
INTELLECTUAL PROPERTY

I. COPYRIGHT OWNERSHIP AND EQUITY

PURPOSE

The purpose of this section of the Boise State University Intellectual Property Policy is to provide guidelines for establishing the ownership of copyrightable works and for equity in the distribution of income received from the sale of those works.

Copyright as defined in 17 U.S.C. §102 is:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- literary works;
- musical works, including any accompanying words;
- dramatic works, including any accompanying music;
- pantomimes and choreographic works;
- pictorial, graphic, and sculptural works;
- maskworks (e.g. photolithography);
- motion pictures and other audiovisual works;
- sound recordings; and
- under 17 U.S.C. § 117, computer programs.

GUIDELINES FOR DETERMINING OWNERSHIP AND EQUITY:

- A. Except as outlined below, Boise State University faculty, staff, and students shall retain all rights to copyrighted and published works produced by them. Copyrightable material in the form of books, articles, **course materials**, musical or dramatic compositions, video tapes, computer software, architectural designs, paintings, sculptures, **traditional academic works** developed by employees without University support other than the use of the staff member's own office and University facilities which are considered part of the normal academic environment and **which typically would not involve an additional cost to the University** shall be the property of the author.
- B. Copyright on materials developed by employees either in conjunction with or aside from their University employment with assistance from University funds, or assistance from University staff, equipment, or facilities that involves additional cost to the university, shall be the property of the creator but licensed to the University.

The minimum terms of such license shall grant the University the right to use the original work in its internally administered programs of teaching, research and public service on a perpetual, royalty-free, non-exclusive basis. The University shall be entitled to a share in any royalties from the work, as set forth below. The products in this category shall be considered "University-supported."

- C. When University employees are employed or directed within the scope of their employment to produce a specific work subject to copyright, or such work is produced pursuant to a specific contract, Boise State University shall have the option to copyright the work in the name of the individual. These works are considered "University directed or commissioned."
- D. If the development of copyrighted materials is supported by a sponsor, the University and the author must adhere to the terms and conditions of the grant or contract. In the absence of such terms, the copyright shall become the property of the University or the individual, in accordance with the guideline set forth in paragraphs A-C above.
- E. In the event of a dispute over the assignment of a particular work to one of the aforementioned categories, adjudication will be by a standing Copyright Committee. The Committee shall be composed of two (2) people appointed by the Faculty Senate and three (3) people appointed by the Vice President for Research.
- F. In all cases in which a person or organization, other than a University employee, prepares copyrightable material with the support of University resources or facilities, exclusive of libraries, an agreement between Boise State University (through the Vice President for Research) and such person shall be executed in advance setting forth understandings regarding the use of facilities, copyright and ownership rights, and financial arrangements.
- G. A copyright notice should appear in all publicly distributed copies from which the work can be visually perceived. The notice appearing on the copies should consist of the following three elements:
 - 1. the copyright symbol (©), or the word "Copyright", or the abbreviation "Copr." and
 - 2. the year of first publication of the work, and
 - 3. the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner. The notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright.

For a complete description of the requirements of the law, see chapter 4 of title 17.

- H. The formula for distribution of royalties shall be:
 - 1. Individual effort (traditional academic works), no University support: 100 percent of royalties to the individual(s); individual(s) also own copyright.
 - 2. University-supported: 60 percent of royalties to individual(s), 40 percent of royalties to University; individual(s) own copyright or may offer joint ownership.
 - 3. University directed or commissioned: 100 percent of royalties to the University or as specified in the contract.

In all of the above cases, it is understood that use of the faculty member's or staff member's telephone, computer, office, library or any other resources without additional charge are considered normal use and will not be considered when determining level of University support.

The University will divide its share of the royalties according to the recommendation of the University copyright committee.

It is the faculty member's responsibility to notify the Vice President for Research that s/he has copyrightable material or intends to develop copyrightable material. Within sixty (60) days of notification, an agreement between the faculty member and the University will be executed. The agreement should include but not be limited to the following:

- a) the distribution of royalties as defined in 1-3 above;
- b) who pays fee(s) for obtaining copyright (generally whomever stands to gain the most);
- c) whether or not the University intends to claim copyright as in B and C above;
- d) delineate the responsibilities of the author and producer;
- e) provide for subsequent editions, loss of the original material, cessation of production, and protection of the author's estate.

