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PFF COUNTERPROPOSAL #1- 9/13/19
ARTICLE 25- INTELLECTUAL PROPERTY

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25.1 Purpose

The District and the PFF have a mutual interest in establishing an environment that fosters and encourages the creativity of individual faculty members. In accordance with that mutual goal, the purpose of this Article is to identify the owners of the copyrights to certain works that may be created by faculty members, and to identify the uses that may be made of those works by faculty members and the District. None of the language in this Article applies to works wholly created by faculty members on their own time, outside of their assigned work schedule, without any use of District equipment and/or resources and intended for non-District use.

25.2 Definitions

25.2.1 "Works" means any material that is eligible for copyright protection including (but not limited to) books, articles, dramatic and musical compositions, poetry, instructional materials (e.g., class notes recorded by students, syllabi, lectures, student exercises, multimedia programs, and tests), fictional and non-fictional narratives, analyses (e.g., scientific, logical, opinion or criticism), works of art and design, photographs, films, video and audio recordings, computer software, architectural and engineering drawings, and choreography.

25.2.2 "License" means permission to use a work. A "non-exclusive license" is one that gives permission to use a work while that same work may also be used by the party who gave the permission and by others to whom permission is also given. For any course offered by the PCCD, the official course outline of record (COR), as defined and approved by the Board of Trustees in accordance with Title 5, Sections 55000, 55001, 55002, and 55100, constitutes the Course and is owned by the District.

25.3 Works Covered

25.3.1 Types of works whose ownership and use are covered by this Article

This Article identifies the copyright ownership of works created by faculty members in connection with the courses they teach, or other duties they perform as faculty members, while they are employed by the District and in connection with their employment; and it addresses the use of those works by faculty members and the District.

25.3.2 Types of works not covered by this Article, and consequences of not being covered

This Article does not cover all works created by faculty members, even if those works are in some sense related to their duties. For example, it does not cover works created primarily for purposes that are separate from a faculty member's teaching or other duties as a faculty member (works not made for hire), such as: novels, even if written by faculty members who teach literature; business books, even if written by faculty members who teach business; art

works, even if created by faculty members who teach art; or music, even if composed by faculty members who teach music. Also, this Article does not cover works created by faculty members for their own personal use that are not intended to be distributed to others, even if created in connection with their duties, such as a faculty member's personal lecture notes. The copyrights to works that are not covered by this Article shall not be owned by the District under paragraph 25.4.2.1 below, and the District is not authorized to use such works under paragraph 25.5.1.2 below.

25.4 Copyright Ownership

25.4.1 Ownership by Faculty Members

25.4.1.1 The copyrights to works created by faculty members will be owned by them, even if those works (e.g., class notes recorded by students, syllabi, lectures, student exercises, multimedia programs, and tests) are created in connection with courses they teach, or other duties they perform as faculty members, while they are employed by the District and in connection with their employment (this includes works created by faculty members while on sabbatical leave from the District), unless the work is created under the circumstances described in paragraph 25.4.2.1 below.

25.4.1.2 In cases where RFP's and grants from outside agencies stipulate in the proposal or formal agreements with the district or college that materials developed as part of the project either remain the property of the outside agency or are to be shared or accessible outside of the district in some way, faculty who receive significant financial support to develop materials as part of the project will be advised before any materials development on their part takes place of this potential loss of ownership and/or future control of any materials developed under the auspices of said grant.

25.4.2 Ownership by District

The District will own the copyright to works created under the following circumstances:

25.4.2.1 Circumstances relating to substantial support by the District

The District will own the copyright to any work created with substantial support from the District. As used in this Article, "substantial support" means financial support over and above the cost of the faculty member's normal compensation, office space, office computer, local telephone use, library use, laboratory use, minimal office supplies and copy services. Substantial support would include extra compensation or the provision of reassigned time to create a work, the cost of providing secretarial, technical, legal or creative services specifically for the creation of a work, as well as the cost or value of the use of expensive District equipment or facilities (such as professional film or recording studios). Grant funds obtained by faculty members for the creation of works shall not be considered substantial support provided by the District. Payment for the development of a course ends after the initial offering of the course

unless mutually agreed between the District and faculty. Additional work beyond the scope and time frame of a grant which enhanced a course developed under work for hire would not be considered to be part of the original work for hire and would remain the work of the faculty member.

25.4.2.2 Circumstances relating to the nature of the work

The District will also own the copyright to any work, such as a course outline, administrative policy, or information brochure that is formally reviewed by the District and becomes part of its curriculum, policies, or administrative or promotional literature. Ownership of a copyright does not preclude updating and/or revising the course. It is understood by the parties that courses are naturally dynamic.

