

Minutes*

**Academic Freedom and Tenure Committee
Friday, May 4, 2007
9:30 – 11:00
300 Morrill Hall**

Present: Tom Clayton (chair), Yusuf Abul-Hajj, Tracey Anderson, Karen Miksch, John Mowitt, Paul Porter, Terry Simon

Absent: Arlene Carney, William Doherty, James Farr, Joseph Gaugler, Candace Kruttschnitt

Guests: University Librarian Wendy Lougee; Nan Wilhelmson (Office of Human Resources)

[In these minutes: (1) copyright policy; (2) Procedures for Reviewing the Performance of Tenure-Track Probationary Faculty; (3) Morris personnel plan]

1. Copyright Policy

Professor Clayton convened the meeting at 9:30 and welcomed University Librarian Wendy Lougee to discuss the draft copyright policy. [Note: the full text of the draft policy has appeared in the minutes of the Senate Research Committee 4/30/07 (which can be found at <http://www1.umn.edu/usenate/research/07-04-30.html>) and the minutes of the Faculty Consultative Committee 5/3/07 and will not be reproduced here again, except for specific language discussed by the Committee.]

Ms. Lougee provided background information on the development of the policy, a revision of the 1999 policy that has been split into two pieces. The earlier policy dealt with both copyright and things that are patentable; now there will be two policies. Copyright, she reminded the Committee, applies to original ideas fixed in tangible form; the copyright need not be registered.

There were issues not addressed in the old policy, she said, such as whom it applied to. There has also been a shift in the last decade in these institutional policies from everything being owned by the university to faculty owning their academic work; recent policies tend to be more nuanced. She co-chairs a committee with Professor Laura Gurak charged to develop a new Regents' policy that would articulate broad principles of values and ownership; later there will be an administrative policy to implement the Regents' policy.

She has been to several committees with the draft, Ms. Lougee related, and has received a number of suggestions.

The Senate Research Committee took exception to Section II(3), "Substantial University Resources. 'Substantial University resources' are University resources of a kind or quantity over and above those that are ordinarily available to most or all similarly-situated University employees or students," which defines a term in the policy that is intended to identify projects in which the University

* These minutes reflect discussion and debate at a meeting of a committee of the University of Minnesota Senate; none of the comments, conclusions, or actions reported in these minutes represents the views of, nor are they binding on, the Senate, the Administration, or the Board of Regents.

may have an ownership interest in. This provision still needs work, Ms. Lougee said. "Substantial" was meant to be both a quantitative and comparative measure.

The "guiding principles" of the policy are these:

"Subd. 1. Balancing Interests. As a public research university, the University's mission is to promote the generation, preservation and dissemination of knowledge. The University's mission is best achieved by balancing the University's interests with a clear recognition of the tradition that University faculty and students own the copyrights in their academic works.

Subd. 2. Ownership. The tradition that faculty own the copyrights in their academic works promotes academic freedom and creates incentives for them to create and disseminate academic works, which in turn, generate future research and scholarship.

Subd. 3. Preserving Rights for the University Community. When publishing academic works, University faculty and students are strongly encouraged to request or retain rights for use by the University community, and to consider licensing options that ensure maximal scholarly and public access to their work. The University has an interest in having access to and the right to use instructional works created by University faculty and students.

Subd. 4. Fair Use. The University recognizes and respects the legal rights of copyright holders. At the same time, the University supports a robust interpretation of the fair use exception that enables educational uses of copyrighted works in ways consistent with the University's educational mission. Thus, the University is committed to promoting a culture in which access to and the lawful use of others' materials is recognized as fundamental to both the process and goals of scholarly inquiry."

The intent, Ms. Lougee said, is to recognize the rights of copyright holders but not tie up materials so much that they cannot become the fuel for new research. The principles seek to recognize the rights of both owners and users. Subd. 3 encourages faculty to retain certain rights for use of materials within the institution, to not sign over everything to a publisher.

The language in the policy dealing with ownership has several provisions, Ms. Lougee noted.

"Subd. 1. Ownership of Academic Works. In accordance with academic tradition, all University faculty and students shall own the copyrights in academic works they create, except the copyrights in works owned by the University or an outside sponsor under this policy.

