Monthly Meetings:
Meetings open (membership not required), 11:45 AM
2nd Tuesday each month, Glenn's Cafe on 8th Street.

THE TIGER COLUMNS

A Quarterly Publication of the University of Missouri Chapter of the AAUP

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AAUP Mission - The mission of the American Association of University Professors (AAUP) is to advance academic freedom and shared governance; …(see http://www.aaup.org/about/mission-1).

Mission of MU Chapter of the AAUP - The University of Missouri (MU) AAUP Chapter mission is to engage in activities that advance the national AAUP mission ....

Spring MU Town-Hall Meeting on Employee-Inventor Rights

A fatal flaw in the MU System's handling of intellectual property for the past couple decades has been the foundation in the CRR 100.020.B clause, *each Employee as a condition of employment agrees to execute any assignments requested by the University*. Two modes of operation can be directly attributed to our administration's interpretation of this clause: a) they have used this as a blanket agreement to do essentially anything they wish with disclosed inventions and b) they place the burden on the employee-inventor to get the rights back.

The liberties administration has taken with the "anything" aspect of this has gotten so bad that many employees see greater benefit to avoid inventing then to be subjected to this treatment; and this is in direct conflict with the purpose of patent law which is *To promote the Progress of Science and useful Arts* as established in Article I, Section 8, Clause 8 of the U.S. Constitution.

When faced with this type of aggression from university administration, the Supreme Court has taken a position in Stanford University v. Roche Molecular Systems, Inc. where, *this Court has rejected the idea that mere employment is sufficient to vest title of an employee's invention in the employer*. The ruling goes on to state the general rule that *rights in an invention belong to the inventor*. These and other Supreme Court decisions are in direct conflict with the foundation upon which the MU administration has established its practices on patentable intellectual property.

The Supreme Court ruling is wise and just. Employers can readily receive rights for patentable intellectual property generated as a result of: a) using data generated from employer laboratories, b) access to the employer's proprietary information/property, c) research performed as part of funded research where the tasks defined the scope of work under which invention occurred, d) "hired to invent" activities that include the defining of a specific project (such as is the typical case with graduate and undergraduate students), and e) student advisee interactions with faculty advisors.

The Supreme Court ruling defines a path forward that is much more kind to employee-inventors than in recent history at MU. Frankly, MU has strayed from the path where the primary purpose is to *promote the Progress of Science and useful Arts.*

This issue is worth further dialogue along with other aspects of inventor rights!

This Spring, our AAUP Chapter will be hosting a Town Hall forum on the topic of "Employee-Inventor Rights at MU". Stay tuned for a time and place. In the mean time, do not miss this editions Column on FREEDOM.

George Bush Senior reached the hearts of our country in 1988 when he said we want a "Kinder Gentler Nation". ...

The "fatal flaws" of current handling of patentable IP at MU would have been avoided if we had a Kinder Gentler MU that worked properly in Shared Governance.

RESPECT

What Has Happened to the FACULTY Component of Shared Governance

Governance of the university is referred to as Shared Governance. History has shown that achieving and maintaining excellence in each discipline is only sustainable when critical decisions are made by those who are actively participating in the teaching and research within that discipline. It thus follows that Faculty have direct authority on curriculum.

The collected rules dictate that Faculty are part of all governance with either direct authority, shared authority, or advisory authority--all decisions of consequence at the University of Missouri should include one of these components as specified in CRR 300.010.C.3.

Violations of shared governance concepts originate from several sources.

One is the appointment of high-level administrators from industry where the concept of sharing governance with the employees is generally non-existent. Understandably, it is quite an adjustment to go from a situation where all decisions can be made with autonomy to where all decisions require some aspect of shared governance.

In one extreme case (in about 2008), the MU System was embarking on an online course program with the greatest of gung-ho … until such time that it was pointed out that the CRR dictates that only degree-granting campuses are

RESPONSIBILITY

Tenure Denial Makes National Headlines

A recent MU tenure decision made national headlines this past Fall in the journal *Inside Higher Ed*. Appropriately, the news worthy nature of this article was not the denial of tenure, since this routinely happens; rather, the news-worthy nature resides in what appear to be anomalies in the procedure.

The tenure decision process is a Joint Governance authority with Faculty decisions at departmental, college, and university levels; administrative decisions by the departmental chairman and college dean; and a final decision by the chancellor. In the case of Dylan Kesler, the following anomalies stand out:

- A denial of tenure despite recommendation for tenure by Faculty at departmental and campus levels. This is rare with the opposite (awarding of tenure despite recommendations for denial) more common.
- The Chancellor's citing of issues associated with Dylan having been accused (but found not guilty) of misconduct as one reason for denial of tenure.
- The administration's citing of the veracity of Dylan's response to the false accusations made against him.

