



Copyright – When It's Yours

College and University employees have long had special concerns about copyright and the boundaries between their personal work and work done as part of their regular duties. For the first time, the State-Union Agreement addresses these concerns directly and provides significantly more ownership rights than existed in the past.

To the best of our knowledge, the State Colleges/Universities have not asserted any property rights to unit members' intellectual work products. But, given the lack of specific contract language in this area and the fact that more attention is being paid to these matters throughout academe, it became clear that contract language was needed.

During the negotiations for the new Agreement this past summer, the Council made an extensive Intellectual Property proposal to the State. The State and the College/University Presidents rejected it and countered with a draconian proposal that gave the institutions ownership of copyright in almost all instances. As negotiations continued, we were able to reverse the State's position and succeed in specifying more ownership rights for employees in the new contract.

Copyright Law

The Copyright Act of 1976 defined ownership of copyrightable works in a way that reinforced the right of an employer to assert ownership of the intellectual property of its employees. Section 201(b) of the Copyright Act provides that: The employer or other person for whom the work was prepared is considered the author for [copyright] purposes ... *unless the parties have expressly agreed otherwise in a written instrument signed by them.* [Italics added.]

The Act also defines a "work made for hire" as: "A work prepared by an employee within the scope of his or her employment. The general premise behind the work for hire doctrine is that an employer who provides office space, pay, benefits and often research tools is entitled to ownership rights in the works of its employees that are produced in the normal course of business. These works are often the direct result of the employer's instruction to an employee and the employee's corresponding execution of his or her duties. Generally, the courts have held that an employee's work falls within the scope of his or her employment when:

- It was the kind of work he or she is employed to perform;
- It was created substantially within authorized work hours and space;
- The purpose of the work, at least in part, was to serve the employer."

Our Agreement

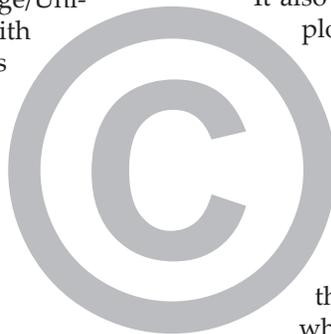
The FullTime/PartTime State-Union Agreement is the Union's "written instrument" that provides added protections for employees working under the contract. The Agreement clarifies the differences between an employee's work and a "work made for hire" that belongs to the employer.

It also recognizes the considerable opportunity that employees at colleges and universities have to produce their own work and establishes their right to own that work — except when the employer has clearly assigned or commissioned the work. Having this Agreement limits the application of the law because we have negotiated specific allowable exceptions.

Before outlining the circumstances under which there is employee ownership, it is important to note what copyright is and what can be copyrighted. Copyright protects "original works of authorship" that are fixed in a tangible form of expression. The fixation in tangible form need not be directly perceptible so long as it may be communicated with the aid of a machine or device. Copyrightable works include the following categories:

1. literary works
2. musical works, including any accompanying words
3. dramatic works, including any accompanying music
4. pantomimes and choreographic works
5. pictorial, graphic, and sculptural works
6. motion pictures and other audiovisual works
7. sound recordings
8. architectural works

These categories should be viewed broadly. For example, computer programs and most "compilations" may be registered as "literary works"; maps and architectural plans may be registered as "pictorial, graphic, and sculptural works."



Several categories of material are generally **not eligible** for federal copyright protection. These include among others:

Works that have not been fixed in a tangible form of expression (for example, choreographic works that have not been notated or recorded, or improvisational speeches or performances that have not been written or recorded)

Titles, names, short phrases, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering, or coloring; mere listings of ingredients or contents

Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices, as distinguished from a description, explanation, or illustration
Works consisting entirely of information that is common property and containing no original authorship (for example: standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources)

When Copyright is yours

The good news in all of the previously described technicalities is that the new 2003-2007 State-Union Agreement gives you ownership to your creative work. It is important that the State has agreed to acknowledge your ownership within the language of the Agreement and that the contract is no longer silent on this matter. What follows are the circumstances under which you own it—especially when you are utilizing normal academic resources commonly available to you as an employee, such as the use of your office, computer, Internet services, library facilities, and/or office equipment:

The copyrightable property is embodied in textbooks, manuscripts, scholarly works, works of art or design, musical scores and performances, dramatic works and performances, choreographic works, popular fiction and non-fiction works, poems, or other works of the kind that have historically been deemed in academic communities to be the property of their author, including lecture notes, course outlines, handouts, exercises and tests developed by employees to support their own teaching activities.

