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Chapter: Fiscal and Administrative Affairs

Modification No. 001

Subject: **Intellectual Property**

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- I. Montgomery College fosters and supports a College environment that encourages creativity and development of new intellectual works in their various forms by its faculty and staff. In appropriate cases, with early disclosure of the effort, the College will recognize ownership in the creator(s) of the work with a right of the College to use the work for its educational mission and the development of its employees, and to participate in an appropriate royalty share in external marketing of the work by its creator(s). However, with respect to intellectual works that are created at the direction of the College to support administrative/non-instructional functions and other works specifically designated by the College, the College will generally retain ownership and rights to the work, subject to specific written agreements to the contrary.
- II. The president is authorized to establish procedures necessary to implement this policy.

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Board Approval: October 15, 2001.

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I. Preamble

Montgomery College (hereinafter “the College”) encourages its faculty and staff members to create and participate in the development, presentation and delivery of new intellectual works, including works of art, performance, literature, and technology, and associated technology-based instruction processes and creation of software products related to instruction and the mission of the College. By encouraging creativity and entrepreneurial activities by faculty and staff, the College will attract and retain talented professionals who will serve and instruct our students and community with innovative instruction, creative ideas, quality artistry and cutting edge technology delivery. The College also supports and encourages open and full collaboration among faculty and staff to produce higher quality outcomes and teamwork in a mutually satisfying environment. In certain cases, when public resources at the College combine with work and effort of faculty and staff to produce an economically successful intellectual property work for the marketplace outside of the College, it is desirable that faculty and staff who develop the work be permitted to own and market the work and realize a majority of financial returns from the work while accepting the risks and expenses associated with such marketing. However, in certain cases, a specified share of the net proceeds should be returned to the College at a certain level of financial success in order to recognize the role of public support for the effort and to further support the future development efforts of the College as an institution of learning. In all cases, it is appropriate that the College have the right, by perpetual, fully paid, non-exclusive license, to appropriate use or display of the work for its internal instruction and education purposes, as well as permit appropriate use or display by faculty and staff to instruct and to further develop and create new or additional applications for internal use.

II. Purpose and Scope

The purpose of Board Policy is to foster the creation and dissemination of knowledge while defining individual and institutional ownership and use rights and the distribution of revenues and other benefits that accrue from the creation and commercialization of intellectual property. This policy also confirms the non-competition obligations of faculty and staff in the use, display or sale of intellectual property works subject to this policy.

III. Definitions

For purposes of these procedures, the following definitions shall apply:

**Copyright/Copyrightable Work** - The Copyright Law of the United States protects original works of authorship that are fixed in any tangible medium of expression. Originality, in the context of copyright law, this means simply that the work has not been copied, i.e., it is an independent creation. A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

Under U.S. law, software is generally protected under copyright law, though in some cases software may be the subject of patent protection. For the purposes of this Policy, software used to disseminate knowledge, (e.g. course notes created in and/or distributed through CD-ROM technology) is copyrightable. To the extent that such software is

subject to patent protection, Board policy applies to such software as well.

**Courseware** - The set of tools and technologies used to present course content, independent of the content itself.

**Course Content** - The intellectual content of the course, as taught at or through the College.

**Exempted or Traditional Scholarly Work** - A scholarly work that falls within certain categories of copyrightable works for which academic institutions have historically waived any ownership interest in favor of the author or work that the College otherwise determines is appropriate to exempt from the requirements of Board policy under these procedures. The College will recognize the following as categories of exempted or traditional scholarly works: all forms of tangible art, including but not limited to paintings, sculpture, apparel and jewelry (not including software graphics or design elements), textbooks, class notes, original written handouts created by faculty, written syllabi created by faculty, research proposals, in-person classroom presentation and instruction (separate and apart from software that may be used in such presentation), scholarly articles, scholarly monographs, dramatic works and performances (but not including videotapes, movies and other multimedia presentations not performed in a live setting) poetry, and popular fiction and nonfiction. As new types of works become established as scholarly works, the College may choose to expand this list beyond these historically established categories.

