

Frequently Asked Questions Concerning the New Copyright Regulations

Please Note: These FAQs are for the information of academic staff members, and shall not be used by any party in any dispute over the interpretation of the Regulations.

1. What prompted the creation of the Agreement Review Committee (ARC) and the drafting of the new Copyright Regulations?

When the Association of Academic Staff negotiated the patent policy with the Board of Governors, it was recognized that the collective agreement provisions regarding copyright needed substantial revision. Under the Post-secondary Learning Act of Alberta, whatever rights staff have as individuals to their creative work is governed by the collective agreements between the AASUA and the Board. As was seen at the time of the patent review, the current language is quite opaque and in need of revision. Recognizing the need for change, the Board and AASUA agreed to form an “Agreement Review Committee” that would examine provisions of our collective agreements regarding copyright, and to review two aspects of intellectual property: copyright and the emerging issue of intellectual property that is not covered by patent or copyright practices. The membership of this ARC has changed over time, but both the Board and the AASUA are pleased to bring forward new Copyright Regulations.

2. Why did this process take so long?

Due to the membership of the ARC and various members going on sabbatical leave or unable to serve on the ARC due to their work responsibilities, it was difficult to schedule meetings. It also took time to deliberate on the issues and to write language that was agreeable to both sides.

3. What are the key principles underlying the new Copyright Regulations?

First, the idea was to replace confusing and out of date language in the academic staff collective agreements with language that would provide academic staff and the Board with clear guidance on the subject.

Second, the idea was to replace language asserting that the Board owns the copyright of staff works in Article 10 with language starting with the principle that staff own the copyright to their work, with some exceptions, discussed below.

Third, we wanted to add protections to ensure that the Board would have a license to use the work of staff to do its core business in certain circumstances.

Fourth, we settled on the principle benefiting both parties that in cases where the University needed ongoing access to copyrighted materials, a non-exclusive license would allow staff to do what they wanted with materials they created even if they leave the University, while still allowing the University to continue to use key materials for specific purposes.

4. If we didn't have a collective agreement, who would own copyright in works produced by academic staff in the course of their duties?

In the absence of provisions within a collective agreement, the Board of Governors – not academic staff - would own the copyright to Works that “result from” or “are connected with”, staff members’ duties or employment. Section 68 of the *Post-Secondary Learning Act* provides as follows:

68(1) Unless otherwise agreed to by the board, the ownership of any invention, work, information or material, regardless of form, including any patent, copyright, technological or industrial design process or trademark acquired or produced by an officer of the post-secondary institution or an employee of the board that results from or is connected with the officer's or employee's duties or employment vests in the board and may be made available to the public under conditions, on payment of fees or royalties or otherwise, as the board may determine.

(2) The board may compensate a person described in subsection (1).

(3) The board may enter into an agreement with a person to whom the board has provided or proposes to provide facilities, equipment or financial aid providing for the respective rights, obligations and liabilities of the board and the person with respect to the ownership of any invention, work, information or material, regardless of form, including any patent, copyright, technological or industrial design process or trademark acquired or produced by the person while engaged in a project funded in whole or in part by the board.

5. To what creative products do the Copyright Regulations apply? What counts as a “Work”?

For the purposes of the Copyright Regulations, a Work is any creative product respecting which copyright is recognized under the *Copyright Act*. Very generally, copyright applies to original literary, dramatic, musical or artistic works – regardless of format or technology of presentation (digital movies as much as handwritten plays). Copyright also applies (for example) to “performers’ performances,” which would include lectures.

The Regulations would also apply, for example, to online course products, such as “MOOCs”. Keep in mind, though, that these sorts of projects can be expensive and involve many parties. It would be very likely that intellectual property rights will be dealt with by the contract(s) that establish the project (see 1.5, 5). If a staff member chooses to enter into these sorts of contracts, the terms of the contracts shall govern copyright ownership.

The Copyright Regulations do not apply to creative products that are not governed by the *Copyright Act*, such as inventions that fall under the Patent Policy, industrial designs, or trademarks.