Neither the accusation of misconduct nor veracity in response to false accusations are valid reasons for denial of tenure in the MU guidelines or AAUP recommended best

FREEDOM

A Challenge to the Administration's Self-Proclaimed Right to Stop Inventors from Publishing

The right to patent technology is founded in Article I, Section 8 of the US Constitution wherein congress was empowered to ultimately create a patent system. The basis was the goal "To promote the progress of science and useful arts." Our forefathers recognized that receiving credit for ones work was an essential aspect of motivating people to make advances that were ultimately good for society. These same virtues form the basis upon which research universities were founded.

The University's Collected Rules and Regulations (CRR) follow these virtues in that *if it is decided that it is not to the best interests of the University to seek a patent, the President shall within a reasonable time seek other means of obtaining a patent or release the rights of the Invention to the Employee-inventor.*

This citation (CRR 100.020.E.2.i) is the only part that addresses the instance when the administration decides not to obtain patent. The release of inventions back to inventors when the University decides not to patent is fully consistent with the US Constitution and the basis under which the University of Missouri was founded.

A reasonable and productive interpretation of this approach is that all employee-inventors owe

INTEGRITY

The Plague of Lawsuits That Could Have Been Resolved – University with a Broken Grievance Process

Lawsuits between parties at universities are particularly problematic because, effectively, the university suffers from the loss of resources devoted by both sides of the conflict—basically the university suffers a "double whammy" from a single incident. This is less of an issue with private corporations where the employee is, typically, fired by the administration.

At universities, the process for firing a tenured faculty member is rather lengthy because tenure is designed to protect faculty members from administrators (and others).

As an example of why this protection is necessary, consider the reality where: a) the best researchers and thinkers of a generation are recruited by a universities, b) most universities cannot compete on a salary basis with corporations, and c) where the primary offering to these talented individuals by the university is academic freedom. Encased in the academic freedom is the ultimate ability to determine one's destiny—the stakes are high, but so is the reward. Now, consider the temptation before the rogue administrator who wants that reward, who wants to be in charge, who wants that power, and who ultimately wants that legacy. Tenure is designed to protect faculty from rogue administrators (among other things). And a minimum necessity of that protection is removal

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to offer courses. The MU System ended this endeavor shortly after this violation was pointed out in a town hall meeting held by the system president. There are good reasons why the MU System should not be offering courses, and there is wisdom buried in the CRRs above and beyond that which groups on campus would otherwise possess in isolation.

To repeat, "there often is wisdom buried in the CRRs above and beyond that which groups on campus would otherwise possess in isolation." The fact is that most faculty members join a university to research and teach. Faculty governance is something that is inherited as a responsibility rather than pursued. And as such, most faculty are not very knowledgeable on the many details of Faculty Governance. At the same time, many administrators operate under the rule that it is typically easier to ask forgiveness than it is to receive permission. The latter is primarily a "catchy phrase", since the violations are many but the actual cases of administrators asking for forgiveness are virtually non-existent.

A primary mechanism of Faculty Governance at Mizzou is the Faculty Council. The common interpretation is that the Faculty Council is a committee of about 30 faculty members which has been delegated with the right to exercise Faculty Authority at the university level (versus college or departmental) unless that authority is specifically vested in a committee (e.g. University Committee on Promotion and Tenure). All members of the Faculty Council, as with all committees delegated with Faculty Authority, are elected by the Faculty as opposed to being appointed by an administrator.

The interviewee for this column is the chair of the Faculty Council, Craig Roberts. Here are results of the interview:

QUESTION - Where is shared governance alive and well at MU?

RESPONSE - Shared governance is alive and well in the Chancellor's office, in various departments (IT, for example), and in some academic units. My unit is CAFNR. I cannot remember any major policy developed at the college level within the past 10 years that omitted Faculty Input. My division (department) is Plant Sciences. I do not recall a policy developed at the division level that omitted Faculty Input.

Shared governance is also alive and well in certain administrators. I know this list will not include everyone, but I would like (continued)

practices. For this reason, the Chancellor was asked about the above points, but no answers were provided to these questions.

An interesting thing about tenure denial is the uproar that occurs as a result of questionable decisions will tend to subside over the months. When the position is formally terminated, the subsidence will slowly fade away all together. But that is not justice, that is not a collegiate approach, and that does keep us on the course to be the type of university we strive to be.

Is the classic image of the university still alive as a vibrant setting for debate and advancement of ideals, or has it evolved to public corporation where a team of lawyers paralyze the soul of the university?

Is the real issue one of the Chancellor taking a position on AAU standards that may go above and beyond what the Faculty are willing to enforce at this time? Or is it administrative retaliation that has percolated through the ranks? Both positions will have critics. One can lead to a higher level of respect for taking a worthy position, one will not.

Rarely is there an endeavor that is both worthwhile and free of critics. Critique is a vital step in achieving greatness.

This issue is not resolved. Thank you Dylan for taking it to the courts; since there doesn't appear to be a satisfactory path to resolution here on campus, maybe the courts will provide a path to resolution.