**Institutional works.** Institutional works are certain works produced as a collaborative effort under the supervision of a department of the College. Institutional works include, for example, works created in a project initiated and directed by a department, or works that are created and then developed and improved over time by a series of individuals, where authorship cannot be attributed to any one individual or group of individuals. Examples of the latter would be certain kinds of software or certain administrative forms that are developed and then improved and updated over time by multiple creators. Ordinarily, institutional works shall also include works that are created at the direction the College to support administrative/non-instructional functions, subject to specific written agreements to the contrary.

**Patent** - Patent is the bundle of rights protected by intellectual property law that protects inventions or discoveries which constitute any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof. Board policy and this procedure applies to intellectual property subject to patent protection.

**Software** - Software is a general term for the various kinds of programs used to operate computers and related devices. Software is often packaged on CD-ROM and diskettes or downloaded over the Internet. Software in this procedure shall include related materials and documentation associated with the software.

**Work for Hire** - Copyright ownership initially vests in the creator of the work. The only exception to this rule is where the work is a work for hire. "Work for hire" generally refers to a work that is prepared by a Staff or Administrative employee within the scope of his or her employment.

Certain specially ordered or commissioned works can also be considered works for hire, but only if they fall into certain categories of works that are enumerated in the Copyright

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Act and there is a written agreement between the creator and the party commissioning the work that the work will be considered a work for hire. "Work for hire" status means that the employer is considered the author of the work under the Copyright Act, unless there is a written agreement to the contrary that is signed by both parties. Works subject to faculty ownership under this procedure and "exempted or traditional scholarly works" are not treated as works for hire under these procedures unless there is a specific written agreement with the College specifying otherwise.

**Works** – Intellectual property as defined or recognized by law and custom created or developed through the application of intellectual efforts by one or more persons.

IV. Ownership of Intellectual Property

- A. **Title.** The College recognizes ownership and title of works in faculty and staff creating and developing such works, subject to use and other rights provided in Board policy and these procedures and subject to exceptions for "work for hire," institutional works and works developed without disclosure as required by this policy.
- B. **Exempted or Traditional Scholarly Work.** The College continues to recognize ownership in the creator of works defined as "exempted or traditional scholarly work" without modification as a result of these procedures. These works need not be disclosed pursuant to Board policy and these procedures.
- C. **Work for Hire.** Although ownership is presumed to vest in the creator of the work, in certain instances where work is performed by Staff or Administrative employees within the scope of employment or by third party contractors pursuant to a written agreement, ownership may vest in the College. For purposes of ownership of works for hire not otherwise exempted under this policy, it is presumed that ownership vests in the College, unless there is a specific written agreement regarding the creation of the work and that agreement specifically vests title or ownership in someone other than the College. In the case of non-employee third parties with which the College is contracting for services related to creation or development of the work, it is the general policy of the College (subject to exception approved by the President or the designee of the President) to enter into written "works for hire" agreements in which the College will obtain or retain ownership rights in the work as part of the agreement for work or services. Where the College owns the copyright in a work, it will acknowledge creators (including creators of works for hire) who have made a substantial creative contribution to the work, if the creators so request.
- D. **Institutional Works.** The College generally owns institutional works. Accordingly, software and related documentation as well as other works created by employees at the direction of the College for College administrative support purposes, such as documents for administrative use and computer software created by non-faculty staff employee programmers of the College for use by the College are generally considered works for hire. However, in the sole discretion of the College, the College may execute an agreement with employees to memorialize ownership in the employee creating such works. Staff employees may be directed to develop works, including software for use by the College, and may be further directed, at the sole discretion to the College, to execute a work for hire agreement recognizing ownership in the College.