Subd. 2. University Ownership. The University shall own the copyrights in the following works created by a University employee or student, acting alone or jointly with others:

- (a) works created by University employees acting within the scope of their employment, except for academic works created and owned by faculty under this policy;
- (b) works created with the use of substantial University resources;
- (c) works specially commissioned or ordered by the University and for which the University has agreed to compensate or provide other support to the creator;
- (d) works created in connection with the administration of the University;
- (e) works created pursuant to a contract with an outside sponsor that provides that the University will own the copyrights in the works."

Subd. 1 puts ownership of academic work in the hands of the faculty. Subd. 2 is intended to address several exceptions, such as individuals who are not faculty creating work in the course of their employment responsibilities (work-for-hire) and those works that the University explicitly commissions.

An idea could be a faculty member's but technical support staff could provide the hands to help the faculty member create it, Professor Abul-Hajj noted; is the idea more important or the work required to do it? It is the idea that faculty will want to protect. There is a clause about written agreements, Ms. Lougee pointed out; it could be that a computer code is original with the technology staff person but the idea is the faculty member's; fixing the code could tip the balance to the technologist. That is why there is a need for written agreements. What if the faculty member hires an RA with technical expertise, Professor Abul-Hajj asked? That would be work-for-hire, Ms. Lougee said, within the scope of employment for the student.

Professor Miksch said that copyright often turns on who has control of the material; if the technology staff controls the content without faculty control, that is a control question and could be an academic freedom issue. Ms. Lougee said control is related but is not the same as copyright per se. Professor Miksch said the courts look at control; faculty worry that someone could take their materials and make changes to them. Ms. Lougee said copyright is the right to disseminate, produce, perform, reproduce, and do derivative works. She said the language in the policy needs more work with respect to instructional materials in terms of the role of various people (including technology support) and what constitutes derivative work.

Professor Simon said that the faculty member created a work; no creativity was required on the part of the technical staff in entering data and running programs. Ms. Lougee pointed out that copyright deals with materials that are fixed in tangible form, which is why it is important to deal with work-for-hire and the role of information-technology staff.

Some have tried to copyright databases, Professor Miksch reported, which has not been allowed; one must DO something with the data. One cannot copyright the telephone book; data inputting is not a copyright issue, it is a way to put data together. Professor Simon said his point was addressed to the University's possible claim because some individuals paid a salary by the University may do technical work (software development) on a project. Ms. Lougee said that may be the case unless the individual who developed the software is a faculty member.

The Senate Research Committee also took exception to Subd. 2(b), establishing possible University interest in "works created with the use of substantial University resources," Ms. Lougee reported. The definition is intended to refer to faculty who receive a greater amount of resources than a similarly-situated faculty member (e.g., the English professor who is provided support to use a supercomputer for linguistic research when English professors would not normally have access to supercomputer time whereas a physicist might). The intent is that the consideration be both comparative and quantitative.

Is a Graduate School grant-in-aid "substantial University resources," Professor Anderson asked? This part of the policy is more focused on instructional materials, Ms. Lougee said—when the University asks a faculty member to do something. A grant-in-aid is not necessarily tied to a particular outcome or deliverable. This language needs more work; it either needs to be deleted or have more clarity, Ms. Lougee said. But the issue of "substantial University resources" generally comes up in connection with instructional materials. If a team of developers is brought in, funded by the University, what are the institution's rights in the materials? (These are not details that would appear in a Regents' policy, Ms. Lougee observed, and would be covered in the to-be-written accompanying administrative policy.)

Professor Abul-Hajj suggested deleting Subd. 2(b). The fact that the University gives a faculty member resources is almost beside the point; the University is paying the faculty member's salary. The ideas generated are what are of concern to faculty, whether scholarly or instructional projects. Who has the right to the ideas once they are fixed? The problem is fixity, Professor Mowitt said; what about something written on a computer? That belongs to the faculty member, Ms. Lougee said. Why, Professor Mowitt asked; he is doing the work as an employee. Because the policy says that faculty and students own the work they produce. As a model, Ms. Lougee noted that a previously-existing Michigan policy provided that the university owns everything and grants ownership *back* to the faculty. The revised Michigan policy says outright that the faculty own their academic work, with exceptions for the University. This type of shift in framing concepts is important. The problem is in the reversal of the provisions, Professor Mowitt said; the faculty own everything but the exceptions seem to take everything back. He said he did not see how using a University computer, while on salary from the University, would not trip the provisions of the policy granting University ownership rights. Ms. Lougee noted that the definitions in the policy provide guidance on several key words/concepts. Specific to this point: work for hire does not include academic work. The intent is that the faculty own all. Professor Anderson suggested adding a definition of "work for hire."

