# ISSUES IN KWANTLEN'S DRAFT INTELLECTUAL PROPERTY POLICY

1. The proposed **Intellectual Property** Policy is premised upon University Act, s.27(2)(v), but this Section **does not mention Intellectual Property**. Rather, s.27(2)(v) deals with the following:

   > "The management, administration and control of the **property**, revenue, business and affairs of the university," and allows the board to "acquire and deal with an an invention or any interest in it, or a licence to make, use or sell the product of an invention, and a patent, copyright, trade mark, trade name or other **proprietary right**."

2. The Policy confuses **Intellectual Property** with **general property** and proprietary rights of the Board.
3. The IP Policy Context Document's claim that "The University Act requires that IP is vested in the Board" is the false premise upon which the IP Policy and Procedure are based. The Act **does not** mention Intellectual Property.
4. The IP Policy Context Document's claim that "KPU currently lacks any policy with regard to IP that is either generated or shared" is inaccurate. Specifically, Kwantlen does have a policy on Intellectual Property that has been jointly agreed to by KPU and the KFA—Article 18.02 of the Collective Agreement: 18.02 Copyright And Intellectual Property.
5. Where possible, KPU policy must be harmonized with the collective agreement. If the proposed policy is not, then specific justification must be provided as part of the policy review.
6. It's unclear why a policy dealing with administration of property and the commercialization of proprietary rights have the administrative responsibility assigned to the Executive Director, Office of Research and Scholarship, when these matters seem to be related to Finance.
7. The proposed policy conflates two separate issues: protecting Intellectual Property and commercializing patents, inventions and trademarks. These should be separate policies.
8. The Context And Purpose section of the IP Policy states that it "exists to define and clarify ownership of intellectual property rights." It does not do so; rather, it generates confusion because it is in direct conflict with Article 18.02 of the Collective Agreement.
9. Since the Policy purports to "provide for the equitable distribution of benefits [through a revenue sharing algorithm] derived from intellectual property" between Kwantlen faculty and the Board, this falls directly into the purview of collective bargaining as do any algorithms pertaining to faculty revenue. More specifically, the University Act does not obligate the Board to deal with Intellectual Property but does give them the ability to negotiate that into a collective agreement.
10. In addition to being founded upon the false premise that "The University Act requires that IP is vested in the Board," the proposed IP Policy is a tautological *tour de force*, wrapped in false syllogisms, viz.
    a. The IP policy applies to all Kwantlen faculty, staff and students who create IP.
    b. **IP** is very comprehensively defined as anything created by Kwantlen employees, staff and students.
    c. "**IP Creator(s)**" means the Kwantlen Faculty, Kwantlen Students and/or Kwantlen Staff who individually or collectively created, developed, discovered or invented any IP. Most egregiously, **Curriculum Materials** are defined as **IP**.
    d. **Kwantlen IP** is defined as "all IP created, developed, discovered or invented" by **Kwantlen IP Creators.**

11. Ergo, based upon #9 above, the Policy concludes that "Subject only to the exceptions set out in Points #2 and #3 below, Kwantlen will be the sole owner of all Kwantlen IP." That is, Kwantlen owns everything created at Kwantlen by Kwantlen students, staff or faculty.
12. Ironically, while the proposed abrogates the IP protections and rights in the CA, it does, quite explicitly protect the IP rights of Kwantlen affiliate employees who work primarily for someone else.
13. The proposed Policy and Procedures are too broad in scope and inconsistent with other institutions. Although it appears that certain sections of this Draft IP Policy have liberally borrowed from SFU's Intellectual Property Policy, it is worthy of note to highlight the following key difference between SFU's IP Policy and Kwantlen's IP Policy:
    a. SFU's IP policy states that "Although the University has the right to require assignment of an interest in IP created by a University Member through the use of its resources, **the full ownership of IP and all rights pertaining to ownership are vested in the Creator**, unless the Creator has entered into an agreement with the University to the contrary. The following exceptions apply:" (See Appendix A)
    b. SFU's IP policy states that "The University specifically acknowledges that the substance of a lecture, whether delivered in the classroom or via other means, **belongs to the Creator**…" (See Appendix A)
    c. SFU's IP policy states that "The University specifically acknowledges **that IP** created in the form of a textbook, instructional website, or **other instructional material developed as part of the normal course teaching activities of a faculty member is owned by the Creator."** …" (See Appendix A)
    d. SFU's IP Policy states that the IP Creator may voluntarily assign or transfer any interest in the IP to the University." (See Appendix A)
14. In other words,
    a. **SFU's IP Policy** has the IP Creator owning the IP as its default position, with the Universities' rights to IP being negotiated on an exception basis,
    b. **Kwantlen's IP Policy** has the University owning the IP rights as the default position, with its IP Creators' rights narrowly defined on an exception basis.
15. In its statement of Statement Of Policy Principles, Kwantlen's IP Policy states that it purports "To provide an incentive for intellectual development and innovation by University Members." Rather than provide an incentive, this policy will cast an "innovation chill" at Kwantlen because faculty will perceive this to be a bad-faith "ownership grab" by Kwantlen.
16. Further to the point above, a policy that vests the ownership of all creative output at Kwantlen with the Board is not only fundamentally an attack on the rights and benefits of faculty as bargained in Article 18.02 of the Collective agreement, but also an attack on academic freedom. The Policy requires faculty to consult with the Employer prior to the publication or dissemination of IP so that the Employer can determine if there are commercialization protection issues. "Publication of IP may make it impossible to seek patent protection, and therefore any IP Creator proposing to make any Publication of Kwantlen IP must therefore first disclose such Kwantlen IP to Kwantlen."
17. While this may be reasonable in some (rare at Kwantlen) cases, this onerous requirement becomes an attack on academic freedom simply because the proposed definition of IP is so broad in scope.
18. Instead of diminishing the intellectual property rights of faculty members, our new university status demands a policy that goes in the opposite direction.
19. In conclusion, the proposed Intellectual Policy should not proceed to the next level of approval. It needs to be re-conceptualized in its entirety, harmonized with the current Collective Agreement and past

