

Draft Report from Intellectual Property Committee

GENERAL STATEMENT

The Committee endorses the introductory language of the existing University Copyright Policy:

Cornell University is committed to providing an environment that supports the research and teaching activities of its faculty, students and staff. As a matter of principle and practice, the University encourages all members of the Cornell community to publish without restriction their papers, books, and other forms of communication in order to share openly and fully their findings and knowledge with colleagues and the public. The Copyright Policy has been prepared in this spirit and with this intent. The Copyright Policy is intended to promote and encourage excellence and innovation in scholarly research and teaching by identifying and protecting the rights of the University, its faculty, staff, and students.

Copyright ownership and the rights thereof are concepts defined by federal law. University policy is structured within the context of the federal copyright law. The long-standing academic tradition that creators of works own the copyright resulting from their research, teaching, and writing is the foundation of the University's Copyright Policy. Exceptions to this rule may result from contractual obligations, from employment obligations, from certain uses of University facilities, or by agreement governing access to certain University resources. This Policy addresses these exceptions.

The Committee does, however, recommend the following changes to the text of the Copyright Policy. Where possible we have used the heading from the existing Copyright Policy and have followed its organization.

As part of our deliberative process, the Committee reviewed the policies of peer institutions. We find the Copyright policies recently adopted by the University of Michigan to be an exemplary model and would urge that it be used as a guide in revising Cornell's policy. (See <http://www.copyright.umich.edu/print-policy.html>).

DEFINITIONS

The University's policies on intellectual property should be independent of the media in which ideas are expressed. Thus, whether ideas are expressed on paper, on a web site, or in any other medium, the intellectual property rights are the same. As a result, the definitions of "traditional work" and "encoded work" in the existing Copyright Policy can be eliminated.

It would be helpful to include in the policy a general definition of "works of authorship" or some similar phrase to inform those affected by the policy of the breadth of material that is copyrightable e.g. "works of authorship" may include lecture notes, textbooks, articles, works of fiction, visual arts, software and musical compositions regardless of the media in which the works are produced or the forms of dissemination e.g. print or electronic.

The Committee recommends that the definition of "substantial use" be moved to the Definitions section of the Copyright Policy:

Substantial use of University resources: entailing the use of University resources not ordinarily used by, or available to all, or virtually all, members of the faculty. A further elaboration of this concept can be found in the "Elaboration of Definition of Substantial Use" included as an Appendix to this Policy.

The Committee recommends that additional illustrative examples be provided to clarify the definition. For example, contributions of instructional and/or technical support to create digital course materials and/or to transform existing materials into digital format can constitute "substantial use" of University resources where such contributions exceed the level of support available to all faculty.

The Committee proposes removing from the definition of "substantial use" the use of departmental or field-specific equipment and resources that, while not available to all faculty, are generally available to all members of the faculty within that department or field. The Michigan policy defines what it terms "usual university resources" as "those resources commonly provided or made available to similarly situated faculty. They include, for example, ordinary use of resources such as the libraries, one's office, computer and University computer facilities, secretarial and administrative support staff, and supplies. For any given department, unit or individual, what constitutes a usual resource will depend upon the functions and responsibilities of that department, unit, or individual. For example, access to a chemistry laboratory may be a usual resource in chemistry, but would probably be considered an unusual resource in English literature."

Questions about whether use of a particular resource constitutes substantial use should be directed to the individual with administrative responsibility for the resource.

OWNERSHIP AND DISPOSITION OF COPYRIGHTABLE MATERIAL

The existing University Copyright Policy provides that ownership vests in the Author except under certain circumstances.¹ The exceptions are:

- 1) work performed under a sponsored research or other agreement that confers ownership on the University or creates University obligations as to intellectual property developed there under,
- 2) material created by non-academic employees within the scope of University employment or by academic employees pursuant to specific direction or assigned duty (other than teaching courses) (often referred to as "work for hire"),
- 3) "encoded works" developed with substantial use of University resources, funds, space or facilities,
- 4) ownership of materials that are both patentable and copyrightable is governed by the Patent Policy.

The Committee recommends the following changes to the existing policy:

Exception 1: no change.

Exception 2: The Committee recommends that the "work for hire" provision be clarified.

"Work for hire" is a legal term defined in the Copyright Act. The law provides that "a work prepared by an employee within the scope of his or her employment" is a work for hire. The employer (i.e., the University) by law is the "author," and hence the owner, of works for hire for copyright purposes.