- E. **Pre-Existing Works.** Works developed and pre-existing at the time of employment or other relationship with the College are exempt from this Policy, provided that written disclosure describing the work is made to the College within 30 days of employment or the effective date of this procedure (whichever is later), and so long as no further derivative modifications are made by the creator during the term of employment or other relationship with the College.
- F. **Special Exemption Works.** An employee may apply in writing to the College for a Special Exemption from the Policy for works created during employment with the College where such works are clearly distinct from the education mission of the College and are outside of the scope of employment of the employee (e.g., creation of a new fishing lure by a member of the math faculty during employment with the College). An IP Review Panel designated as provided in Paragraph IX below shall review the application for exemption and make recommendation to the President of the College (or designee) who shall have the final authority to grant the special exemption for the described work.
- V. License for College Use (Including Display) of Intellectual Property.
- A. **License of Intellectual Property.** All works created or developed by College faculty or staff shall be subject to an irrevocable royalty-free, fully paid nonexclusive right of the College to use or display the works for internal College purposes. This right of use shall include the right to use all associated materials and documentation (such as syllabus and material given to students), as well as the right to modify and amend, including to develop derivative uses, for College purposes. This license to the College is perpetual and does not include a right to market or sell for commercial purposes. Upon request of the College, the faculty or staff owners of the work will execute agreements that memorialize this license in favor of the College.
- B. **Use of Intellectual Property.** The College and its faculty, students and staff may use the work for internal, non-commercial educational or support purposes, and such use may include display of the work, utilization of the work in modified forms to create derivative works or compilations, or use in other contexts than originally contemplated by creators of the work. This use of the work shall include the right to make copies for use in scholarship, teaching and research.
- VI. Obligations of Faculty and Staff
- A. **Disclosure and Coordination.** In order to promote advance planning and collaboration for the most effective use of the work by the College, to avoid legal issues and conflicts that can arise, and in order to effectively coordinate use of College resources to support the creation and development of the work, disclosure of intention to create, or the creation of, a work to the College must be made as soon as possible. Ordinarily, this period of time shall be within one hundred and twenty (120) days of the effective date of this Procedure and its distribution to all persons through the College's e-mail system to persons on the "MC Communications mailbox" (subject to further extension on a case by case basis upon good cause shown as determined in the sole discretion of the IP Review Panel created hereunder) or within sixty (60) days of the initiation of the work, whichever is later. An important obligation of faculty and staff who desire to create the work is such early disclosure of their creative activities to their respective Dean or administrative supervisor. This disclosure must be in writing

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and identify the goals and proposed applications for the work and identify resources of the College that could be used to facilitate the creation of the work.

- B. **Required Permissions.** It is the responsibility of the faculty or staff members who are creating the work to ensure that the work does not use or infringe upon intellectual property owned by others. If the work does include such intellectual property, the creator is responsible for obtaining all necessary licenses, releases and permissions for use of the intellectual property in the work. The College may require assurance that the work does not infringe upon the intellectual rights of others.
- C. **Conflicts of Commitment; Conflicts of interest.** Independent of ownership, and subject to any policies of the College regarding conflict of interest or conflict of commitment, a member of the faculty or staff may create works at or for other academic institutions only with permission of the President or the President's designee, and generally then only as part of ordinary scholarly exchanges, including visiting Instructorships and guest lectures, as long as these activities do not include or allow the commercialization of any course content, courseware or other teaching or research-related activities created or conducted at another institution unless the works are also licensed to the College for use as provided herein for works created at the College. This requirement for permission and prohibition on conflict of commitment and conflict of interest activities as they may apply to such works shall extend for the term of employment, and in the case of software, for a period of three (3) years after the date of termination of the faculty or staff member from the College. This requirement for permission shall not apply to sales of developed works to third parties so long as the member of the faculty or staff does not participate in rendering services in connection with the work (e.g., in the sale of software consisting of courseware and course content, a faculty member may not physically present the course at another institution or through another entity other than the College, except with permission).

VII. Royalty and Revenue Sharing

- A. **Net Revenue Sharing.** The College shall be entitled to share in "Net Revenues" generated by sales of the work outside of the College to the extent of five percent (5%). "Net Revenues" shall be determined after reimbursement to the creators of the works of all costs of development, including attorney fees and accounting costs, costs of sales and marketing. The College shall be offered access to the books and records relating to the sales of the works outside of the College at least once per year, together with such documentation of costs and expenses as the creator may wish to present. The College may then accept access and review such books and records and additional documentation at its discretion, but is not required to do so.
- B. **Title and Ownership.** Title and ownership to the works is unaffected by the revenue sharing provided in Board policy and this procedure. All transfers of ownership in the works, direct or indirect (through stock transfers, etc.), shall not affect the right of the College to royalties provided in Board policy and this procedure, and notice of such transfers shall be given to the College (including name and address of all transferees) as well as notice to all transferees of the royalty interest of the College.