DEFINITION OF TERMS:

- A. **Originating department, laboratory, or center:** The department, laboratory, or center which administers the funds, space, or facilities used in developing the copyrightable material.

II. FAIR USE

PURPOSE

The purpose of this section of the Boise State University Intellectual Property Policy is to provide guidelines as to what constitutes fair use of copyrighted works.

INTRODUCTION

Copyright is a constitutionally conceived property right which is designed to promote the progress of science and the useful arts by securing for an author the benefits of his or her original work of authorship for a limited time. The Copyright statute implements this policy by balancing the author's interest against the public interest in the dissemination of information affecting areas of universal concern, such as art, science, history, and business. On January, 1, 1978, the Copyright Revision Law (Public Law 94-553, October, 19, 1976) became effective as Title 17 of the United States Code. This Act defines the rights of a copyright holder and how they may be enforced against infringement. Included within the Copyright Act is the "fair use" doctrine which allows, under certain conditions, the copying of copyrighted material. While the Act lists general factors under the heading of "fair use" it provides little in the way of specific directions for what constitutes fair use. The law states: 17 U.S.C. §107. Limitations on exclusive rights: Fair Use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or digital media or by any other means specified by that section, for purposes such as criticism, comment, new reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- and the effect of the use upon the potential market for or value of the copyrighted work.

NOTE: The copyright law applies to all forms of photocopying, whether it is undertaken at a commercial copying center, at the quick copy center, departmental copying facilities, or at a self-service machine. While faculty are free to use the services of a commercial establishment, be prepared to provide documentation of permission from the publisher (if such permission is necessary under this policy), since many commercial copy centers will require such proof.

GUIDELINES FOR DETERMINING FAIR USE OF COPYRIGHTED WORKS

The Copyright Act allows anyone to photocopy copyrighted works without securing permission from the copyright owner when the photocopying amounts to a "fair use" of the material. The guidelines of this report outline the boundaries for fair use of photocopied material used in research or the classroom or in a library reserve operation. Fair use cannot always be expressed in numbers -- either the number of pages copied or the number of copies distributed. Therefore, faculty should weigh the various factors listed in the Act and judge whether the intended use of photocopied, copyrighted material is within the spirit of the fair use doctrine. Any serious questions concerning whether a particular photocopying constitutes fair use should be directed to University counsel.

A. Research Uses

At the very least, an instructor may make a single copy of any of the following for scholarly research, use in teaching or preparing to teach a class:

- a chapter from a book;
- an article from a periodical or newspaper;
- a short story, short essay, or short poem, whether or not from a collective work;
- a chart, diagram, graph, drawing, cartoon or picture from a book, periodical, or newspaper.

These examples reflect the most conservative guidelines for fair use. They do not represent absolute ceilings for the amount of copyrighted material which can be photocopied within the boundaries of fair use.

In general terms, reproduction of an entire work should be avoided because of its detrimental impact upon the market for that work. And, unlimited or excessive photocopying in disregard of the rights of copyright owners must be avoided.

B. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for an instructor for classroom use or discussion, provided that:

- The copying meets the tests of brevity, spontaneity, and cumulative effects as defined below.
- Each copy includes a notice of copyright.

Brevity is defined as "including less than ten percent" of a published work -- e.g., of a textbook, a monograph, a novel, or a collection of poems. The copying of a single complete unit within a published work is allowed even if it exceeds ten percent of the total work -- e.g., a chapter of a textbook, monograph, or novel; a poem from a collection; or an article from a journal.

The test of **spontaneity** is met if the copying is at the instance and inspiration of the individual teacher, and the inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in the time that it would be unreasonable to expect a timely reply to a request for permission to make multiple copies. Since repeated copying of an excerpt may have a **cumulative effect** on the market for a work, copying without permission of the copyright holder shall not be repeated with respect to the same item by the same teacher from term to term.

Creation of a collective work or anthology by photocopying a number of copyrighted articles and excerpts to be purchased and used together as the basic text for a course will in most instances require the permission of the copyright owners. In the courts, such photocopying is more likely to be considered as a substitute for purchase of a book and thus, less likely to be deemed fair use.