There is a long-established tradition within academia exempting scholarly publications by faculty from the "work for hire" doctrine. Faculty own the copyright to such works. There is no clear understanding with respect to other types of work.

¹ This default position is based largely on the practices at peer institutions. This is a policy determination and not one based in legal precedent. Under U.S. copyright law, employers own the copyright to works created by their employees. Faculty are legally employees of the University. Despite a widely held belief among academics that there is a "faculty exception" to the work-for-hire doctrine, the reality is that there are very few cases (none in our jurisdiction) recognizing an exception and then only with respect to scholarly publications (and all pre-date the latest (1976) revision to the copyright statute). There are, therefore, no legal constraints on the University in formulating its policy position.

a) The current policy draws distinctions based on the nature of an author's appointment with the University in applying the work for hire doctrine (with the "academic" category encompassing those titles described in Article XVI of the University Bylaws). The Committee finds that this approach produces inexact and less than ideal results. The definition used in the current policy includes scientist, extension associate, librarian, archivist, and teaching associate. Works created by individuals in some of these positions need to be owned by the University. For example, an extension associate may be hired to write educational materials that Cornell Cooperative Extension will disseminate broadly throughout the state in a manner inconsistent with individual ownership of those materials.

The Committee proposes a new approach that would draw distinctions based on the nature of the copyrightable work rather than on the nature of the relationship between the creator and the university.

Work in a university like Cornell covers a very wide range. On one end is faculty academic work that is entirely driven by the individual creator. At the other extreme are works undertaken to meet the administrative needs of the University, carried out under supervision or within specifications and expectations laid down by a unit. Our committee thought that clearly the creator of the first class of work should own the copyright and the University should own the copyright at the other end of the spectrum. Most work of faculty and senior research associates tends to fall in the first class, while the work of staff tends to fall in the second.

There are occasions when faculty members execute tasks under direction of their departments (for example, writing a course description for the course catalog or preparing a case study for use in a departmental curriculum).

The Committee also recognized that many professional staff in various fields, librarians, and others do routinely undertake research projects and prepare scholarly papers. It is appropriate that such works e.g., scholarly papers presented at conferences, created by non-academic staff be owned by the individual employee even if that individual is in a staff position.

The underlying principle is the tradition that members of the university own the copyright in their academic and creative efforts. Conversely, the university has copyright to administrative materials. We recommend that, regardless of who creates a work:

- i) If it is clearly academic and created at the initiative of the author, the copyright is owned by the creator. Examples include most lectures, textbooks, and journal and conference papers.
- ii) If it is clearly administrative or created as a specific requirement of employment or pursuant to an assigned duty that may be included in a job description or employment agreement, or be instigated or facilitated by a unit of the University for the express purpose of making such works

available to individuals or entities other than, or in addition to the creator for use in teaching, research, patient care, public information, or other University activities, the university owns the copyright. Examples include admissions or publicity material, course catalogs and departmental Web sites. The University does not claim ownership of instructional material or courseware merely because the University requires faculty members to teach courses as part of their regular responsibilities. The University may claim ownership of certain instructional materials or courseware, including online course materials, when the University has specifically requested such materials and either invested substantial University resources in them or specifically compensated academic creators with additional financial compensation, release time etc. for the development of the materials or where materials are created in the course of an administrative assignment e.g. a report for a University committee. The University does not claim ownership of faculty-initiated scholarly works based merely on general expectations that faculty members will publish such works.

Where the title to which an individual is being appointed does not correspond well to the nature of the work to be performed by that individual with respect to the academic/non-academic distinction employed in the Copyright Policy, the issue of copyright ownership should be discussed and explicitly addressed by supervisors in the appointment letter or other documentation.

With respect to particular works, if there is any doubt about which category materials fall into, the individuals involved are encouraged to clarify the situation, in writing, before the materials are created.

The Committee recognizes that an unambiguous default assumption needs to serve as a starting point for assigning copyright ownership.

If there is no written clarification, the presumption is that copyrights to materials created by academic employees and students are owned by the creator; materials created by other members of the university are presumed to be works for hire with copyright owned by the University.

In order to fit the framework of the existing policy, these recommendations will need to be recast as an exception to the general rule that the author owns.

The current exception in the existing policy reads:

The copyright of material that is created by a non-academic employee within the scope of University employment or by academic employees pursuant to a specific direction or assigned duty (other than the teaching of courses) from the University or any of its units shall be the property of the University.

