed in the patent, a copyright applies to only the manner of expression and allows the free flow of facts and ideas.

It is obvious that copyrighted material pervades the activities of higher education and that copyright applies to almost everything that occurs within an academic community, except for the unrecorded spoken word.

1. Staff.

The University is the copyright holder of all the work product of staff, with occasional exceptions for scholarly endeavors.

2. Faculty Publications.

The faculty produces an enormous volume of copyrighted works in the course of educational and research activities. The proposed policy is unambiguously clear that faculty members own the copyright to traditional scholarly work, irrespective of the circumstances and resources that supported the faculty members’ research activities.

3. Faculty Using Normal Resources

Faculty members develop copyrighted works in the course of educational activities. For example, faculty typically create a syllabus and a variety of supplementary materials for students. These materials have been traditionally “owned” by individual faculty members.

Today many items that ten or twenty years ago would have been paper handouts are now

available on the Web. Moreover, the University provides to the faculty resources and assistance at the Teaching Excellence Center to help faculty members create educational materials that they can post for their students on the Web. Because the materials are now created with technology owned by the university, sometimes with Rutgers staff assistance, and then distributed over an expensive computing network, the Committee realizes that some faculty might be unclear as to whether the university would assert any ownership interest in these materials.

Any concerns about this issue would inhibit the faculty from taking the fullest possible advantage of these resources and would undermine the very reason that the university has dedicated very substantial resources to create the computing and networking environment that would benefit the educational experience of our students. Accordingly, the policy is explicit that the use of those resources ordinarily available to all or most of the faculty leaves the copyright with the faculty.

4. Faculty Using Substantial Resources Not Available to All or Most Faculty.

There are a variety of educational and learning aid projects that are so labor intensive that faculty necessarily require additional departmental or university resources if these materials are ever going to be developed. These are the sorts of materials where the faculty, department or unit, and the university all have an interest in the matter.

One interest of the university and department is that these materials developed with special support must be available for use at Rutgers to assist in the educational process. Accordingly the policy provides that the university may assert copyright ownership to these materials to assure, for example, that all faculty within the department will be able to utilize these supplementary educational materials as they see fit.

Where the university asserts its copyright interests, the policy recognizes various interests.

5. Research Funding Generally Results in University Ownership of the Copyrightable and Patentable Results.

As always, faculty are free to publish the results of their research, and own the copyright to such scholarly publications.

C. A Word on Commercialization

Both patent and copyright processes allow for sharing work developed at the university, but the role of commercialization in each is different. The role of commercialization of intellectual property and the motive to maximize income is central to any University patent policy, while the role of commercialization in a copyright policy is generally non-existent or incidental because the occasions when major commercial opportunity for copyrighted works exists will be relatively rare. Once again, traditional scholarly publications are owned by the faculty irrespective of funding.

There will, however, be occasional possibilities to “commercialize” supplemental educational materials that have been developed with special resources. For example, when supplementary material has been very well done, a commercial textbook publisher may express an interest in making the learning aid an accompanying CD to a textbook on the topic.

A primary benefit of commercializing this sort of copyrighted material would be to promote and broaden recognition of the sponsoring department within all of higher education. The small amount of money generated would probably be less than the cost of development of the work. This may be allocated to reimburse the sponsoring unit. The university may be reimbursed if substantial resources outside the unit were used for the project. It is appropriate to make a case-by-case determination on the distribution of these funds depending on the circumstances of each work. At the inception of any substantial project it should be possible to address these issues in advance.

We have dwelt on this topic because we believe it is very important that a clear-minded evaluation of the proposed policy is that everyone grasp the reasons why commercialization of work product cannot be the cultural focus of a sophisticated University copyright policy.

III. Synopsis of Proposed Copyright Policy

This part of the narrative is a brief summary of some of the fundamental provisions of the proposed copyright policy.

A. Applicability of the Policy

1. Faculty, Staff and Students

The policy applies to faculty, staff and students.