There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets, answer sheets, and like consumable material.

Copying shall not be directed by higher authority.

C. Copying for Music Education Purposes:

1. Emergency copying to replace purchased copies which for any reason are not available for an imminent performance, provided purchased replacement copies shall be substituted in due course, is permissible.
2. For teaching purposes, multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a performable unit, and that the excerpts do in no case constitute more than ten percent of the whole work. The number of copies, as with prose works, shall not exceed one copy per pupil.

3. Printed copies of a work which has been purchased may be edited or simplified, provided the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if none exist.
4. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes, and may be retained by the educational institution or individual teacher.
5. A single copy of a sound recording to be made from recordings owned by the educational institution or individual teacher for purpose of constructing aural exercises or examinations may be retained by the educational institution or individual teacher.

D. Copying for Library or Archive Purposes:

1. A single copy of an unpublished work may be made for purposes of preservation and security or for deposit for research use in another library or archives if the copy is currently in the collection of the library or archives.
2. A single copy may be made of a published work for the sole purpose of replacement of a damaged, deteriorating, lost or stolen copy if an unused replacement cannot reasonably be obtained at a fair price.
3. A single copy may be made from a library collection or archives of no more than one article or other contribution to such collection or periodical issue if:
 - a) the copy becomes the property of the user and the library or archives has no notices that the use would be for other than private study or research; and
 - b) the library or archives prominently displays a warning of copyright protection at the place where copying orders are accepted.
4. The library or archives will not engage in concerted reproduction or distribution of multiple copies of the same material nor in the systematic reproduction or distribution of single or multiple copies except for appropriate inter-library loan arrangements.

E. Copying from Audio-Visual Works:

Section 108 gives libraries the right to reproduce and distribute "a limited number" of copies of, and excerpts from, an audio-visual news program. This permission, however, is only for regular news broadcasts of major events and does not extend to commentary of editorial remarks concerning the news events.

Since there is no definitive prior law or clarifying guidelines covering audio-visual works, the general policy will be to seek permission to the extent possible before copying from audio-visual works.

F. Copying from Computer Programs:

The Copyright Act of 1976 did not specifically address computer programs. The Act was amended with the "Computer Software Copyright Act of 1980" as section 117. This Act recognized that computer programs, once they are fixed in a tangible medium, are protected by copyright as one of many kinds of literary works.

The law is: Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of the computer program provided:

1. that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or
2. that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner. (17 U.S.C. §117)

In the absence of definitive guidelines for the copying of computer software, the general guidelines for fair use should apply. A reasonable number of backup copies may be made but one should not engage in copying that would infringe on the copyright holder's ability to make a profit.

The printed documentation accompanying the diskette or tape is protected like all other copyrighted material. It may be photocopied for personal use, but making copies for classroom distribution without permission or purchase is an infringement.

III. PATENT OWNERSHIP AND EQUITY

PURPOSE

The objective of this section of the Boise State University Intellectual Property Policy is to provide guidelines for establishing the ownership of patentable works and for equity in the distribution of income received from the sale or licensing of those works.

All employees of the University are governed by this policy, as well as all individuals who use University facilities, equipment, or materials in the process of conceiving an idea, invention, or discovery.

GUIDELINES FOR DETERMINING OWNERSHIP AND EQUITY:

When an employee believes that s/he has a discovery or invention that is worth patenting, a disclosure statement (see Appendix A) must be submitted to the Vice President for Research. An individual must submit a disclosure statement if more than incidental (See Definition of Terms) use of University facilities has occurred. Within one month of the receipt of a disclosure statement, the University Patent Committee will review the disclosure. The inventor(s) should be involved in the review. The Committee, under the direction of the Vice President for Research or designee, is composed of seven (7) members: three (3) appointed by the Provost and Vice President for Academic Affairs, two (2) appointed by the Chairperson of the Boise State University Faculty Senate, the University General Counsel, and the Vice President for Research. The purpose of the Committee is to determine the extent of the University's ownership and equity in the invention, technical merit, state of development, patentability and commercial potential, as well as providing recommendations on whether or not and how the University should pursue patenting and/or licensing.