Professor Anderson asked who "the University" is in the policy and these discussions. Ms. Lougee said it is the organization, and legally it is the Board of Regents.

Following review of other sections of the policy, Professor Abul-Hajj asked about a faculty member who writes a book that generates revenue; does the University get a cut? It does not, Ms. Lougee said. This policy gives the income to the faculty member. (Other policies come into play if, for example, the faculty member assigns the book in classes he or she is teaching.) One important concept included is that the faculty member could retain some rights to a book or article so it can be used royalty-free in classes and on campus; otherwise students and the libraries pay a lot for something a University faculty member has written.

Ms. Lougee turned next to the section on the "University's Right to Use Instructional Works," which provides that "the University will have a perpetual, royalty-free right to exercise the rights of a copyright owner in instructional works created by University employees and students, but only for educational and administrative purposes consistent with the University's mission and academic norms, including, for example, for purposes of obtaining or maintaining accreditation. Upon the written request of a University employee or student who has created an instructional work, the University shall remove the employee's or student's name from the work." Comments so far suggest this section needs work, she said; the intent is that the University has the right to use instructional materials (1) for administrative purposes such as accreditation and (2) for educational purposes. In the case of the latter, a faculty member may develop a course and materials and then cannot teach the course; another faculty member may draw on these materials to execute the course. The Senate Research Committee had a problem with the language granting the University the "rights of a copyright owner," which includes dissemination, etc. That committee suggested inserting the phrase "for its internal" before "educational and administrative purposes."

Professor Abul-Hajj reported that the faculty in one program did a lot of work developing PowerPoint slides that each took 5-6 hours; when the program was expanded, those faculty were asked to give the slides to new faculty to use in classes. The faculty refused to do so and said the new faculty

should develop their own slides. Must the faculty, in this case, do what the dean says? This language says they must. Ms. Lougee said she had no ready answer to the question; the committee is still wrestling with that question. Both students and faculty were given paper copies of the slides, Professor Abul-Hajj said, and faculty could convert the paper copies back to slides, but some faculty refused to provide the slides themselves. That is why she asked who "the University" is, Professor Anderson said; is there a clear indication of authority on this issue? The Senate Research Committee asked the same question, Ms. Lougee said; "the University" is the Regents, on whose behalf deans and department heads act. Professor Anderson surmised that if she were to say SHE as a faculty member is acting on behalf of the Regents, that might not go over very well.

Could faculty members grant the right to use materials with a University stand-in, Professor Anderson asked? They could, Ms. Lougee said; the reverse case is the question. All would probably agree that the University should have full access for administrative uses; the question is about instruction. Faculty members can show their materials to anyone they wish.

It has been traditional that faculty owned instructional materials and publications in part because the institution did not want liability, Professor Miksch said; there is an academic freedom issue and again the University does not want to be liable (although it will defend a faculty member exercising his or her academic freedom). She said she could not imagine anyone refusing to provide a syllabus but the slides are a grayer area. If she teaches a traditional course and the University wants to put it online, who controls it? New technology is raising questions.

Professor Simon suggested the current language gives the University more than the rights of ownership; he suggested that less-confusing language be developed. The language will undoubtedly change, Ms. Lougee said.

Professors Mowitt and Abul-Hajj alluded to an incident that has come before the Committee. It has been alleged that a staff member revised instructional materials for a course and submitted them to a supervisor without telling the faculty member. The "University" has taken control of the materials; this action impinges on academic freedom. Ms. Lougee said that is not a copyright issue per se. But the staff member claims the material "is mine and I can change it," Professor Mowitt pointed out. Ms. Lougee said the material does NOT belong to the staff member; in the case of the staff, it was likely work for hire. She agreed with Professor Miksch that new technology does raise new issues.

