

Copyright Workgroup/Taskforce Draft Intellectual Property Policy

Background Materials

Federal Copyright Law (17 U.S.C. 101 et seq.):

- Copyright protection subsists 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;
 - motion pictures and other audiovisual works;
 - sound recordings; and
 - architectural works
- In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.
- Fair Use Exception (17 U.S.C. 107): The fair use of a copyrighted work for purposes such as criticism, comment, news 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.

State IP (§ 2.2-2822):

- All patents, copyrights, and potentially patentable or copyrightable materials created by a state employee are the property of the Commonwealth.
- State IP law (and policies/guidelines) does not abrogate citizens' right to access public records under FOIA.

Higher Education IP (§ 23-4.3 and 23-4.4).

- Institutions of higher education are required to adopt, and will be governed by, their own IP policies, which are to be developed according to state guidelines developed by DPB (DPB has not done this yet).

- The Board of Visitors at state institutions of higher education are authorized to assign any interest they possess in intellectual property. Governor's approval required in certain instances.
- The Governor's prior written approval is required for transfers of such property developed wholly or predominately through the use of state general funds (DPB was required to define), exclusive of capital assets, and either
 - such property was developed by an employee of the institution acting within the scope of his assigned duties, or
 - such property is to be transferred to an entity other than the Innovation and Entrepreneurship Investment Authority, an entity whose purpose is to manage intellectual properties on behalf of nonprofit organizations, colleges and universities, or an entity whose purpose is to benefit the respective institutions.

The president of each institution is required to report annually to the Governor and the Joint Commission on Technology and Science regarding the assignment of any intellectual property interests by that institution.

FOIA (§2.2-3700 et seq.):

- Default: All public records shall be open to inspection and copying by any citizens of the Commonwealth.
- "Public records" means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.
- FOIA provides several exemptions to *specific public bodies* (e.g. Crime Commission) and exemptions for *specific types of public records* (e.g. legal advice, health records, educational records, trade secrets, etc.)

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Attribution Non-commercial No Derivatives: The most restrictive category allows attributed redistribution, but prohibits changes to the original work and commercial use.

Potential Outline

- I. General policy statement
 - a. Protect the Commonwealth's investment in its employees
 - b. Protect the taxpayers' investment in the Commonwealth
 - c. Promote innovation, education, and entrepreneurship among citizens both inside and outside the Commonwealth by eliminating real and perceived barriers to intellectual property developed by state agencies.
- II. Statement on who owns the IP
 - a. The Commonwealth owns the IP?
 - b. The Commonwealth and an employee share ownership?
 - i. How is ownership share calculated?
 - ii. Should ownership remain with the Commonwealth and employee only be given a license?
 - c. The employee owns the IP?
- III. Process/guideline for identifying what IP should be protected
 - a. Start with an employee determination threshold (based on time or money invested?)
 - i. significant value?
 - ii. potential commercial value?
 - b. If potential commercial value meets threshold, then employee reports to manager/agency head/IP office within specific cabinet.
 - c. If potential commercial value does not meet threshold, then employee does not seek patent protection (simple) or employee places Creative Commons license on work.
 - i. Which Creative Commons license?
 - ii. Should it be the same for all works or should it be agency level discretion?
 - d. If reported to manager/agency head/IP office, then create a new threshold. If IP meets new threshold, then manager/agency head/IP office reports to:
 - i. IP Board or Sect. of Admin
 - ii. Makes final determination as to whether IP should be protected and sends report to IP Board (Sect. of Admin) for final approval.
- IV. IP protection by the IP Board
 - a. IP board makes determination as to whether to protect IP with a copyright or patent.
 - b. IP should not be protected unless the Commonwealth is willing to enforce protection of the IP.

- c. IP Board would need the authority to license, sell, or otherwise transfer interest in the IP to private entities.

Potential Legislative Changes

§ 2.2-2822. Ownership and use of patents and copyrights developed by certain public employees; Creative Commons copyrights.

A. Patents, copyrights or materials that were potentially patentable or copyrightable developed by a state employee during working hours or within the scope of his employment or when using state-owned or state-controlled facilities shall be the property of the Commonwealth.

B. The Secretary of Administration, in consultation with the Secretary of Technology, shall establish policies, subject to the approval of the Governor, regarding the protection and release of patents and copyrights owned by the Commonwealth. Such policies shall include, at a minimum, the following:

Do we need to change the language from 'policy' to 'guideline'?

1. A policy granting state agencies the authority over the protection and release of patents and copyrights created by employees of the agency. Such policy shall authorize state agencies to release all potentially copyrightable materials under the Creative Commons or Open Source Initiative licensing system, as appropriate.

Do we need to format this as a 'guideline on how to use Creative Commons'?

2. A provision authorizing state agencies to seek patent protection only in those instances where the agency reasonably determines the patent has significant commercial value. The responsible state agency shall file with the Secretary a summary of the expected commercial value of the patent.

Do we need to format this as a 'guideline on how to determine if IP needs to be protected by full copyright or a patent'?

3. A procedure authorizing state agencies to determine whether to license or transfer to a state employee any interest in potentially patentable material developed by that employee during work hours, as well as to determine the terms of such license or transfer.

Do we need to format this as a 'guideline on how to determine an employee share in ownership or license of IP'?

4. A procedure authorizing state agencies to determine whether to license or transfer to a private entity any interest in potentially patentable material developed by that agency, as well as to determine the terms of such license or transfer.

- *Do we need to format this as a 'guideline on how to determine when to transfer IP to a private entity and the terms of the transfer'?*

C. Nothing in this section shall be construed to limit access to public records as provided in the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

D. This section shall not apply to employees of public institutions of higher education who shall be subject to the patent and copyright policies of the institution employing them.

- *Do we need to add a provision requiring all IP transfers to be routed through an IP Board or the Sect. of Administration for final approval?*
- *Do we want to require all agencies to report IP creation/transfer activity to Sect. of Administration or an IP Board?*

Some Remaining Questions:

- How do we decide who gets rights to IP in PPEA and private partnerships?
Follow university model?
- Can we place a default Creative Commons license on all public records and operate with exceptions, similar to FOIA model? Would we want to do this?