

Faculty Senate Town Hall Meeting: Intellectual Property

Barbara C. Wingo

Associate Vice President and

Deputy General Counsel

September 23, 2013

What is “intellectual property?”

- Patent
- Copyright
- Trademark
- Trade secret

Patent: What does a patent protect?

- Means of protection for a person who has invented a new and useful process, machine, manufacture or composition of matter.
- Patent holder has the right to exclude others from making, using or selling the invention.
- Person is entitled to a patent if can claim subject matter that is new or novel, unobvious and useful.

- How is a patent secured?
- How long does patent protection last?

Copyright: What does copyright protect?

- Copyright protects "original works of authorship fixed in any tangible medium of expression."
- Copyright is intended to secure to the author (or other owner of the copyright) for a limited period the exclusive right to (and to authorize others to) reproduce, distribute, sell, perform or publicly display the copyrighted work and derivatives of the work.

Copyright: What does copyright protect?

- Copyright protection is secured immediately upon creation of the work.
- Ownership of a fixed tangible form of the work vests no copyright.

- How is copyright secured?
- How long does copyright protection last?
- What are limitations on copyright?

- What is a trademark?
- What are trade secrets?

Ownership of Intellectual Property: Default Rules

- Inventions
- Works
 - Copyright immediately vests in the author upon creation of the work. But in the case of a work made for hire, the employer is presumptively the author.

Inventions: UF Intellectual Property Policy

- Invention made in the field or discipline in which a faculty or staff member is engaged by UF or made with the use of UF support is the property of UF.
- The faculty or staff member shall share in the proceeds.
- The faculty or staff member is required to promptly disclose any inventions.

Works: UF Intellectual Property Policy

- UF shall own “University-supported Works.”
- “University-supported Works” do not include scholarly articles published in journals independent of the University and theses or dissertations of graduate students.
- With regard to faculty members and other employees in the collective bargaining unit, “University-supported Works” do not include: (1) scholarly or artistic works, the intended purpose of which is to disseminate the results of academic research, scholarly study, or artistic expression; and (2) “Instructional Material,” as defined in the UFF/UFBOT CBA except if the University has either (a) expressly commissioned the faculty member in writing to produce, or participate in production of, the Work with University funds for a specific University purpose or (b) expressly assigned the faculty member in writing to produce or participate in the production of the Work.

A simplification of the University's intellectual property policies as they relate to electronic platform and online learning:

<http://teach.ufl.edu/resources/intellectual-property/>

1. The University will own the copyright in a work of authorship by faculty member or other employee that is created to be captured electronically for use in an online learning course. The creation of such materials may be part of the faculty member's assignment or may be commissioned through an overload appointment.
2. The University has the right to use such course materials in the University's online learning courses without additional compensation to the originating authors.
3. Revision of online course materials will be the responsibility of author(s) unless they are no longer University of Florida employees or are unable or unwilling to make such revisions. In such case, the material may be revised by other University of Florida faculty.
4. If such materials are licensed to a third party (not to the University or an affiliated entity), distribution of proceeds will be governed by Article 25 of the Collective Bargaining Agreement for in-unit faculty members or the University's Intellectual Property Policy for other faculty and staff members.

Supplementary Slides

- Issues in Copyright
- Developments in Patent Law
- Open Access

Issues in Copyright

- Fair Use
- TEACH Act
- Securing Permission
- Current Cases

What is “fair use” of copyrighted material?

Section 107 of Title 17, U.S.C., provides that “the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”

What factors are used in determining if a use constitutes a fair use:

- (a) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (b) the nature of the copyrighted work;
- (c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (d) the effect of the use on the potential market for or value of the copyrighted work [17 U.S.C. 107]

What is the TEACH Act?