The copyrightable property is embodied in a storage medium such as films, videos, audio recordings, multimedia materials, distance learning materials, and courseware. The copyrightable property has been released by the College/University to the creator. The copyrightable property is created on sabbatical leave with no more than incidental use of College/ University facilities. Where the employee owns the copyright to the work, the employee shall retain all royalties or other benefits from any commercialization of the copyrightable property he/

she owns. However, the College/University reserves the right to use the copyrightable property royalty-free as long as it is a viable course, unless the creator has specifically demonstrated that such royalty-free use significantly impairs the creator's right to commercialize the copyrightable property he or she owns. The employee may make reasonable revisions or updates at his or her discretion upon notification to the Provost/Vice-President for Academic Affairs.

When the College/University owns the work

The copyrightable property is embodied in a work that is commissioned by the College/University pursuant to a signed contract. The copyrightable property is embodied in a work that the employee is specifically assigned to create. The College/University indicates, in writing, at the time it grants an alternate assignment within load, whether it intends to claim ownership of copyright to any work made possible by the alternate assignment.

The copyrightable property is created with **more than** incidental use of College/University facilities or financial support. "Incidental use" means normal academic use of resources commonly available to the employee such as the use of an employee's office, computer, Internet services, library facilities, and/or office equipment.

The copyrightable property that is created in the course of research supported by the College/University which is funded by the College/ University and/or a sponsor pursuant to a grant or research agreement, or which is subject to a materials transfer agreement, confidential disclosure agreement or other legal obligation affecting ownership, will be governed by the terms of such grant or agreement, as approved by the College/ University. The College/ University will ordinarily own copyright to such property.

The College/University ownership rights described above may be modified by an agreement between the creator and the College/University. Additionally, where the College/University owns the copyright to the work, it retains all royalties or other benefits from any commercialization of such work, unless there is a mutual written agreement between the creator and the College/University regarding shared ownership of copyright to such work. There is one other area of ownership that must also be noted. Copyright ownership of any type of recorded synchronous course shall be determined by mutual agreement between the creator and the College/University. The parties shall enter such agreement **prior** to the recording of the course.

Copyright Caveats

Undoubtedly, disputes over ownership will occur under the provisions of the agreement. The body of interpretative decisions under our new Agreement will grow with each dispute over the ensuing years. However, the new language defines from the outset what your ownership rights are without your having to first engage a very expensive copyright lawyer. If you are creating a copyrightable work, it is very important to clearly understand if your institution has assigned or commissioned you to do it. If it has, get it in writing and don't sign any document until you are certain that you fully understand the specific implications of the document. Contact the Council office if you have any concerns regarding this matter.

If your institution hasn't assigned or commissioned you to create a work — it's yours. However, it is still a good idea to keep a log of your use of the institution's resources when you are working on your own projects. While you may never face questioning, it is good to have records.

Even if you don't think there are future riches from potential commercialization of your creative work, and in order to maintain control over a future use, it is vitally important that you assert your claim to ownership of your intellectual property when you're sure it's yours as follows:

A notice of copyright "© 2003 Jane Doe," should be affixed to all work products. If the work is unpublished, the notice takes the form "Unpublished Work © 2003 Jane Doe"

If there is any conceivable commercial value in the work, or if there is any possibility that you will want to use the work in another context, or if you have any desire at all to maintain control in future use of the work, you should register your copyright with the Copyright Office of the Library of Congress in your name and not as a "work for hire."

You may be wondering whether patents and inventions are addressed in our Agreement since they are also creative works. Unfortunately, they are not. A different body of law deals with these areas so patents and inventions remain an issue that will have to be collectively bargained during

negotiations for the next Agreement. If you are concerned about an invention or patent, the basic principle of clarifying ownership before embarking on a project should be followed. Please remember that you can call the Council office for additional consultation. We have made considerable progress in this contract toward protecting your intellectual property, but there may be unanticipated gray areas and questions will arise. We will be vigilant in making sure that individuals are given the protections promised under the Agreement.

For more information on copyright and how to copyright your work, visit or refer to CNJSCL pamphlet titled "Protect Your Copyrights!" available from the Council of New Jersey State College Locals office.

Sources:

- David Strom, Intellectual Property, Issues for Higher Education Unions:
- A Primer, Washington, DC,
- AFT Copyright © AFT 2002.
- Council of New Jersey State College Locals Protect Your Copyrights, Union, NJ, n.d.
- U.S. Copyright Office



**CONTACT US IF YOU NEED MORE
INFORMATION OR HELP**

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