When appropriate, a committee will be established, per aforementioned guidelines, to resolve disputes that may arise concerning ownership and equity of discoveries or inventions. The committee will review all relevant material submitted to it prior to making its recommendation to the Provost and Vice President for Academic Affairs. The committee's recommendation is to be made within sixty (60) days after receiving the matter for consideration. The Provost and Vice President for Academic Affairs' decision to be made within thirty (30) days after receiving the committee's recommendation. This decision to be transmitted in writing to the inventor and appropriate departmental administrator and dean.

The University may claim financial interest in a potentially patentable item if the University assignment of the innovator is to invent or create, or the innovator made use of University funds and/or facilities (in excess of "incidental facilities") as described above, or the University contributed substantial funding in some other manner. The Provost and Vice President for Academic Affairs will notify the innovator within sixty days after disclosure of a discovery or invention of intention of the University to file a patent application or otherwise retain title to a discovery or invention. If the University decides to pursue a patent, the Provost and Vice President for Academic Affairs in consultation with the inventor will determine which of the following courses of action to take:

- retain title and develop and market the discovery or invention;
- when required by contract, retain the title and dedicate the discovery or invention to public use;
- assign title to a commercial developer and/or marketer; or
- pursue alternative actions, such as obtaining a patent with costs borne by potential licenses.

Should the University decide not to claim rights to a discovery or invention, all such rights will revert exclusively to the innovator and the University will not make any further claim to the patent. Notice of relinquishment should be sent with the committee's decision to the inventor by certified mail. The University, at its discretion and subject only to the restrictions of a sponsoring agency or a licensing agreement, may release a previously obtained patent to the innovator for promotion and development. In so doing, the University may require that it recover any costs incurred in obtaining the patent or in subsequent promotion.

DEVELOPMENT, PROMOTION, AND LICENSING:

In administering the patent portfolio of the University, the Provost and Vice President for Academic Affairs, or his or her designee, shall act to bring to the public the inventions and discoveries in which the university has proprietary rights. In doing this, s/he shall use whatever means seem best for appropriate development, promotion, and licensing of each invention consistent with the expressed goals of this Patent Policy and other pertinent Boise State University and State Board of Education policies/rules.

The University is free to enter into agreements with any outside agent which it feels will successfully aid the University in developing inventions or discoveries, in obtaining patents or in promoting or manufacturing inventions, provided that such agreements are consistent with this Patent Policy. If a particular invention or discovery is to become subject to such an

agreement, this shall be made known to the inventor, who will also be notified about any rules governing the relationship among the outside agent, the University, and the inventor due to such agreement.

The University is free to enter into any licensing agreements which it deems are beneficial to the University, the inventor and the public in general, provided such agreements are not prohibited by a sponsoring agency's rules and regulations. Any terms governing the relationship among the licensee, the University or the inventor due to such licensing agreements shall be disclosed to the inventor.

FORMULA FOR DISTRIBUTION OF PATENT ROYALTIES:

Revenue generated by a patent will be divided as follows:

Before **direct costs** are recovered: the **gross revenue** will be divided 80% to the University and 20% to the innovator until the University's direct costs related to acquisitions and development of the patent are recovered. From this, the University will pay the innovator's authorized expenses related to patent development.

After **direct costs** are recovered: the **gross revenue** will be divided 50% to the University and 50% to the innovator. However, the committee may alter this split if there are unusual circumstances. It is recommended that the University return a percentage of its share to the department in which the innovator works (as seed or incentive money to support innovation). When the University assumes developmental rights to a patent, it also assumes responsibility for current and future litigation. All litigation costs may be considered direct costs and are covered under the distribution formula.

An annual accounting of the royalties and other considerations received as of December 31, shall be made by the University and reported to the innovator in March of the following year at which time the innovator's share of royalties or other consideration shall also be payable.

TRADEMARKS:

The use of trademark(s) to identify a product shall be negotiated by the innovator and the University. In the event arbitration is necessary, a seven (7) member committee constituted as described above will be convened to settle the dispute.

DEFINITION OF TERMS:

DIRECT COSTS: Direct costs are patent filing fees, fees for patent searches and legal advice, fees arising out of litigation, or marketing costs. Indirect University overhead and other University costs normally associated with the operation of the University are not deducted from gross royalties or otherwise allocated to costs or fees associated with the invention.