- Subsection (1) of 17 U.S.C. §110 permits the display or performance of any work in face-to-face teaching at a nonprofit institution. However, subsection (2) authorized transmissions only of nondramatic, nonaudiovisual literacy works prior to the enactment of the TEACH Act in 2002.
- The TEACH Act authorizes transmissions of a nondramatic literacy or musical work, “or reasonable and limited portion of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session” if certain criteria are met:

- Such performance or display is at the direction of the instructor “as an integral part of a class session offered as a regular part of the systematic mediated instructional activities” of an accredited nonprofit educational institution.
- The performance or display is “directly related and of material assistance to the teaching content of the transmission.”

- The transmission is made solely for, and “to the extent technologically feasible, the reception of the transmission is limited” to students enrolled in the course.
- The institution has policies regarding copyright and provides informational materials to faculty, students, and staff members on copyright compliance. The institution must also provide notice to the students that the course materials are subject to copyright protection.
- The institution must apply technological measures that reasonably prevent the retention of the material by the students longer than the class session and prevent unauthorized further dissemination of the materials.

Securing Permission to Use a Copyrighted Work

- Seek permission directly from the owner or from a collective rights organization.
- Permission should be given in writing and be clear on the nature of the use permitted.
- Person or entity granting permission should certify that is owner of the copyright or otherwise has authority to grant permission.

Developments in Copyright Law

- Registrar's Call for Updates to U.S. Copyright Law
 - Asks for comprehensive approach
 - “Bold adjustments to general framework”
 - Rethinking the long copyright term; requiring registration
 - “Opting out” of preventing certain uses by educational institutions or libraries
- Comments on orphan works and mass digitization
- Copyright Principles Project (CPP): Directions for Reform

- Cambridge University Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga., 2012).
 - Non-profit educational use of small portions of academic books in the e-reserves context represents a fair use of the copyrighted materials.
- Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445 (S.D. N.Y. 2012).
 - Digitization of books and the restrictions on the use of copyrighted works represent a fair use.
- Both decisions are being appealed.

Developments in Patent Law

- American Invents Act (AIA)
 - Change to a first-to-file system.
 - Greater concerns about one-year scientific publications grace period.
- Stanford v. Roche
 - Bayh-Dole Act does not vest title automatically to recipients of federal funds.
 - Beware of dueling assignments.

Bowman v. Monsanto

- Self-replicating technologies
- Patent exhaustion doctrine does not allow a farmer to “reproduce” or “make copies” of patented seeds for his own use or sale to others without permission

Association of Molecular Pathology v. Myriad Genetics

- Are human genes patentable or are they simply non-patentable products of nature?
- The isolated BRCA genes were not patentable.
- The synthetic cDNA that mirrors the coding sections of the BRCA genes is patentable.
- As in other areas of intellectual property law, colleges and universities were on both sides of the debate.

Open Access

Open Access Policies in general

- Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities
- OER Policy Registry
- ROARMAP

NIH Public Access Policy

- Applies to manuscripts that are peer-reviewed, arise from NIH funding in FY2008 or later, and are written in the Latin alphabet.
- Authors responsible for compliance, including insuring that any publication or copyright transfer agreements allow submission to PubMed Central.
- Electronic version of manuscript must be submitted to PubMed Central upon acceptance for publication, to be made publicly available no later than 12 months after the official date of publication.
- PM CIDS must be included in citations that are reported to NIH in grant reports via eRA Commons.

White House Office of Science and Technology Policy (OSTP) Public Access Policy

- Agencies must submit draft plans to OSTP by August 22, 2013
- OSTP and OMB will review draft plans

OSTP Access Memorandum:

- Goal of making easily publicly available the “direct results of federally funded scientific research”
- Public access in order to accelerate commercialization of innovation
- Digital format “for search, retriev(al), and analy[sis],” generally 12-months post publication

OSTP Access Memorandum:

- Direct research results do not include laboratory notebooks, drafts, plans for future research, peer review reports, preliminary analyses communications with colleagues and specimens.
- Proprietary and business confidential information, personal privacy information and intellectual property rights must be protected.
- Data management plans required of institutions doing federally-funded research.
- Appropriate costs for data management and access allowed in proposals.