practices of Kwantlen, synchronized with IP Policies and Procedures of other Canadian post-secondary institutions that vest ownership of creative output with the IP creators, while make appropriate allowances for the institution to share in revenue that arises out of commercial ventures such as patents and inventions.

## APPENDIX A: SFU's POLICY ON INTELLECTUAL PROPERTY

**Ownership**

**5.1** Although the University has the right to require assignment of an interest in IP created by a University Member through the use of its resources, the full ownership of IP and all rights pertaining to ownership are vested in the Creator, unless the Creator has entered into an agreement with the University to the contrary. The following exceptions apply:

**5.1.1** The University owns IP resulting from work specifically requested of a University Member by the University pursuant to a written contract of employment. This includes information brochures, commissioned studies or descriptive handbooks, whose production has been initiated at the request of the University.

**5.1.2** The University owns IP resulting from the performance of a written contract for service, agreement or commission in which the University and the Creator have agreed to the University's ownership. This may include products prepared for distance education and/or continuing education courses and purchased outright by the University; and other types of teaching or research-related materials, production of which is initiated at the request of the University. The Creator of products prepared for distance education and/or continuing education courses may request the consent of the University to use agreed extracts from the written or recorded materials for other purposes, including the preparation of textbooks. Ownership of the resultant products shall be determined by negotiation between the University and the Creator.

**5.1.3** The University or a sponsoring agency may own the rights to IP developed in the course of sponsored research pursuant to a written contract.

5.2 The University specifically acknowledges that the substance of a lecture, whether delivered in the classroom or via other means, belongs to the Creator (in this case the lecturer) and that records of such lectures do not constitute IP under the terms of this Policy. The University will distribute records of such material to University Library cardholders only with the permission of their Creator.

**5.3** The University specifically acknowledges that IP created in the form of a textbook, instructional website, or other instructional material developed as part of the normal course teaching activities of a faculty member is owned by the Creator.

**5.4** The University specifically acknowledges that IP created exclusively by a student Creator in the course of completing the requirements for an academic degree or certificate is owned by the student Creator, to the extent that the IP comprises part of the requirements for the degree or certificate. In order to qualify under this paragraph, the student and the supervising faculty member must agree in writing that the student is the sole inventor or author, as the case may be, pursuant to the relevant IP law. Consistent with SFU Graduate Regulations, nothing in this Policy shall preclude a graduate student from publishing his/her thesis in any form at any time.

**5.5** The Creator of IP may voluntarily assign or transfer any interest in the IP to the University. The University, at its discretion, may accept such assignment or transfer and thereafter may transfer or license its ownership or interest to others, including the Creator.

**5.6** The Creator of IP may assign or transfer his/her interest in the IP to the public domain or transfer that interest to another entity.

http://www.sfu.ca/policies/research/r30-03.htm

**APPENDIX B: MATERIAL PROVIDED BY JIM TURK**

The issue in regard to who owns IP and whether it can be negotiated in BC universities is covered on page 88 of *Re: Dr. Mary Bryson and Master of Educational Technology) v. The University of British Columbia, Feb. 18, 2004 (Dorsey, Q.C.)* where the arbitrator (James Dorsey ) wrote:

"In the university employment context, because of the importance of the expression of ideas to academic freedom and the presumptive first ownership of copyright in faculty, issues related to copyright are part of the core of the relationship between employer and employee. They are part of the conditions of employment. I conclude that the scope of the union's exclusive bargaining authority includes the right to negotiate about matters related to the copyright ownership of bargaining unit employees in works made in the course of their employment."

"Faculty members are expected to engage in scholarly activity and to produce and disseminate their scholarly work. Because of this expectation and to protect the unfettered pursuit of knowledge that is necessary for scholarship, it is accepted, in the context of employment at a university, that academic authors have copyright ownership of their writings, unless they agree to assign the copyright to the university, a publisher or someone else. This can be characterized as the academic or teacher exception to the presumption of first ownership of copyright in the employer or it may be treated as an implied agreement to the contrary based on custom, tradition, practice or a common and shared understanding. Whether grounded in an exception or implied agreement, academic authors are the first owners of the copyright of their work. (See the review and analysis in Dolmage v. Erskine [2003] OJ No. 161 (Ontario Superior Court of Justice - Small Claims Court)).

The only item I would add is that the arbitration decision has been confirmed by the British Columbia Labour Relations Board, following an application for review filed by the University [BCLRB No.B56/2006], 2006 CanLII 6155., in a very detailed decision confirming the arbitrator's reasoning.