My name is Guy Rub. I am an associate professor at the College of Law, and my main field of expertise is intellectual property law, and, specifically, copyright law. I am also a member of the Intellectual Property, Patents, and Copyrights (IPPC) committee. I was appointed to this committee this academic year, probably as a reaction to the IP policy that this committee put forward last year, which many faculty members, myself included, found sloppy, imbalanced, and unfair.

This year, the committee decided to split the IP policy into two policies: a patent policy and a copyright policy. I would like to provide you some insights about these two policies:

**PATENT POLICY**

The Patent Policy was drafted at the end of 2015 and was finalized early in 2016. Minor revisions were made in the draft in recent weeks.

I believe this is a good and balanced policy. It protects the interests of inventors while allowing the university to reasonably commercialize their inventions. This policy reflects joint work by members of the IPPC committee and the university’s Technology Commercialization Office (TCO), which showed flexibility throughout this process and, what I feel, is a real desire to open a new page in the faculty-TCO relationship that will improve the scholarship work on campus and its commercialization. Matt McNair, in particular, deserves recognition for facilitating and participating in this process.

There are, however, two important issues that still require the attention of the faculty council and the senate.

The first concern is with faculty input. As most of you probably remember, last year the draft IP policy was circulated for all faculty members for comments. This process generated valuable comments that brought critical insight to IPPC. This year, the draft patent policy unfortunately did not yet go through a similar process. I do not know how many of you circulated this policy to your faculty, but as IPPC received almost no comments on the draft, I am concerned that most faculty members did not see this document. This is troubling. While I think that the patent policy is well-written, there might be issues with this policy that IPPC is unaware of. Other faculty members, especially those that regularly work with the TCO, might provide valuable input. Moreover, many members of IPPC, myself included, were worried that enacting this policy without faculty input will annoy many of our colleagues and will cause distrust, especially toward the university administration and the TCO. To be blunt, passing a semi-
secret patent policy does not seem to be the proper way to open a new (and improved) page in the faculty-TCO relationship. IPPC unanimously passed several resolutions, calling the Steering Committee to facilitate the circulation of the draft patent policy to the faculty for comments. It is unfortunate that no such email to the faculty was yet sent. I hope that every faculty member was nevertheless exposed to this policy and got a reasonable chance to comment on it. You should not vote to pass this policy before they do.

Second, I have real concerns about the process of approving this policy. Nobody seems to doubt that the board of trustees (“BoT”) will eventually need to vote on a draft policy and approve (or disapprove) it. However, how the BoT will get the draft policy and what draft it will get remain unclear and very troubling. Earlier in the process, some suggested that the senate has no authority to vote on this policy, which is obviously wrong. Recently, it has been suggested that once the senate approves the draft, it will then undergo a separate process, managed by OUCI, which will not be controlled by faculty members and might not even involve faculty feedback. And in this process, the draft might be revised and then presented to the BoT. If such a process is on the table, the faculty council and the senate should not agree to it, because the senate must not accept losing control over the draft policy that is presented to the BoT.

There is a lot to say about this issue and you are welcome to contact me (or Kristi Williams) with questions, but suffice to say that the senate has full authority to bring the policy before the board of trustees. Indeed, statements that you might have heard such as “the senate has authority only over rules and not over policies” (I’ve heard it from many, including important members of the senate) are simply wrong. The University Rules cannot be clearer. Rule 3335-5-41 states that “The university senate, subject to the authority of the board of trustees, shall have the power … to establish the educational and academic policies of the university.” When it comes to IP, a specific rule states a similar procedure. Rule 3335-13-06 states that “The provisions of the [IP] policy shall be subject to review by the faculty committee on patents and copyrights and recommended to the board of trustees by the university senate.” Note that the rules do not mention OUCI or any other entity but the senate. It is the senate that needs to recommend the new policy to the board of trustees. These rules are more than just a technicality. They protect our core principles of shared governance. While soliciting comments from the OUCI process is, in my mind, desirable, and while I don’t expect those comments to be significant, the senate must not approve or disapprove a patent policy unless it is in the final form to be presented to the board of trustees.

To conclude, some have asked me how I would vote on the patent policy if I were a senator. My answer is that if I was sure that (i) each faculty member received a reasonable opportunity to comment on the policy and (ii) the draft I am voting on is the final draft to be presented, if approved by the senate, to the board of trustees, I would vote for the patent policy. Otherwise, I would vote against it at this stage.
COPYRIGHT POLICY

I believe that the copyright policy in front of you is a messy early draft and that should not have left the committee. This policy was not yet finalized by the committee but it was rush before the end of the semester and it is now in front of you after a problematic process and a decision that I consider a mistake. As such, in some respects, I think that at this stage it is almost a waste of your time to delve into this poorly drafted and imbalanced policy.