6. What are the main elements of the Copyright Regulations?

Basic rule – paragraph 1.1: a staff member who creates a Work resulting from or connected with the staff member’s duties or employment **owns copyright in the work, with some exceptions discussed below.**

At the same time, Works are licensed to the University – paragraph 2.1: the University is entitled to a licence (details about this below) to a Work referred to in paragraph 1.1, for all purposes within the University’s approved mandate under the PSLA.

Exceptions to the University’s licence are referred to in paragraphs 2.1 – 2.6: the licence does **not** apply to any Work created by a staff member “to fulfill assigned course responsibilities” (details about this below – the point: no paragraph 2.1 licence to teaching materials).

Despite those exceptions, and in specified circumstances, the University has limited rights to use even materials described in paragraphs 2.6 – 2.8, 2.9 (and paragraph 2.10 for some categories of Academic staff): e.g., if a staff member is unavailable or unable to deliver all or part of a course duly assigned to the staff member (the University’s rights will be only for the duration of the course for that academic year)

7. Are there any situations in which an academic staff member would not own copyright in a Work that he or she produced in connection with employment duties?

There are situations in which a staff member would not own copyright in a Work produced in connection with job responsibilities.

Under paragraph 1.4, a staff member would not have copyright in Work produced – generally – for administrative purposes. While 1.4 provides some context, guidance may also be provided by the “frequently asked questions” that will be prepared.

Paragraph 1.5 recognizes that a staff member may create a Work pursuant to a written agreement – he or she may be hired by the University to produce some creative product. Intellectual property rights respecting that creative product will be addressed in the agreement.

Paragraph 1.6 recognizes that some types of research funding have provisions respecting intellectual property ownership – a condition of receiving the funding is complying with the intellectual property aspects of the arrangement. It may be that under the terms of a funding arrangement, the funder is to hold copyright in works produced with the research funding. The University, as intermediary between the researcher and the funder, may “obtain from the staff member an assignment or licence of the copyright as necessary to fulfill [the University’s] obligations to the sponsor under the sponsored research funding agreement.”

Paragraph 1.7 recognizes that a staff member may – e.g., during a secondment – create Works pursuant to a contract between the University and a third party. In these cases, copyright ownership and licensing are governed by such agreements.

8. Do the Copyright Regulations recognize “moral rights”?

Yes. “Moral rights,” generally, are rights to claim authorship, to remain anonymous, or to use a pseudonym; the right of integrity (the right to resist distortion or modification of a work that is prejudicial to the honour or reputation of the creator); and the right of association (the right to resist the use of a work in association with a product, service, cause, or institution, if such use would be prejudicial to the honour or reputation of the creator).

Moral rights are recognized in paragraph 1.3.

Additionally, paragraph 2.5 describes an academic type of moral right: A staff member who reasonably believes that his or her Work is unsatisfactory for a proposed use because it is outdated, it is incomplete, its use would have a negative effect on the professional reputation of the staff member, or there are “other academic grounds” to oppose its use, “may amend the Work or require that its use be withheld. This right is an express limitation to the University’s paragraph 2.1 licence.

9. What is the nature of the University’s licence to use Works created by academic staff, referred to in paragraph 2.1?

The licence is

- (a) “immediate” – it comes into existence when the Work comes into existence; no (e.g.) written licence agreement is necessary;
- (b) “non-exclusive” – the staff member may grant licences to use the Work to others;
- (c) “royalty free” – the staff member is not paid royalties for the University’s use of the Work (this is because – the Work having been created in the course of employment duties – the University has supported its production financially);
- (d) “non-transferrable” – the University cannot transfer its licence to a third party (e.g. some sort of third party educational services provider); and
- (e) “irrevocable” – the staff member can’t unilaterally cancel the licence.

The licence is a right or permission to use the Work “for all purposes within the University’s approved mandate” under the PSLA. Paragraph 2.2 provides some examples of these purposes.

Paragraph 2.4 recognizes that a staff member may agree to grant additional licence rights to the University.

10. What if, as a condition of publication, a publisher requires the assignment of copyright from the creator?

Under paragraph 2.3, if a publisher requires the assignment of copyright to the publisher as a condition of publishing, then the staff member has no copyright to licence to the University. The paragraph 2.1 licence, then, does not arise. The staff member is required to make “best efforts” to have a licence analogous to the paragraph 2.1 licence extended to the University. Best efforts is assessed within the context of the situation. It requires doing that which is known to be usual, necessary and proper in attempting to secure the objective.