2. Visitors who use university facilities

The policy also applies to visitors to the university who use university facilities. Note that this is not a claim of university copyright in the work of every visitor to the university. For example, the university makes no claim on account of using the library; this applies just as much to visitors as it does to the university community. A visitor would have to make use of substantial university resources or fall under some other provision of the policy for the university to claim copyright.

3. Consultants and Independent Contractors

The policy applies to independent contractors and consultants. Usually the tasks performed by consultants are those where the University should own the copyright.

It is very important to know that, unless there is a written agreement assigning all rights to the party paying for the service, copyright law provides that these works are owned by the consultant or independent contractors; the institution paying for the service receives only a license to use the work for an intended purpose.

University policy, therefore, states that no consultants may be engaged unless they execute a standard agreement that unambiguously assigns the rights to the University. This standard provision may be modified in unusual cases where it is appropriate to do so.

Because of the decentralized organization of the University we do not expect to eradicate entirely this avoidable problem. Contracts over a certain dollar figure processed by the Rutgers Integrated Administrative System (RIAS) will automatically be reviewed.

For small projects, faculty and administrators sometimes “end run” the process with a short engagement letter. Widespread ignorance of the counterintuitive legal rule that the consultant owns the copyright unless agreed to otherwise in writing has led to numerous unnecessary disappointments regarding copyright ownership.

We have emphasized this point in the hopes of consciousness raising and reducing unnecessary disappointment and complications.

B. Publication of Scholarly Work

Freedom to publish scholarly work is a bedrock of academic research tradition. Faculty members view having a free hand over publication of their scholarly work as essential. This is served by faculty ownership of their scholarly works. The university also views faculty freedom to publish as essential and will not permit any external funding of work at Rutgers that allows a sponsor control over any faculty publication.

C. The Copyright Policy Does Not Amend Other Policies.

The copyright policy does not amend other university policies including the law and regulations regarding conflict of interest or policies concerning asynchronous learning (distance education).

D. Educational Materials Developed with Ordinary Resources Available to All or Most Faculty

As detailed above, the faculty own the copyright to these materials.

E. Works Typically Owned by the University

The following works will be owned by the university unless agreed otherwise.

- (i) works created at the university's direction
- (ii) works created by staff
- (iii) works created with external funding, which generally requires that these works be owned by the institution; once again, note that the faculty hold copyright to academic publications based on this work.

F. The Special Case of Work Supported by "Substantial Resources"

If a faculty member wishes to use "substantial resources" to support a project, it will be highly unusual if all essential terms are not worked out in advance of the work. This includes issues relating to ownership, use, control over the resulting work, and any revenue distribution issues. There are however, unusual cases in which over the course of time a faculty member has made use of special resources without any advance arrangements. For these unusual circumstances, the university needs a "catch-all" provision relating to use of "substantial resources."

The policy defines "use of substantial university resources" as follows: The use of substantial university resources refers to the use of university funds, facilities, equipment or other resources not ordinarily available to all or most faculty members. Use of substantial university resources includes but is not limited to: research funding, paid or release time awarded to support the creation of the copyrightable work, use of university laboratories or special instrumentation, and dedicated assistance by University employees.

This provision is consistent with the principle that substantial public resources should not be used for private gain.

The policy also provides specific reassurance that certain resources commonly available to all faculty are not considered within the definition of "use of substantial university resources:"

Use of any or all of the following resources ordinarily available are not considered use of substantial university resources: academic year salary and benefits, salary received on sabbatical, office space, library resources, personal computers and the university's computer infrastructure, normal use of secretarial staff and supplies, use of the teaching excellence centers, and small awards to faculty from certain internal grant programs. The faculty will hold copyright to pedagogical materials (including materials in electronic format or posted to a website) developed in the normal course of their teaching duties using resources ordinarily available to all or most faculty members.

