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## CALIFORNIA STATE UNIVERSITY, LONG BEACH

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### OFFICE OF THE PROVOST DIVISION OF ACADEMIC AFFAIRS

March 18, 2015

Colleagues,

Intellectual Property (IP) is one of the most complex issues to come before the Academic Senate. It is very understandable that there are diverse views and differing understandings. My own understanding of IP issues has deepened as a result of listening to our dialog. My answers below are not a defense of the policy as written. You will find in my comments below ideas not yet incorporated into the draft policy.

Two years ago, the Chancellor's Office told me that they would not seek to clarify IP policy, but expected campuses to do so on their own initiative. Knowing the importance of IP to our digital future, I asked the Task Force on Technology to include consideration of IP in their deliberations.

However, recently I had a conversation with the Chancellor's Office new General Counsel, Fram Virgee. I was very impressed with his grasp of IP issues. He let me know that he is planning to focus his attention on developing a framework for IP policy. I am eager to take advantage of his expertise, and the expertise of two of Mr. Virgee's colleagues, who are IP specialists as we craft a policy for the campus. This will take time. For this reason, I am now supportive of taking our time to complete this work. It may be wise for the Senate to table the policy for the time being.

Nevertheless, because the issues are so complex and timely, and because I believe the dialog to be educational for all participants, I am pleased to provide responses to questions regarding Intellectual Property. I believe that you will see that I have invested considerable effort in providing these responses. These responses reflect my current point of view but I am not a lawyer or IP specialist. Since the issues are so complex, I am adding a summary at the beginning before responding to the specific questions. Thank you for your engagement in this complex issue.

#### **Summary**

Our need for an IP policy is not about today, but about the future. The campus currently spends millions of dollars each year on digital technology, mostly on digital staff and infrastructure and some on faculty stipends and time. However, the amount we are spending today pales in comparison to what we are likely to spend in the future. I expect digital technology to play an increasing role in all

our modes of instruction. In the future, digital learning products will more often be developed by collaborations of a group of faculty, instructional designers and support staff. Multiple authors who depended heavily upon state-funded staff and infrastructure complicate the IP issues greatly.

Academic publishers see this coming future and are eager to take financial advantage. The products they will offer will have high production values but will be costly for our students, aimed at national markets instead of tailored to our needs, and the publishers will hold all IP rights to their products.

We may have an alternative: to invest strategically in locally created products for digital teaching and learning. We could create products tailored to our needs and our faculty interests at lower cost to students. This would require a University large financial investment in faculty, support staff and infrastructure. An useful and important goal is to craft an IP policy that creates an environment in which the University will have a strong incentive to invest heavily in faculty – including teams of faculty and instructional designers – so they can develop digital products, and to invest in the digital infrastructure and staff support, without fear of being tangled up in IP conflicts that could jeopardize the curriculum.

University leaders, such as the provost, have a fiduciary responsibility to protect the financial investments of the institution and would have to be wary of making large investments in faculty, staff and infrastructure to develop digital curriculum if IP rights do not clearly provide for the University to use and reuse content developed at significant expense.

One model can be found at the University of California. For course materials created without “extraordinary support” (“exceptional University resources” is the UC term), IP ownership and all rights are reserved for the faculty creator. However, when “exceptional university resources” are necessary to create course materials, a contract between the faculty member and the funding entity is required that provides the UC with a “free-of-cost, nonexclusive” license to use and reproduce the copyrighted work for educational purposes.

I support the idea that a nonexclusive license is exercised at the department level (and not by Academic Affairs or by CCPE, for example). I support the idea that the nonexclusive license is limited by a “right of first refusal,” meaning that if the department needs to offer a section of a digitally created course and an author is available to teach the course, that author has first right to teach or refuse.

An important and desirable policy goal for us is to craft an IP policy that creates an environment in which the University will have a strong incentive to invest heavily in faculty – including teams of faculty and instructional designers – to develop digital products, and to invest in the digital infrastructure and staff support, without fear of being tangled up in IP conflicts that could jeopardize the curriculum. If we are successful in creating such a policy, we can, I think, provide for faculty IP ownership including opportunities to develop and commercialize works, while incentivizing the University to invest in faculty and protecting the University investment in curriculum.

#### **1. What are the Administration’s/University’s vision and perspectives on Intellectual Property? (Overall/Big Picture)**

Our need for an IP policy is not about today, but about the future. We are functioning perfectly well in the present, but the future is likely to bring challenges.