The above approach would dictate the following change in the existing text:

The copyright to material that is created by a non-academic employee within the scope of University employment shall be the property of the University unless there is a written agreement to the contrary. Such agreements may be appropriate where a staff member is creating an academic work such as a scholarly article or conference presentation with the permission of, but little guidance from his or her supervisor.

The copyright of material that is created by an academic employee pursuant to a specific direction or assigned duty from the University or any of its units shall be the property of the University. Such specific duties may include requests that a faculty member develop labs, case studies or other curricular material to be used by members of the department or college other than or in addition to the faculty author. Other examples include course descriptions written for the course catalog and works created in the course of an administrative assignment, e.g. committee reports. A teaching assignment shall not constitute a specific direction or assigned duty conferring on the University copyright ownership in lecture notes and other instructional materials.

b) clarify ownership of course materials. Heightened attention has been brought to the topic of course materials as a result of the growth of distributed learning.

There is apparently wide divergence of practice across the campus in the degree of sharing of course materials, Web sites, cases studies and problem sets. In some disciplines, course materials are considered a communal resource. When a new faculty member teaches an established course, the new course builds on the old materials. Examples and problem sets may be shared with other universities via open-access Web sites. In other disciplines, course materials are closely associated with the faculty member who develops them. Course Web sites are protected by passwords and a new faculty member who takes over an established course expects to develop new materials.

The current policy is silent on this subject except to state that a teaching assignment does not constitute “a specific direction or assigned duty” converting academic work into “work for hire.”

The Committee reads the current policy as stating that the general rule is that academic employees own the copyright to the course materials that they create. We favor this view. While the decision as to how much to share materials with colleagues lies ultimately with the person who created them, members of the University are encouraged to conform to the general practices in their disciplines and departments.

While a teaching assignment is not in itself “a specific direction or assigned duty” converting academic work into "work for hire," consistent with the principle articulated above, there are occasions when academic employees execute course-related tasks under

the direction of their departments (for example, writing a course description for the course catalog or preparing a case study for use in a departmental curriculum). These should be cited as examples of specific directions or assigned duties converting academic work into "work for hire" owned by the university.

Exception 3: eliminate the media-based distinction between "encoded works" and "traditional works" contained in the current policy.

The consensus of the Committee was that this distinction was unsatisfactory. The principles that apply to software developed at Cornell are the same as those for other activities that generate copyrighted materials. On rare occasions, software may incorporate inventions that satisfy the requirements to be patentable (original, non-obvious, useful); the university patent policy applies to such cases. In keeping with the policies of peer institutions, the "substantial use" test (discussed above in the Definitions section) would apply equally to all works created by academics.

Exception 4: no change.

STUDENTS

The Committee recommends that students be better integrated into the Copyright Policy. The existing policy section on Ownership and Disposition of Copyrightable Material states that it applies to academic and non-academic employees and students. We agree with this approach. Inclusion of Students within the "Ownership" section obviates the need for much of the material currently contained in the "Students" section. We suggest that the "Students" section be reduced to the following:

In addition to being covered by the provisions of Section II. OWNERSHIP AND DISPOSITION OF COPYRIGHTABLE MATERIAL, works created by students are subject to the following rules:

Students performing work compensated by the University are subject to the provisions governing nonacademic employees under Section II.

Students who are hired to perform specific tasks that contribute to a copyrightable work will ordinarily have no rights to ownership of that work, regardless of the source of funds from which they are paid. In such cases, the party who owns the copyright to the rest of the work will ordinarily retain copyright ownership of the portion contributed by the student. [Note: this may be harsher to students than necessary. It might be possible to satisfy these needs through other means such as joint ownership or the reservation of license rights. The University of Michigan policy provides "Students are frequently involved in the creation of works in consultation with, or under the supervision of, University faculty and staff. Such works may be related to coursework, research, extracurricular activities, or other University projects. In some circumstances, it is

difficult to determine whether and to what extent students are acting as agents or employees of the institution. Accordingly, written agreements with students regarding copyright should be executed whenever the University or its representatives have any doubt about copyright ownership or other interests."]

Students working collaboratively with academic employees on projects that result in copyrightable work may be granted the same rights and obligations of copyright ownership, as would another academic employee working collaboratively on the project. Students and academic employees should establish these rights at the outset of their collaboration.

Students are also subject to the rules and restrictions of their respective units, colleges and the Graduate School. For example, students who copyright their theses or dissertations must grant the University rights to reproduce and distribute copies of their works in accordance with the policies of the University or College.

