

To: Paul Horn, Senior Vice Provost Research

From: Faculty Senators Council

Re: Interim Review and Comments on 2012 Draft NYU Statement on Intellectual Property

Date: May 31, 2012

Dear Paul,

Thank you for the opportunity to review and comment on the draft NYU Statement on Intellectual Policy, dated 4/2/2012 and received on 4/19/2012. The document has been circulated to all members of FSC, and an FSC committee is now in the midst of a thorough review of the statement. We have also solicited comments from some of the faculty who served on the authoring committees. This is an interim report of our progress.

We are troubled by the short period of time for review and comment requested by your office. Given the importance of this policy, we respectfully request that you delay submission of this document to the Board of Trustees until early fall.

Bearing that request in mind, we submit the following comments and recommendations as an Interim Report.

A. Comparison of 2009 & 2012 Drafts

The Executive Summary refers specifically to the 2009 draft Statement on IP and outlines the significant changes to that document that now appear in the 2012 draft. Given that the 2009 draft was thoroughly reviewed and approved by the FSC, we plan to undertake a line-by-line comparison of the 2012 changes to the 2009 draft. Our review would benefit from any documents your office could provide that offer a line-by-line comparison of the 2009 and 2012 drafts.

B. The NYU Intellectual Property Agreement (draft 5-18-12)

We have the following concerns about the "IP agreement" that faculty and others in the University community may be asked to confirm in writing:

i. Paragraph A should be re-drafted to underscore that the assignment of rights, title, and interest is not absolute. The current phrasing "I have assigned to NYU *all of* [ital. added] my rights, title and interest in and to..." is too far removed from the limiting condition, "that is subject to NYU

ownership under the terms of the Statement of Policy on Intellectual Property and/or grants or agreements under which research or other activities I participate in is funded or otherwise supported.” We would also prefer to see the word “*only*” replace the words “*all of*”.

ii. We have general concerns about the interest and title claims the University might make with respect to “Research Data closely associated with the Invention or necessary or useful for the Invention’s protection, development or application thereto...” The distinction between copyrightable works, TRP, and research data is not clear-cut in our mind. We think that this issue requires further reflection or clarification.

iii. Given that faculty and other members of the community will be asked to confirm this policy in writing, a practice that is not the norm for other NYU policies, we recommend that the agreement make clear that members of the NYU community maintain their right to external legal advice and action.

Specifically, we recommend that the Agreement include the following clause: "Nothing in this statement limits the right of any member of the university from undertaking legal action pursuant to intellectual property claims."

We think the inclusion of this phrase in the “agreement” is especially important given the Policy Statement’s use of the phrase “Nothing in this policy constitutes a waiver by NYU of any rights that NYU may have under any other NYU policy, by contract or pursuant to any applicable law.” The rights of the University should be balanced against the rights of those who are members of the NYU community.

C: Mandatory Review of Policy

Given the importance of the policy, its long period of gestation, and the ever-changing legal landscape, we recommend that the Statement be approved for a trial period of one year.

Specifically, we encourage you to consider the following clause: "This policy will be reviewed by a committee consisting of FSC representatives, faculty and administrators one year from the date of implementation. This committee is charged with reviewing the application of the statement, and with proposing revisions to the Office of the Provost."

D. Regarding “XV: Making NYU Owned Copyrightable Works Available For Public Use, Including Through Open Source Licensing”

We would like to explore the idea of a royalty for faculty whose instructional media is made available through open source licensing, especially in cases where their use becomes frequent and widespread.

Our discussion on this topic has also highlighted another issue that requires further study: the use of instructional media, in the words of the Statement, “to effectively deliver academic content throughout and beyond its global network of campuses and facilities, including through digital means (X.a)” We would welcome the opportunity to have a specific conversation with the administration about the use and distribution of instructional media across NYU’s study abroad sites, portal campuses, and beyond.

E. Disputes and the Advisory Committee

The draft Statement gives the Provost complete discretion with respect to the appointment and composition of the IP Advisory Committee. At present, there is no indication that faculty will be invited to serve on the Advisory Committee.

We recommend that the Statement acknowledge faculty membership on the IP Advisory Committee to include at least two faculty members if total committee membership is six or less, and at least three faculty if total membership on the committee is more than six. The FSC should be consulted in the appointment of faculty to the Advisory Committee.

We further recommend that in the case of disputes, faculty have the right to request a hearing before the IP Advisory Committee. In the current draft “the Provost and/or The Executive Vice President may within their sole discretion refer the matter to the Intellectual Property Advisory Committee or another designee to adjudicate the matter...”. We think this undervalues and even undermines the rights of the faculty and other members of the university community. Given that faculty do in fact retain formal ownership over much of the IP referred to in the Statement, we think it is especially important that they can call upon a hearing before the IP Advisory Committee when a dispute arises.

F. Perpetual Rights and Moral Rights

The FSC is uncomfortable with the claim of perpetual rights with respect to instructional media, (i.e. “Creator grants to NYU, a non-exclusive, *perpetual* [ital. added], world-wide, royalty free license (with the right to sublicense) to use such Instructional Media in any form or media for any purpose consistent with the mission of NYU, including educational and research purposes and for publicizing NYU or any program or department of NYU, and including the right to make derivative works for such purposes” XI.B.3b). Does this perpetual right extend to instances where the faculty member leaves NYU and begins to teach the same course at another institution? Does this perpetual right extend beyond the lifetime of the individual? Our interim recommendation is to strike the word perpetual from the Statement.

The same subsection contains language that reflects the “moral rights” of faculty, specifically that “[w]here the Creator is identified, or may be reasonably identifiable within the Instructional Media, NYU will not edit or use any such Instructional Media in a manner that materially misrepresents the intent of the Creator in authoring or creating the Copyrightable Work.” We appreciate the inclusion of this clause, but we are concerned that the text provides only two examples. The first example refers to the importance of providing an “appropriate explanation” for “scientific information that is no longer accurate.” Why is it that the test of properly representing the intent of the Creator is reserved only for the “accuracy” of “scientific information?” The second example is “where a Creator’s name is indicated within the Copyrightable Work, NYU will not edit portions of any such course or program in a manner that changes the manner in which the content would be reasonably understood.” Does this mean that NYU can edit in any manner it sees fit where the Creator’s name does not appear in the Copyrightable work? We don’t think these two examples sufficiently address the possibilities for misrepresenting the intent of the Creator. We think this needs further study.

We look forward to your response. We will continue our review of the 2012 draft IP Statement.