The campus now spends millions of dollars each year on digital technology including our learning management system, PeopleSoft, digital infrastructure, and more. Staffing technology is a major cost driver. However, the amount we are spending today pales in comparison to what we are likely to spend in the future. I expect digital technology to play an increasing role in all our modes of instruction: including traditional lectures, flipped and hybrid, and fully online.

In the past, “cost of instruction” primarily meant faculty costs. However now, costs of creating, maintaining, and staffing a digital infrastructure are a much larger portion of the cost of instruction.

The ubiquity of media has meant that students are exposed to slick, high-production-value digital products constantly. To remain relevant, universities are increasing production values of instructional digital products with graphics, embedded videos, animations and the like.

As production values rise, digital products are becoming more often collaborations among a group of faculty, instructional designers and support staff; I expect this trend to continue and amplify leading to high quality but also high cost digital products that become central to our curricula. This is the important future trend for which we need to prepare.

Academic publishers are eager to take financial advantage. Companies like Pearson are hiring teams of faculty to develop, in concert with their in-house instructional designers and programmers, slick, high-production-value digital products; faculty who participate in this “work for hire” model sign over all IP ownership and use rights and the company sells the product at a very high price to students. However, because of the economics of publishing, commercial academic publishers are primarily interested in the high enrollment courses for which they can sell products to a national market.

### *Choices*

In this developing context, we could limit our investment in developing our own digital learning products and rely on companies like Pearson. We would not have to wrestle with difficult IP issues. However, disadvantages include

- (a) Our students will face a high price,
- (b) We will be dependent on national markets and publisher interests to acquire products that we need, and
- (c) Products won’t be especially tailored to our needs or faculty interests.

An alternative is to invest strategically in locally created products for digital teaching and learning. The advantages of this approach are that

- (a) Products will be tailored to needs of our students and the interests of our faculty,
- (b) Student costs will be low, and
- (c) Digital products can showcase our faculty strengths.

Disadvantages are that

- (a) Products will be increasingly expensive to create, and
- (b) IP rights could be a tangled mess because products will be the creation of teams of faculty and instructional designers supported by tech staff and a digital infrastructure.

An important and desirable policy goal for us is to craft an IP policy that creates an environment in which the University will have a strong incentive to invest heavily in faculty – including teams of

faculty and instructional designers – to develop digital products, and to invest in the digital infrastructure and staff support, without fear of being tangled up in IP conflicts that could jeopardize the curriculum.

**2. What constitutes the "University" in the policy? Specifically, will this policy govern the College of Continuing and Professional Education (CCPE) or is CCPE strictly a "work for hire" operation? What about the Foundations? Need clarity on what is covered under the University, as well as its applicability to regular and special sessions.**

This is two separate questions, one about the scope of the policy and another about what constitutes "work for hire."

Scope: CCPE is a unit of Academic Affairs and CCPE is included in all academic policies pertaining to Academic Affairs, unless specifically excluded by a policy. The Foundations are auxiliaries of the University and do not offer academic programs. Sponsor funded IP, such as federal grants, is often governed by sponsor agreements but that can vary depending upon specifics of the funding award.

Work for hire: As I understand it, "work for hire" is a term of art in IP law (I am not a lawyer). I believe that courts have held that absent a specific agreement, work done for hire, that is, all IP work done for additional compensation, belongs to the employer, not the employee. A work for hire situation could apply to CCPE work or to stateside work. See also my ideas below about limited use rights.

**3. What is the administration's view regarding "ownership" versus "use rights?" What types of Intellectual Property would fall under each of the two categories? How might the University want to use IP, and would the University support a policy that limits types of IP used, types of use, and circumstances of use?**

First, note that in the traditional world of academic publishing, a faculty member who writes a scholarly book and publishes it with a traditional publisher, almost always signs over both IP ownership and use rights to that book in return for a royalty that is a small fraction of the sale price of the book. A faculty member who publishes a scholarly article with a traditional publisher, almost always signs over both IP ownership and use rights to the article in return for no royalty at all.

Until recently, patents, not teaching materials, were at the center of IP discussions. As with many R1 institutions, faculty at UC campuses at the time of hiring must sign an acknowledgement that the University will own all patents created by the faculty member.<sup>1</sup> It is only with the advent of expensive digital products with the potential to become central to curricula and reused semester after semester that questions of digital materials ownership and use rights become important.

My understanding of the distinction between "ownership" and "limited use" is as follows: The owner(s) enjoys the sole right to sell or publish commercially or externally, and of course, enjoys full rights of use.