RESOLUTION OF DISPUTES

The Committee recommends that the composition of the ad hoc committee be revisited. The University of Michigan policy provides: "The Provost will appoint an ad hoc committee and designate a chair. The committee will consist of a combination of administrators, faculty, staff and/or students as appropriate given the nature of the complaint and the respective roles of the parties involved."

ADDITIONAL TOPICS

Collaborative Works

It is not unusual for several members of the University community to contribute to a work either concurrently or over time. The policy should advise individuals to clarify (in writing) what rights each contributor will have in the output of their collaboration. In this regard, it would be useful for the Copyright Policy to include a section describing the legal doctrine of "joint ownership," as well as the other possible rights allocations in such cases. This section should delineate the pre-requisites to creating a joint work and its alternatives as well as the rights and responsibilities associated with them.

Unless the contributions are made under circumstances that bring them within one of the exceptions delineated in OWNERSHIP AND DISPOSITION OF COPYRIGHTABLE MATERIAL above, the allocation of rights among multiple authors is largely a matter for them to resolve, ideally through an explicit agreement about these matters.

Rights Reserved by the University in Instructional Materials

The Committee recognizes the need for the University to retain certain limited rights to use course materials even when ownership resides in the faculty or other academic employee. We recommend that the Copyright Policy be revised to include a list of rights reserved by the University in instructional materials that are generated (and continue to be owned) by academic employees and students:

In order to carry out its mission, the University retains a non-exclusive, no-cost license to use, re-use, reproduce, display and distribute and make derivative works (such as compilations, archives or composite works) of instructional materials for the education of Cornell students. Instructional materials may include syllabi, course descriptions, reading lists, assignments, slides, lecture notes, lab exercises, tools, simulations, multimedia, web-based pages, exams, student assignments, and recorded discussions. In accordance with academic custom, the University will acknowledge the authors of these works unless the authors request otherwise.

Copyright Management

The Committee recommends that a new section be added to the Policy on the obligations that a member of the Cornell community has regarding the management of his or her copyrights. The Committee feels that while the University, in the copyright policy, should not exert an ownership interest over much of the intellectual property produced at the University, it should be able to expect authors to manage their copyrights in support of the mission of the University: to serve society by educating responsible citizens and extending the frontiers of knowledge. The free and open exchange of ideas has been at the heart of the collaborative enterprise of the university, and scholarship is best served through open, unconstrained sharing of information. In addition, how individuals manage their copyrights may have financial implications for them, other faculty, staff, students, and the University.

Publication has been one of the primary mechanisms that copyright owners have used to share information. Where and how to submit scholarly and scientific work for publication is properly the right of the author, and the University has no right to control that decision. When authors publish a book or a paper, many publishers ask authors to transfer all copyrights in the work to them. When authors assign copyright to publishers, they lose control over their scholarly output. Assignment of copyright ownership may limit the ability of authors to incorporate elements into future works and to use their own work in teaching at the University and might force the University to pay to use the material. Unless addressed in the transfer agreement, an author may be forbidden by the publisher to do the following:

- Post the work to his or her own web site or to a disciplinary online archive;
- Copy the work for distribution to students;
- Use the work as the basis for future articles or other works;

- Give permission for the work to be used in a course at Cornell;
- Grant permission to faculty and students at other universities to use the material.

Copyright restrictions may also jeopardize the ability of the Cornell University Library to make materials available to students. When all rights are transferred to publishers, the publishers are at liberty to impose significant costs and administrative burdens on using the work for non-commercial education purposes. Some commercial publishers use the control that they gain from having copyright transferred to them to charge very high prices to libraries. The Cornell University Library Board has brought to the attention of faculty the subscription costs of the journals to which they submit papers. Faculty may wish to be aware of this information before joining the editorial board of journals that are unduly expensive or restrictive to authors.

While it is common for publishers to ask that all rights be transferred to them, it is often not a requirement for publication. *Nature*, for example, no longer requires authors to sign away their copyright but asks instead for a license to publish. Authors retain the right to reuse their papers in any of their future printed work, and have the right to post a copy of the published paper on their own websites. Many other publishers have adopted similar policies.