GROSS REVENUE: Total amount of money received.

PATENT: A patent protects the idea embodied in the invention, as well as the particular expression of that idea. A valid patent is a legally granted monopoly on a particular invention, machine, or process. When issued, it gives the holder exclusive right to make, use,

and sell the substance of the invention for up to twenty (20) years, depending on the invention.

To obtain a patent, a patent attorney is generally required. A patent search includes a search of prior art in the field, and requires a detailed description of what the invention is and how it accomplishes its purpose and functions. To be patentable, the invention or process must be new and useful, and must be a creation that goes beyond the prior art in the field. One must fully describe in precise detail the invention, how it is made, what it does, and how to use it, including the description of the prior art. **TRADEMARK:** A trademark can be any sign, symbol, word, other mark or device, which is attached to goods offered for sale in the marketplace in order to identify that merchandise with a particular manufacturer or seller. Its function is solely to indicate ownership or origin. It affords the owner of the trademark protection against the sale by others of similar or the same product. A trademark is only valid if it is being used and must be in actual use before the owner can prohibit others from using it. Without sales of items with the trademark affixed, there is no protection. Also, the mark should be distinctive so that it may be used to distinguish one set of goods from another of the same type in the marketplace.

Trademarks are protected by the common law. Registration with the government does grant some important advantages. Registering sets a time when the mark was first used and protects the owner against subsequent claims. It also makes foreign registry easier.

- **INCIDENTAL:** Casual not of prime concern, not particularized.
- **INVENTOR:** To mean faculty or other employees of the University or University-affiliated personnel including students who use University facilities not regularly available to the public who are responsible for developing and producing an invention or non-patentable discovery.
- **NON-PATENTABLE DISCOVERY:** To mean anything that may be produced or discovered that may have commercial value, but is not patentable.
- **INVENTION:** To mean anything that may be subject to patent, i.e., utility patents (machines, compositions of matter, manufactures and processes); plant patents; and design patents.

IV. CONFLICT OF INTEREST

PURPOSE

The purpose of this section of the Boise State University Intellectual Property Policy is to incorporate State Board of Education (SBOE) Rule - IDAPA 8.00 I 2,4 - Conflict-of-Interest Rule as it relates to Intellectual Property activities.

- A. All decisions of employees of Boise State University concerning transfer of intellectual property are to be made solely on the basis of promoting the best interest of Idaho's postsecondary education and the public good.
- B. In the event that an employee of Boise State University shall be called upon to consider a transaction involving an organization with which an employee of Boise State University is "affiliated," such employee, as soon as he or she has knowledge of the transaction, shall:

1. disclose fully the precise nature of his or her interest of involvement in such transaction and/or such organization; and
 2. refrain from participation in the institution's consideration of the proposed transaction.
- C. The employees shall also disclose to the institution on a continuing basis all their relationships and business affiliations that reasonably could give rise to a conflict of interest because of their respective duties and responsibilities.
- D. For the purpose of this conflict-of-interest rule, an employee is "affiliated" with an organization if he or she or a member of his or her immediate family (i.e. his or her spouse, and their parents, children, brothers and sisters):
1. Is an officer, director, trustee, partner, employee or agent of such organization;
 2. Is either the actual or beneficial owner of more than 50% or \$5,000 of the voting stock or controls interest of such organization (see BSU Conflict of Interest Policy 5040A); or
 3. Has any other direct or indirect dealings with such organization from which s/he knowingly is materially benefited. It shall be presumed that a person is "materially benefited" if s/he receives directly or indirectly cash or other property (exclusive of dividend and interest) in excess of \$100 in any year in the aggregate.
- E. All disclosures required to be made hereunder must be directed in writing to the president of the institution or his or her designee who shall have responsibility for administration of this conflict-of-interest rule. The employees shall rescue themselves from any and all potential conflicts of interest. All known violations, disputes and other issues arising out of the application of this rule to employees of the Boise State University shall be referred to the State Board for appropriate action. If the State Board determines that a conflict of interest has occurred, the State Board may take action against the employee pursuant to section 5, Dismissal for Cause.

Boise State University shall ensure that all contractors retained to facilitate the transfer of intellectual property conform with this conflict-of-interest rule.