"Limited use" could mean many things (hence the confusion). The often-cited policy of Purdue University describes this idea as follows:

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<sup>1</sup> This acknowledgement is attached to the loyalty oath. <http://ucnet.universityofcalifornia.edu/forms/pdf/upay-585.pdf>, accessed 16 March 2015

*Each Instructional or Scholarly Copyrightable Work shall, by operation of this policy, be subject to a perpetual nonexclusive, royalty-free license from the author to the University to use, duplicate, and internally distribute the Instructional or Scholarly Copyrightable Work for any pedagogical, research, or educational purpose of the University, subject to attribution of original authorship and to internal academic procedures and requirements of the department and school of origin of the Instructional or Scholarly Copyrightable Work.*<sup>2</sup>

I hope that we define “limited use” as follows: Academic departments of the University have a free-of-cost, nonexclusive, license to use and reproduce the work only for purposes of meeting the instructional needs of our matriculated students.

I support the idea that this limited use is exercised at the department level, not at the Division or University levels, because it is only at the department level where we must ensure the integrity of curriculum. I support the idea that limited use is further constrained by a “right of first refusal,” meaning that if the department needs to offer a section of a digitally created course and an author is available to teach the course, that author has first right to teach or refuse before the department permits another faculty member to use the materials. For lecturer-creators, this right would be complicated by order of work provisions because the Collective Bargaining Agreement would trump any policy, but often a lecturer-creator is likely to also have order of work priority.

**4. What constitutes “extraordinary” support? How does it differ from “ordinary” support for faculty development? If faculty embrace technology for improved instruction and student success, would that be considered “extraordinary” support?**

As I understand it, “extraordinary support” (the UC term<sup>3</sup> is “exceptional University resources”) is a term of art in IP law (I am not a lawyer). I believe that it can refer to the additional compensation provided in a work for hire situation and I believe that it can refer to resources such as staff and technology needed to complete a project. UC policy requires a specific contract when exceptional University resources are necessary to create course materials; contracts provide the UC either with ownership or with a “free-of-cost, nonexclusive, world-wide license to use and reproduce the copyrighted work for education and research purposes.”<sup>4</sup> I am inclined to believe that it makes sense for our IP policy to follow a similar approach with a specific agreement whenever exceptional University resources are necessary.

**5. Specifically, what are the administration's views regarding "continuity of instruction" and "return on investment?" Specifically, under what conditions would return on investment be appropriate and reasonable?**

A chief responsibility of University leaders is to protect the quality and integrity of instruction. In a world increasingly reliant on expensively produced digital products, the nature of this responsibility is changing. If the University creates an IP policy that makes it clear that instruction using digital

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<sup>2</sup> <http://www.purdue.edu/policies/academic-research-affairs/ia1.html>

<sup>3</sup> <http://copyright.universityofcalifornia.edu/resources/ownership-course-materials.html>

<sup>4</sup> “When the University commissions for the production of a work, title normally shall reside with the University. In all cases, copyright ownership shall be specified in a written agreement. Any such agreement which provides for ownership by other than the University, generally shall also provide the University with a free-of-cost, nonexclusive, world-wide license to use and reproduce the copyrighted work for education and research purposes.”

<http://copyright.universityofcalifornia.edu/resources/copyright-ownership.html>, accessed 16 March 2015

products can continue uninterrupted despite faculty turnover, then the University will have a strong incentive to invest heavily in faculty without reservation, and to invest in the digital infrastructure and staff support. If the University does not create an IP policy that makes it clear that instruction using expensively created digital products can continue uninterrupted, then administrators must be mindful that an expensively created product could become unavailable when a faculty member retires, resigns, goes on sabbatical, or becomes otherwise unavailable. Because administrators have a fiduciary responsibility to protect University resources, investments in faculty for digital products would have to be limited and cautious.

I am inclined to believe that it makes sense for our IP policy to follow the UC approach with a specific agreement whenever exceptional University resources are necessary.

I am not fully certain of the meaning of the ROI question. I do not expect the University to make any profit on digital teaching and learning products; quite the contrary, I expect this enterprise to be very costly.

Another potential meaning of ROI might ask about the learning outcomes compared to the investment made. As I understand the state of research evidence, flipped and hybrid modes can produce superior learning for some courses. One fantastic example of this has been well documented by Professor Young of Biology recently. For online, courses, my understanding is that the evidence suggests outcomes generally neither superior nor inferior to traditional instruction for many courses, but with a significant convenience factor for many students. This view is consistent with the results of our own online conversions, which we have tracked closely.

**6. If a faculty member refuses the right to teach a course, can the University take instructional materials (such as PowerPoint slides, handouts, etc.) created by the faculty member without her/his consent or compensation and make them available to another faculty member to teach the course?**

Please see the answer to Question 3 above for my views on this and note my support for the right of first refusal.