It is important to note that while the draft patent policy was heavily discussed, revised, finalized, and approved unanimously within the IPPC committee, sending you this “policy” was not. The two faculty representatives that were appointed after last year’s debacle, Kristi Williams and I, strongly opposed its release.

The problems with this document are so numerous that I believe it is a waste on my time, and more importantly, yours, to go over them one by one. Let me just mention a few:

Who owns the articles you write? I think that everyone would agree that a faculty-author should own the article he or she writes. Nobody on the committee suggested otherwise in any of the meetings I’ve attended (although, I did hear people, outside of the committee meetings, questioning this tradition). But the draft policy might suggest otherwise. Section VI.B states that “In accord with academic tradition, except to the extent set forth in this policy, the university does not claim ownership to instructional, scholarly, or artistic works.” Scholarly is not defined (which might cause issues) but let’s reasonably assume that articles are scholarly works. But what does “except to the extent set forth in this policy” refer to? It is unclear. But it might refer to Section VI.A which reads “It is the policy of the university that all rights in copyright shall remain with the creator unless the work is [1] a work-for-hire … [2] is supported by a direct allocation of funds through the university for the pursuit of a specific project, [3] is commissioned by the university, [or] [4] is created through significant use of university resources.” Circumstances [2]-[4] are troubling because they are so vague. Do you know what “created through significant use of university resources” mean? Neither do I. Does using research assistants count? How about library resources? Labs? Circumstance #1, however, is significantly worse. It is quite possible that all of our work is created “for-hire.” If fact, this is the position of the OSU legal. Therefore, if the copyright policy provides that copyright “shall remain with the creator unless the work is a work-for-hire,” and if an article I wrote was “work-for-hire” maybe the university does not think it should “remain with the creator.”

I don’t believe that the majority of the committee believes in this, but the policy they sent you seems to say so. Why? Ask them. My guess is that this is because it is an initial messy draft that should not have been shared with others at this stage. By the way, the university’s current IP policy is clearer in stating that faculty members own their articles and other scholarly work.
**Licensing of instructional work**: Review Section VI.C. This section reads: “[c]reators of instructional works hereby grant the university the right to use the instructional works and to make and use derivative works thereof in university’s internally administered programs of teaching, research, and public service on a perpetual, royalty-free, non-exclusive basis.”

No similar license is included in the current IP policy. There are quite a few issues with this provision. For example, let’s assume that you take your detailed class notes that you have prepared and improved over a few years and decide to edit them and publish them as a textbook. Is this “instructional works”? Probably. The term is not defined (problematic drafting, right?). If the textbook is instructional work, the university now has a perpetual, royalty-free license over it. It can make copies of it and give it to students. In fact, it can even sell it to students. It can make changes in your book. You granted them the license. It doesn’t end here: I’m not sure you can even publish the book. Most commercial publishers require you to grant them an exclusive license. However, once you grant a perpetual license to the university, you can’t give anyone else, including any publisher, an exclusive license. That makes sense: the publisher wants to sell the book to students, including OSU students. It doesn’t want to allow the university to make copies of it, to revise it, and so on.

**Who receives royalties?** Review Section VII.A.: “Royalty income … will normally be distributed in accordance Section VII of the university’s Patent Policy except that a creator of the applicable copyrightable work (including employee-creators of works for hire) shall be treated as a creator under the Patent Policy for the purposes of proceeds distributions made thereunder.”

That’s a mouthful. It also has at least two obvious problems. First, what does “normally” mean? Who determines if the royalty income is normal or not? Based on what? Shouldn’t the policy provide a clearer language when it comes to our rights to receive payment for our work?

Then consider who the “creator of the applicable copyrightable work” is. The patent policy defines “Creator” very carefully. The copyright policy, for some reason, does not. Does that mean that a research assistant can be considered “a creator”? How about a secretary that proofread a book? How about an editor? Or a commentator? The answer to all those questions is “possibly.” This is a known issue in IP law that can result in litigation and therefore the policy should carefully address it. It doesn’t.

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I can go on and on. Each one of you, whether a lawyer or not, can probably carefully read the document and find a few more drafting issues with it.

In my mind, this is not a serious document. It is an early draft. It includes quite a few imbalanced and unfair provisions that the faculty should never accept, such as the perpetual license, and the faculty council and the senate should be clear about it. But otherwise, I seriously doubt whether this draft is worth your time and annoyance.

I hope you clearly, overwhelmingly, and loudly reject it.
I thank you for considering those comments. Feel free to distribute them as you so desire. If you would like to discuss them further, please do not hesitate to contract me directly. I am available by email (rub.1) or phone (688-5819).