25.4.3 Faculty Member's Option to Acquire Copyright

If the District is to be the owner of the copyright to a work because it provided substantial support for its creation, the faculty member who created the work shall have an option to acquire the work's copyright by paying the District an amount of money that shall be agreed upon in writing by the faculty member and the District at the time the District provides (or agrees to provide) that support, with the approval of the PFF. To exercise this option, the faculty member shall pay the District the agreed-upon amount; and the District shall immediately assign the work's copyright to the faculty member.

25.4.4 Process for Documenting District Ownership and Faculty Member's Option

25.4.4.1 If the District is to be the owner of the copyright to a work, the faculty member and the District should sign an agreement that contains the following clauses: "Faculty member and District agree that the work identified below shall be a work made for hire whose copyright shall be owned by the District. If the work is not a 'work made for hire' as a matter of copyright law, then faculty member hereby assigns his or her copyright in the work to the District. "The work to which this agreement pertains is one that will be created by faculty member with substantial support from the District, or is a work that will be formally reviewed by the District and will become part of its curriculum, policies, or administrative or promotional literature. The work is titled or described as follows: _____."

25.4.4.2 If such an agreement has not been signed, the absence of a signed agreement means the faculty member is the copyright owner rather than the District, unless the District proves in arbitration (as provided in 26.8 below) that it did provide substantial support for the work or that the work became part of its curriculum, policies, or administrative or promotional literature.

25.4.4.3 If the District is to be the owner of the copyright to a work because it contributed substantial support, the agreement signed by the faculty member and District also should contain the following clause: "To exercise his or her option to acquire the copyright to the work identified above, the faculty member shall pay the District the sum of \$ _____."

25.4.4.4 The amount to be paid by the faculty member to exercise his or her option to acquire a work's copyright may be adjusted from time to time, if for example the amount of the District's support increases (or decreases), but only if the faculty member and District both sign a new clause containing the agreed-upon adjusted amount.

25.4.4.5 PFF shall approve any such agreements reached as described above.

25.5 Permitted Uses

25.5.1 Use of Work when Copyright is Owned by Faculty Member

25.5.1.1 Uses by faculty member

The District acknowledges that faculty members may use works whose copyrights they own in any and all ways they may wish, including, for example, authorizing the for-profit publication of such works in return for royalties paid solely to faculty members, subject only to the District's non-exclusive license to use those works (set forth in paragraph 25.5.1.2 below), without any further authorization from the District.

25.5.1.2 Uses by District

It is the policy of the District to protect and not to infringe on the copyrights of others within or without the District community. Use of copyrighted works without permission of the owner may subject the user and the District to liability from an infringement action or other possible causes of action. Accordingly, administration, faculty, staff, and students are required to restrict their use of copyrighted materials within the confines of District policies, District guidelines, applicable statutes, and relevant court decisions.

The rights of copyright owners are not exclusive; permission is not necessary for every use. Exceptions to the exclusive rights of copyright owners are numerous and, among others, include: "Fair Use" of copyrighted works; limited copying of computer programs; certain "Library Exemptions"; application of the "First Sale Doctrine" which allows one who buys a copyrighted work to display and resell it. This doctrine does not apply to sound recordings, computer programs, or distribution through a computer network or learning management system. Works that are covered under Creative Commons licenses also do not require permission to be used.

The District recognizes the importance of the use of copyrighted materials in fulfilling its educational mission. It is therefore the policy of the District to encourage proper use of copyrighted materials either through acquiring the permission of the copyright owner or under one of the legitimate exceptions outlined in the preceding paragraph. The District may do these things, but the District may not authorize others to do them, unless the District first obtains the written consent of the faculty member who owns the work's copyright.

25.5.2 Use of Work when Copyright is Owned by District

26.5.2.1 Uses by District

Faculty members acknowledge that the District may use works whose copyrights the District owns in any and all ways it may wish, including, for example, authorizing the for-profit publication of such works in return for royalties paid solely to the District, subject only to the non-exclusive license of the faculty member who created the work to use it (in the manner set forth in paragraph 25.5.2.2 below), without any further authorization from the faculty members who created those works.