It is difficult to foresee, in an increasingly digital future, which pieces of a course can be disaggregated and still maintain the quality and integrity of a course offering. Since the purpose of "limited use" is to maintain the integrity of curriculum, I support the limited use for those components necessary to maintain that quality and integrity.

**7. What assurances exist that CCPE will not continue to compete with academic departments?**

CCPE has no credit academic programs of its own. All credit CCPE programs are the work of faculty in our regular academic departments. It is the faculty of those regular departments who decide to develop and offer a special session credit degree with the support of CCPE. Similarly, summer offerings are decided by the academic departments, not by CCPE.

I do not support the idea that CCPE would have an independent reuse right. As noted above, I support vesting the reuse right in the academic department. I support the idea that academic departments take a lead role in planning strategically which offerings become digital (online, flipped, hybrid) and in using and reusing the content developed with University (often extraordinary) support.

**8. Should academic departments' role in IP policy be defined since curriculum ownership is that of the faculty/department?**

In the answer to Question 3, above, I have articulated the idea that the academic department is the place where the University's limited use right is exercised. It is only at this level that the right is important for ensuring the continuity of the curriculum.

**9. Would "Academic Affairs" accept an IP policy that denies the University ownership or use rights to any intellectual materials other than the Standard Course Outline (SCO) and catalog course descriptions? Exceptions: Creator of the materials has given consent; Creator and the University have entered into a contractual agreement regarding shared use and/or ownership? What about course syllabus?**

Academic Affairs is perfectly happy with a policy that gives full ownership (as defined above) to faculty so long as academic departments retain a limited use right to reuse expensively developed digital courses. An IP policy that did not provide for the limited use of academic departments in order to ensure continuity of the curriculum would have a chilling effect on the administration's willingness to invest heavily in digital products and so a provost would not be fulfilling his or her obligation to protect the integrity of the curriculum and the fiscal investments of the University if he or she agreed to a policy that did not ensure continuity of the curriculum.

**10. Please explain the difference between a professor's live lectures to his/her class and the professor's pre-recorded lectures that may be included in an online class. Who owns the intellectual property rights?**

The practical difference is that the digital lectures and other digital content may have been created with costly University investments and delivering those to students depends upon even more costly University digital infrastructure. Digital lectures created under contract with a publishing company such as Pearson would almost certainly belong to the publisher. Digital lectures created without using any University resources and entirely self-financed would (I think) belong to the creator. Digital lectures created using "ordinary" University resources are in a grey area and not being a lawyer, I cannot provide a clear opinion. Digital lectures created using "extraordinary" University resources are one of the subjects of this discussion.

**11. Please explain if the University would own the intellectual property rights to a creative activity or book created by the professor during a sabbatical or assigned time. Would a sabbatical or assigned time not be extraordinary support?**

Please see the answer to Question 4 above for my views on this. However, most sabbaticals and most assigned time are not focused on curriculum and so the University has no need for a limited use right even if the support were deemed extraordinary.

**12. The IP Policy as proposed does not seem to recognize faculty group interests (as organized in their departments). Often courses have multiple authors, e.g., SCO first writer + SCO reviser + SCO reviser for an online course, the contribution of course coordinators for multi-section courses, CSULB textbook authors whose books are used in courses taught by both the author and the other faculty, etc. Recent contracts offered by CCPE seem to assume that an online course has a single author, whereas a course might be like a film-project with multiple authors and contributors. How might the University protect these group interests?**

This is a very important and useful question and it raises a chief reason why we need a good IP policy. I fully expect that multiple authoring of courses will become far more common in the future. If even one of the multiple authors of a course becomes unavailable for any reason and there is a need to offer the course, the IP situation is dangerously unclear. This is a key reason why our IP policy needs to anticipate this future. As noted above, I am supportive of the principle that the limited use right is exercised by the academic department. With such a limited use right, the University's interest in protecting the continuity of instruction is protected.

There is however, another dimension to multiple author situations. What happens when some or all of the authors of a multiple-authored digital course product wish to monetize their work? I support the idea – and this is included in the policy as proposed – the authors retain ownership and have the right to monetize that work.

However, there may be a tangle of IP issues that could be difficult for the authors to sort. It may be desirable – but this is not a deal-breaker for me – to create a process similar to the process for assigning ownership of patents, a faculty committee that examines the circumstances of the creation of the work and recommends the proportions of ownership to assign to the respective authors.

Thank you for the opportunity to provide this context to the IP discussion.

Sincerely,



David A. Dowell, Ph.D.  
Interim Provost and Senior Vice President for Academic Affairs