Ms. Lougee next reported that the language dealing with conflict of interest ("University employees will not use and will not authorize or license others to use their academic works in a manner that competes with courses, programs or services offered or known by the employee to be under development by the University) would probably be deleted. The intent of the language was to prevent development of a course at the University and then have it offered concurrently through another institution (e.g., online institutions). She said that that issue can likely be addressed through the consulting policy. One problem is adjunct faculty who may be teaching at multiple institutions. Professor Abul-Hajj asked if he would be barred from teaching a course elsewhere while he is on sabbatical; he would not, Ms. Lougee said.

The main issues are the definition of "substantial University resources" and University rights to instructional materials, Ms. Lougee summarized. Professor Miksch gave Ms. Lougee kudos on the forthright language about fair use.

Professor Mowitt asked if ICR funds fall into the "commissioned work" category. Ms. Lougee said the policy does not cover ICR funds. Professor Mowitt noted that Professor Ruggles had pointed out that faculty cannot get grants without University support; does the University own the work from the grant, as a result? Ms. Lougee said she could not imagine circumstances when that would be considered commissioned work; the policy needs to focus on instructional materials, not research or scholarly work. Ms. Lougee said that the policy needs to be clearer on what "commissioned work" is.

Professor Anderson hypothesized that in a discipline there is a decision that a new course is needed and one faculty member will be primarily responsible for it. Is that faculty member commissioned to develop the course? Ms. Lougee said she was not certain but expressed doubt that a course in that circumstance would be "commissioned work." It is typical for departments to hire new faculty with an expertise in particular areas to teach the subject matter, Professor Abul-Hajj observed, so in a way the new course is "commissioned." The language can be tightened, Ms. Lougee said. There could be cases where the University buys out part of a faculty member's time to develop a specific course, but that would require a written agreement. Professor Simon suggested that ALL "commissioned work" be required to have a written agreement.

Professor Clayton suggested that if "pedagogical" = "instructional," the language in the policy should be consistent. He also suggested that a definition of "work" should be included at the very beginning. At present the definition is circular, and he also strongly urged that the definitions NOT be in alphabetical order, because in this case the definitions should proceed from the more general and broad to the more specific; they "should not be ordered alphabetically in defiance of logic." Ms. Lougee noted that there are structural requirements for Regents policies, including alphabetic listing of definitions.

Professor Clayton thanked Ms. Lougee for joining the meeting.

2. Procedures for Reviewing the Performance of Tenure-Track Probationary Faculty

The Committee returned to the Procedures and considered the final sections, which follow.

24. Central Review.

After receiving the recommendation of the dean, the senior academic administrator makes a final decision. He or she may also consult with other persons before making a decision, but each such consultation or review shall be recorded in the candidate's file.

If the senior academic administrator uses a review committee to review one or more candidates, it is subject to restrictions and procedures parallel to those imposed upon the collegiate review-committees. If the senior academic administrator consults with individuals about a particular candidate's qualifications, the consultation and basis for judgment must be recorded.

25. Standards for review and action.

The central reviews and action must be based upon the standards for tenure applicable to the department and position involved. See part **21** of these procedures.

26. Action by the senior academic administrator; explanations to dean and department.

The senior academic administrator takes action on the recommendation. If his or her action differs from the recommendation of the department, he or she must send to the tenured faculty of the department and to the candidate a written statement of the substantive reasons for differing from the judgment of the tenured faculty of the department. (See section **7.63** of the tenure code.) That statement must be an evaluation of the candidate's substantive qualifications on the merits and include an explanation of the reasons for which the senior academic administrator believes it appropriate to substitute his or her judgment for that of the department with regard to those qualifications. It may not be a mere recitation of the reviews that have taken place. If the senior academic administrator's action differs from the recommendation of the Dean, a similar statement must be sent to the Dean.

Procedures and Criteria for Promotion

27. Procedures for Promotion

Procedures for considering promotion should parallel those for considering candidates for tenure.

Consideration for promotion must take place whenever the unit recommends a probationary Assistant Professor for tenure. A separate vote on promotion should be recorded and forwarded.