Once again, this does not affect faculty members' traditional ability to publish scholarly works. It conceivably could, however, affect ownership of certain pedagogical material, although it is hard to imagine practical circumstances when these issues would not have been attended to prior to commencement of the project. More likely this provision will occasionally

apply to research that has over time relied on substantial university resources and that has resulted in a commercially viable application. In some cases, the university may not be able to evaluate in advance of the creation of materials whether it would serve a purpose (such as education, research, or commercial distribution) for the university to elect to claim the copyright. In these circumstances, purely private benefit as a result of use of substantial resources is generally unacceptable at major research institutions. This is particularly true at public institutions.

While the university has the right to assert its ownership claims when it has made a substantial investment in the creation of copyrighted materials, the committee also wishes to emphasize that the university will not automatically assert copyright ownership to all materials that are developed with substantial resources. The university may elect to exercise its ownership rights to further the principles embodied in the copyright policy, for example, to enable the works created with substantial university resources to be made available to the university community or for other public access.

Even when the university owns copyrighted materials under this policy, appropriate rights and interests may be shared with the faculty to, for example, revise or update the materials, or use them for non-commercial purposes should the faculty member accept employment at another institution. The diversity of circumstances involved may require additional negotiated rights on a case-by-case basis. Additionally, the university and the creator of a work may negotiate an arrangement whereby the university does not elect ownership but retains rights of internal use or other appropriate rights.

Should any faculty member be unsure of copyright ownership or wish to pursue copyright ownership of materials created at the university where the use of substantial resources may be involved, the faculty member should request clarification, ownership, and/or sharing of rights with the appropriate university administrator(s).

G. Distribution of “Revenue”

The committee is persuaded at this point in time that the circumstances under which copyrighted materials may generate some revenue vary so considerably that there is no one-size-fits-all formula that is appropriate. Experience to date at Rutgers has shown that reaching agreement in each particular case is not difficult. The Committee believes that a default provision would distort a process that has worked well and provides flexibility necessary because of the changing digital environment and the great variety of situations to which a copyright policy applies.

H. Fair use.

The “fair use” provisions of the copyright statute permit the limited use of copyrighted material for purpose of scholarship, criticism, or teaching. The statute provides for the

evaluation of any specific situation based upon four factors. This is a very important and complex area of the law.

Current university policy on fair use deals only with photo duplication of copyrighted materials. The interim administrative policy promulgated by the university in 1983 and still in effect limits copying at the university to what is permitted by fair use guidelines for classroom copying in not-for-profit educational institutions arrived at between representatives of the education and publishing sectors following adoption of the 1976 copyright law. The guidelines set forth strict definitions for brevity, spontaneity, and cumulative effect that must be considered before reproducing copyrighted materials for classroom use. Limits, for example, are placed on the number of pages or words that can be copied and the number of items that may be copied for a course each term.

Guidelines are intended to serve as a safe harbor rather than rules beyond which no use may be made. If a needed use exceeds the safe harbor guidelines, the law allows an assessment using the four factors of fair use. If it is clear and convincing that a proposed use would be subject to the “fair use” exemption, then the work may be used without asking, and possibly paying, for permission.

The proposed copyright policy allows fair use at the university beyond the “safe harbor” guidelines and allows faculty members to take advantage of this very important exception to copyright holders’ exclusive rights. Appropriate exercise of fair use requires individuals to understand how to apply the four factors in good faith fair use assessments for each use of a copyrighted work. Educational materials that describe the fair use provision of the law without incurring the penalties of infringement need to be developed for the Rutgers community.

I. Administration of the Policy

Because of the difficulty in predicting and codifying the many unforeseen uses and applications that may arise in the copyright environment, the committee will be recommending that a copyright policy advisory committee of faculty and administration be formed to advise on such matters as the interpretation of copyright policy, educational programming regarding copyright, changes in copyright policy, and recommendations for appropriate mechanisms for assistance and advice concerning issues of “fair use” beyond those established by “safe harbor” guidelines.

4/24/03