25.5.2.2 Uses by faculty member

Faculty members shall have a non-exclusive license to use works they created, whose copyrights are owned by the District, only within their scope of employment with the District in the following ways: (1) to reproduce such works (for example, by photocopying them, by duplicating computer disks or drives on which they have been saved, or by installing them on computer networks); (2) to distribute such works (for example, to students in classes); (3) to perform such works (for example, in classroom teaching, by webcasting, or by broadcasting); (4) to display such works (for example, over the web); and (5) to create derivative works (for example, companion materials or updated versions).

Faculty members may do these things themselves, but may not authorize them to be done by others, unless they first obtain the written consent of the District.

25.5.3 Use of Names of Faculty Members, District and Colleges

25.5.3.1 District's use of faculty member's name

The District agrees that when it uses a work created by a faculty member (regardless of who owns the work's copyright), the District will identify the faculty member who created the work, for as long as the work continues to be used by the District.

If for any reason the District does not wish to identify the faculty member, the District may ask the faculty member for authorization not to do so; and the faculty member has the option but not the obligation to release the District from this obligation.

If for any reason the faculty member does not wish for his or her name to be used in this manner, the faculty member has the right to require the District not to identify him or her; and in such a case, the District agrees not to do so, or to stop doing so as soon as reasonably possible.

If the District fails to identify a faculty member under circumstances when it should have, or identifies a faculty member under circumstances when it should not have, the

faculty member shall be entitled only to a reasonable remedy that takes into account the seriousness of the violation, as determined through negotiations between the District and the PFF, and will not automatically be entitled in all cases to a remedy that requires the District to recall and destroy all existing copies of works that fail to include or omit the faculty member's identification.

25.5.3.2 Faculty member's use of name of District or College

Faculty members agree that when they use works they have created (regardless of who owns the works' copyrights), those works will identify their creators' relationships with the District or College, for as long as they continue to be employed by the District. (For example, if a faculty member creates an online course that identifies the faculty member as its author, the faculty member's name shall be followed by the name of the College at which the faculty member teaches.)

If for any reason a faculty member does not wish to identify his or her relationship with the District or College, the faculty member may ask the District for authorization not to do so; and the District has the option but not the obligation to release the faculty member from this obligation.

If for any reason the District does not wish its name or the College's name to be used in this manner, the District has the right to require the faculty member not to identify his or her relationship with the District; and in such a case, the faculty member agrees not to do so, or to stop doing so as soon as reasonably possible.

If the faculty member fails to identify the District or College under circumstances when he or she should have, or identifies the District or College under circumstances when he or she should not have, the District shall be entitled only to a reasonable remedy that takes into account the seriousness of the violation, as determined through negotiations between PFF and the District, and will not automatically be entitled in all cases to a remedy that requires the faculty member to recall and destroy all existing copies of works that fail to include or omit the District's or College's identification.

25.6 Responsibilities

25.6.1 Registration of copyright

It shall be the responsibility of the party who owns the copyright to each work to register that copyright with the United States Copyright Office, if the owner so chooses.

25.6.2 Acquiring and paying for necessary rights from third parties

If the creation or use of a work requires rights to be acquired from third parties, such rights shall be acquired and paid for by the party (i.e., the faculty member or the District) who owns the copyright to that work. Faculty members acknowledge that in some cases, the cost of acquiring

necessary rights from third parties, if paid by the District, may itself constitute "substantial support" from the District, so the District would become the owner of the copyright to such works simply because it paid to acquire those rights.

25.6.3 Determining and documenting copyright ownership when two or more faculty members create and own the copyright to a work

If a work whose copyright would be owned by a faculty member (rather than by the District) is created by two or more faculty members, it is the responsibility of those faculty members to determine the manner in which they share ownership of the copyright to that work, and it is their responsibility to prepare (or have prepared at their own expense) a written agreement between them documenting their determination. No grievance against the District may be asserted by faculty members arising out of any consequences of their failure to make or document an agreement concerning the manner in which they share ownership of the copyright to such a work.

25.7 Authorization of individual agreements the terms of which differ from those described above. Faculty members and the District may, if they wish, enter into individual agreements with one another concerning copyright ownership and usage rights to specific works, the terms of which differ from those set forth above. The terms of any such individual agreement will supersede the terms of this Article, once such an agreement is signed by the faculty member and an authorized representative of the District. Any such agreement will be approved by the PFF.

25.8 Dispute resolution. Disputes between faculty members and the District concerning this Article shall be resolved pursuant to the grievance procedures contained in Article 14, except that an arbitrator who is expert in copyright law shall be chosen by the parties, or, if the parties are unable to agree on an arbitrator, chosen in accordance with the commercial arbitration rules of the American Arbitration Association.