VIII. Miscellaneous Provisions

- A. **Use of College Name or College Marks.** Use of the College's name or the College's Marks in connection with a work, other than by way of identification of the creator as a member of the faculty, staff or student at the College, constitutes use of a valuable College asset, requiring separate and explicit written permission from the College to do so. Use of the College's name or the College's Marks can affect the reputation and academic standing of the institution, the value of the marks and can constitute a misuse of a public resource in certain situations. Consistent with the College's general use of name policy, faculty, staff and students may not participate in the creation or use of works that might give the impression of College sponsorship unless there is specific written permission from the College. Any uses of the College name or the College's Marks (other than to identify the creator by his or her title at the College) in connection with a work created by a member of the faculty or staff, or by a student, must be approved in advance by the College.
- B. **Documentation regarding Rights of Use; Ownership.** The College and creators of works will cooperate in the execution of documentation that will establish and confirm rights of use, title and ownership consistent with this policy. Each will execute such documentation as may be necessary to establish such respective interests in the works.
- C. **Attribution for Original Created Work.** As a professional and ethical courtesy, employees who use works created by other employees under this policy and procedure are expected to include a "created by" citation that gives credit to the original creator(s) of the work.

IX. Administration; Dispute Resolution.

- A. **Administration.** The intellectual property policy will be administered by the Dean of the appropriate department, in the case of faculty, and by the administrative supervisor, in the case of staff. Questions regarding forms of agreements and contracts shall be referred to the general counsel of the College.
- B. **Dispute Resolution.** In the event of a dispute regarding the application of these procedures or any action related to them, the dispute shall be referred to a panel of four persons consisting of a faculty or staff member designated by the creator of the work, a member of the College Council<sup>1</sup>, the Dean or administrative supervisor of the creator of the work, and the Executive Vice President for Administrative and Fiscal Services or designee (Chair of the Panel) ("IP Review Panel"). This panel shall make a decision in writing that resolves the dispute and recommends the proper application of the policy to the particular situation. The decision of the IP Review Panel may be appealed within 10 days by any party to the President (or designee) who shall make a final decision on the matter in dispute; if not appealed in a timely manner, the decision will become final. This dispute process must be exhausted before any party may seek to enforce its respective rights by judicial process; however, this process shall not affect any party's rights to pursue a judicial remedy after the final decision of the President.

X. Sales of Works Owned by the College.

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<sup>1</sup> As defined in the new governance system, effective May 2012

- A. **Right to Sell.** The College may sell intellectual property owned by the Board of Trustees upon such terms and conditions as the Board of Trustees may deem appropriate. Such intellectual property may be sold on or off-campus.
- B. **Sale of Copies of Any Works That Can Be Duplicated.** Local sales of copies of works are authorized to be made by the Director of Procurement upon appropriate payment to a campus cashier. The cashier shall provide the purchaser with a copy of the paid sales slip marked for the Director of Procurement. The purchaser exchanges the slip for the number of copies included in the transaction. The cashier deposits funds received for such works in the appropriate special revenue account. Mail order requests with accompanying payment may be received and honored by the Director of Procurement, who will arrange with the cashier to deposit the proceeds received to the correct account.
- C. **Sale of Works owned by the Board of Trustees That Cannot Be Duplicated.** Arrangements may be made for the sale of works owned by the Board of Trustees that cannot be duplicated (generally, graphic and artistic works). Such sale should be coordinated with the appropriate provost or vice-president, the Director of Procurement and others as appropriate. Arrangements so made would provide for the security of the works and for receipt of funds in accordance with College policies and procedures.
- XI. Federal Implications.
- Except as otherwise provided in the conditions of a Federal award, when publications, films, or similar works are developed from work supported in whole or in part by Federal funds, the author is free to arrange for intellectual property protection without Federal approval. Any such claim for ownership of the work shall, however, be subject to a royalty-free, nonexclusive, and irrevocable license to the Federal Government to reproduce them, translate them, publish them, use and dispose of them, and to authorize others to do so.

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