11. Are there any Works – besides those referred to in paragraph 2.3 – respecting which the University does not have a paragraph 2.1 licence?

Yes. Generally, paragraph 2.6 excludes teaching materials from the paragraph 2.1 licence, with certain exceptions (see question 13).

12. But are there any circumstances in which the University could have a licence even to teaching materials?

Yes, in defined circumstances:

(a) Under paragraph 2.7, the paragraph 2.1 licence extends to course outlines – but only concerning those elements of a course outline that set out information required by GFC Policy (that is, the paragraph 2.7 exception does **not** capture a full syllabus or course readings and topics).

(b) Under paragraph 2.8, if a staff member is unable or unavailable to deliver all or part of a course duly assigned to that staff member, the University may use that staff member’s teaching materials to complete the delivery of the course. This clause would apply, for example, if a staff member died, became ill, or quit – the University would be under an obligation to registered students to finish the course, and the staff member’s materials could be used to do so. The paragraph 2.8 licence is good for the duration of the academic year in question only. Note that it only applies if a course has been “duly assigned.” The University could not – for example – use an instructor’s materials to deliver a course without having first assigned that instructor to that course.

(c) Under paragraph 2.9, “[t]he University may use a Work described in paragraph 2.6 for the purposes of unit accreditation, in connection with transfer credit determinations or as the University may be required to meet its obligations to students.”

13. What does paragraph 3.1 – which deals with computer programs – mean?

Human generated computer code (software), which gives rise to computer programs, are copyright-protected. In some cases, however, the integration of software in inventions may be protected under patent rules. Hence, not only copyright but patent rules may apply “to software

that is patentable intellectual property.” If a computer program is not patentable it remains protected by copyright law only.

14. What if a staff member uses his or her copyright-protected works to provide educational services for a competitor University?

The Copyright Regulations deal with copyright ownership. Use of copyright protected materials is still subject to the collective agreements, University policies and procedures, and the general law. The point of paragraph 4.1 is that staff members’ use of copyright protected works is subject to the University’s conflict of commitment and conflict of interest policy.

15. What happens if a Work is created through the efforts of University personnel, (e.g.) a grad supervisor and a student, or an academic staff member and a non-academic staff member?

Paragraph 5.1 acknowledges that Works created collaboratively” present special challenges regarding copyright.” Paragraph 5.2 - if the creators are University personnel, the relevant provisions of policies, procedures and collective agreements (including the Copyright Regulations) will apply. Paragraph 5.3 - if a written agreement is in place with third parties, then that agreement will apply, or the general law in the absence of such an agreement. Given the challenges, potential collaborators should consider copyright ownership issues as soon as possible and consider entering a written agreement to deal with ownership issues before starting the collaboration.

16. How do the Copyright Regulations govern staff members’ intellectual property rights with third parties?

The Copyright Regulations govern the relationship between staff members as employees, and the Board as their employer, under the collective agreements. Ownership of Works created by staff with or for publishers, external collaborators, funders, and (e.g.) the Tri-Council is determined by a combination of the terms of the Copyright Regulations and the terms of the agreements with those third parties (see paragraphs 1.6, 1.7 and 5.3).

It is important to note that copyright law is not the only area of law that applies to copyrighted Works. For example, the law of defamation) also applies to uses of copyrighted Works.

17. Who do I contact if I have questions about my rights in a copyrighted work?

The AASUA should be your first point of contact, and is available to assist its members in discussions with University representatives on questions which may arise relating to rights to a copyrighted work.

18. Why is paragraph 2.10 included in the CAS:T, SOTS and TRAS agreements only?

It was recognized that in certain circumstances the University needs to be able to assign to these categories of staff members the creation of “multi-course” or “multi-section” materials, with the

University obtaining a license to use such materials in the future. The more temporary nature of appointments under these agreements means the University needs to ensure it has the right to continue to use such materials past the end date of a staff member's appointment.

19. Why does the CAS:T agreement make reference to the length of the license back to the University?

Since CAS:T representatives on AASUA Council felt that limiting the duration that the University could use their material for continuing teaching was important, the University agreed to their request to limit the length of the license to three years.