Faculty and other academic authors have at least two options for managing their copyrights. First, they can if they wish reserve specific rights. Authors may wish to reserve some or all of the following rights:

- The right to make reproductions for use in teaching, scholarship, and research
- The right to borrow portions of the work for use in other works
- The right to make derivative works
- The right to alter the work, add to the work, or update the content of the work
- The right to be identified as the author of the work
- The right to be informed of any uses, reproductions, or distributions of the work
- The right to perform or display the work
- The right to include all or part of this material in the author's thesis or dissertation
- The right to make oral presentation of the material in any forum
- The right to authorize making materials available to underdeveloped nations for humanitarian purposes
- The right to archive and preserve the work as part of either a personal or institutional initiative e.g. in a web site
- The copyright in every draft and pre-print version of the work.

Since scholarship is a collaborative enterprise, authors may as well seek to secure for all educational institutions, and not just the University, some of the rights listed above.

It is often difficult, however, to anticipate in advance everything that an author may wish to do with a work, especially over time and with changes in information technology. Authors therefore may wish to follow the alternative instead: whenever possible, retain ownership of the copyright and instead license to the publisher only the rights the publisher needs to conduct its business.

The Copyright Information Center (at <<http://www.copyright.cornell.edu>>) has more information and suggested language that can help authors develop a publishing license. Sample language for author's rights is also available at the SPARC (Scholarly Publishing and Academic Resources Coalition) *Create Change* website, <<http://www.createchange.org/faculty/issues/controlling.html>>. Authors may also wish to develop a license using the tools available through Creative Commons <<http://www.creativecommons.org>>.

It is the recommendation of this Committee that the Copyright Policy include the following:

Authors are expected to manage their copyrights in support of the mission of the University. When entering into publishing agreement, Cornell authors should, whenever possible, reserve certain rights to the University by including the following provision: "The author retains the right to make copies of the work for internal distribution within Cornell University."

In recent years there has been a movement recognizing the broad, free dissemination of knowledge as a fundamental mission of the academy. The Committee recommends that the Copyright Policy articulate the University's support of this movement and cite relevant resources and models related to: retaining use rights for authors and their institutions, making materials available to underdeveloped nations for humanitarian purposes, and open access publishing, archiving and preservation.

Copyright Notice

The Committee requests that the Policy include guidance on the proper wording of copyright notices where the University is the owner of the copyright:
In those cases where the University is the owner of copyright, the following notice should be included:

Copyright © [year] Cornell University. All Rights Reserved.

The date in the notice should be the year in which the work is first published, i.e. distributed to the public or any sizable audience.

Within the University, the individual colleges or administrative units in which works are created have responsibility for the administration of copyrights and responding to requests for permission to use the copyrighted material for nonprofit educational purposes. It is therefore recommended that the name and address of the department to which readers can direct permission requests be included in the notice:

Requests for permission to reproduce this work should be referred to the
Department of _____ at
_____. The

Office of University Counsel and the Cornell Research Foundation are available to assist with commercial sales or licenses.

Departments may opt to register the copyright with the United States Copyright Office. Forms to do so may be obtained from the Copyright Office web site, <<http://www.copyright.gov>>. Questions concerning copyright notices and registration should be addressed to the Office of University Counsel.

Use of the Cornell Name

It is recommended that the Policy include a link to the Cornell University Policy on "Use of Cornell Name" which addresses the rules and procedures applicable to using the University's name.

Works by non-employees and independent contractors

The Committee recommends that a section be added to the Copyright Policy addressing works created by independent contractors:

Whenever possible, the University should acquire copyright ownership, as well as ownership of the physical work, with respect to works created for the University by independent contractors such as consultants, photographers and web page designers. A written agreement is needed to achieve this result. The Office of University Counsel is available to assist in the preparation of such agreements.

Copyright Infringement

The Committee recommends that a statement regarding infringement be added to the Policy. For example:

Respect for intellectual property is essential in an academic community. The University supports full utilization of the rights of fair use and the rights granted to educational institutions and libraries under copyright law. Where uses of copyright material will exceed those permitted by fair use and other statutory exceptions, permission to use the copyrighted material should be obtained from the copyright owner. Information on copyright and obtaining permissions can be found at <http://www.copyright.cornell.edu>. Copyright infringement is a violation under the Campus Code of Conduct, the Code of Academic Integrity and the Policy on Responsible Use of Electronic Communications.

To facilitate its deliberations, the Committee seeks comments and suggestions from the faculty regarding issues and concerns. Please direct your remarks to:

Professor John E. Hopcroft, Chair
Committee on Intellectual Property
5144 Upson Hall
jeh17@cornell.edu