Probationary faculty with the rank of instructor who are granted tenure must also be promoted under section **6** of the tenure code; a separate vote is therefore inappropriate.

Consideration for promotion may occur whenever it is initiated by the department head or by the faculty senior in rank to the candidate. The candidate may at any time request that a review take place, but the faculty senior in rank will decide whether to conduct it.

The body that makes the recommendation consists of all members of the regular faculty of the department senior in rank to the candidate. (Both tenured and probationary faculty senior in rank may vote.) Adjunct and non-regular faculty senior in rank may be consulted but have no vote, unless an exception has been provided by analogy to that provided in part **13**. Otherwise, the procedures of parts **12, 13, 14, 15, and 17** apply.

28. Criteria for promotion.

While a decision to grant tenure is based upon a demonstrated potential to continue to contribute significantly to the mission of the University and to its programs or teaching, research, and discipline-related service (see section **7.11** of the tenure code, reproduced as an Appendix to this document), promotion in rank is based on actual achievement in these areas.

Promotion to the rank of associate professor is based upon professional distinction in research and demonstrated effectiveness in teaching and advising students, and, where relevant, in discipline-related service. Promotion to the rank of professor requires, in addition, a national or international scholarly reputation in the individual's field of study.

Professor Miksch said she did not understand the difference between promotion and tenure inasmuch as the University will not grant tenure to assistant professors. There ARE two votes, Committee members pointed out. Are there different criteria, Professor Miksch asked? They are separate discussions, Professor Clayton said, but the second one is redundant. The language could be eliminated because there is no tenure without promotion. There are exceptions, such as hiring associate professors without tenure, but this document applies to probationary faculty.

The Committee agreed to strike all of the current sections 27 and 28.

3. Morris Personnel Plan

Professor Clayton next welcomed Nan Wilhelmson from the Office of Human Resources to present the Morris personnel plan.

Ms. Wilhelmson began by explaining that all collegiate personnel plans are required by an administrative policy covering appointments with a teaching function [developed a number of years ago as a result of work by two task forces, the first one chaired by Professor Kent Bales and the second chaired by Dean John Brandl]. The report identifies tenured and tenure-track faculty, term/contract faculty, temporary and visiting faculty, adjuncts from within and outside the University, and P&A teaching specialists and lecturers. Every college is required to have a plan for teaching appointments explaining how contract faculty will be used, if there are any. This Committee has the responsibility to provide feedback on these reports. All but two colleges have approved plans in place; Morris submitted its plan two years ago but there was a lot of back-and-forth on it before it was finally approved.

In general, the Morris campus plans on 2-5 faculty appointments per year that are annually renewable, and only during the academic year. Professor Abul-Hajj asked the percentage of faculty at Morris on contract appointments; Professor Anderson said it is very small number, perhaps 10 out of 120 or 130 faculty.

Professor Clayton observed that it puts people in a tough position when they are on appointments renewed year by year; people face undesirable anxiety. Is there any chance that these could be made 3-year appointments, for example? Nothing bars such appointments, Ms. Wilhelmson confirmed, but the campus has indicated it does not wish to make them. Nor does a multi-year appointment bar non-renewal, she said in response to a question, but termination for cause would require documentation. Some of these faculty are hired on a fill-in basis, Professor Anderson said, and in the case of filling in for division chairs, those appointments (as division chair) are for five years.

Ms. Wilhelmson said there are not a lot of multi-year contract appointments; they are mostly made for programmatic or financial reasons. They are seeing more annually-renewable appointments—but they also hear the same concerns that Professor Clayton expressed. Professor Mowitt said this Committee's concern is that these appointments are framed entirely from the interest of the institution and he suggested the Committee revisit the issue next year. The concern of the faculty, Professor Abul-Hajj agreed, is that there is a nation-wide trend toward using more contract faculty. Ms. Wilhelmson agreed and said that that is why the policy was put in place. She said that she would provide a report to the Committee next November on the number of faculty in each category for each college, as required by the policy. She also said she would talk with Vice President Carrier about multi-year appointments.

Professor Clayton thanked Ms. Wilhelmson for joining the meeting and adjourned it at 11:00.

-- Gary Engstrand

University of Minnesota