At MU, every professor assigns students' course grades based on their actual performance. If there is a concern about a grade, the professor is required to discuss those concerns with the student, and in a typical course of events, the grades are fully justified and the issue is resolved in short order. Should we as professors start to base grades on accusations, not facts, and refuse to have meaningful discussions when students have concerns on their grades? If the "Kesler" approach is good enough for the Chancellor's interaction with faculty, why is it not good enough for the interactions of faculty members with students?

Chancellor, we would like transparency here. There is a good and righteous path that can be taken where you do not have to hide behind attorneys in the absence of transparency.

See continuation of articles, complete questions asked to interviewees, and complete responses at:
http://aaup.missouri.edu/

the University the right of first refusal to pursue patent and license for commercialization. When the University chooses not to patent, it should gracefully release the patentable intellectual property back to the employee-inventor so as not to deny the employee-inventor the right to receive patent and associated recognition.

Often times the rights of employee-inventors are summarized as the right to share in royalties received from licensing; however, this is only one benefit associated with receipt of patent. A more-comprehensive list of potential employee-inventor benefits associated with receipt of patent includes the following:

- Royalty Moneys
- Patent as a Publication
- Improved Professional Reputation
- Proof of Origen of Concept up to and including a legacy
- Use of Patent(s) to Strengthen a Case presented for Research Funding
- Basis for forming a Self-Sustaining Company
- Creation of Jobs (business formation)
- Improved Faculty Moral

All of these benefits can be denied to a deserving employee-inventor if university administrators decide to both deny pursuit of patent and deny release of the invention rights back to the employee-inventor. Inventor's rights are clearly NOT the mere single issue of sharing royalties with employee-inventors.

To preserve this and other rights, without limiting the ability of administration to patent and pursue commercialization, the following five principles were sent to the Chancellor in the Fall of 2014 as Principles upon which patentable intellectual property should be handled at universities:

Principle #1 – Universities are a public corporation (not a private corporation). At a university faculty members are the foundation and the bastion of intellectual property ("IP") — research programs are created and advanced around faculty members. When the faculty member leaves a university, his/her research program leaves also. This is different from private corporations where researchers are educated in IP owned by the company (including proprietary information). At private corporations, research members come and go, but the IP remains the exclusive ownership of the corporation.

Principle #2 – Faculty shall not be denied the right to have their patent applications filed. Private corporations have reserves of "proprietary information", and the officers of a private corporation may reserve (continued)

of the ability of administration to fire a tenured faculty member without a due process that includes Faculty Authority as an integral aspect of revoking tenure.

In view of this environment and as a protection against the cited "double whammy", universities have a long tradition of internal grievance and irresponsibility processes for internal resolution of differences.

Here at the University of Missouri, there is a mounting body of evidence that internal resolution processes are broken. When the resolution processes fail, the losses are to both the individuals and the University.

One could argue that the floundering performance of MU based on AAU metrics is a result of the failed internal resolution processes. One could argue that failed internal resolutions processes have led to deterioration of the environment where mob-type of behaviors (both of faculty and administrative groups) flourish because cronyism rules the day and accountability is rare. However, such arguments would be difficult to prove because of time delays between actions and effects (and because most things are not single-issue).

Artifacts that are less difficult to prove are: a) the number of lawsuits filed and b) the nature of grievance committee findings. Among the questions put before Interim Provost Ken Dean were the following:

1. One of the reasons put forward for the change of the grievance system (to include an administrator) five years ago was stated as that some things should go directly to the filing of more lawsuits. There certainly has been an increase in lawsuits. Do you take this as meaning that the grievance system is successful?
2. There are real problems with the grievance system. One of the problems is the way the grievance committee attempts to turn around a grievance case in the way of findings against the grievant where: a) no formal filings of charges are ever made against the grievant, b) because no charges are made against the grievant no defense against the charges are heard, c) because there is no process described for grievance-committee-initiated charges against the grievant there are no procedures followed including no presentation of case and no rebuttal, and d) the grievance committee can act in a "vacuum" of responsibility and actually find against the grievant on items for which there is no basis of wrong-doing in the collected rules. Do you deny that these actions have happened?

Ken Dean did not provide a response. No civil society could survive a grievance process such as that currently practiced at MU

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RESPECT COLUMN (Continued)

to name a few as examples: Jeff Zeilenga, Hank Foley, Gary Allen, Bowen Loftin. These are the kinds of administrators who have a natural tendency to solicit Faculty Input. Again, there are certainly others, but these names come to mind off the cuff.

QUESTION - What are the most disappointing failures of shared governance in recent years at MU?

In a polite but honest response, Dr. Roberts mentioned Renew Mizzou project which included the creation of Mizzou North, remediation of mold-infested library books, the Missouri Press, The MU Strategic Operating Plan (MUSOP)

QUESTION - What are the best examples of exercised shared governance by the Faculty Council in the past 5 years?

Topics listed by Dr. Roberts in response to this were the development of IT policies, major search committees, long-range visioning effort. Areas listed as mixed but improving with respect to effective Faculty Governance were budget allocation and mixed to improving on Title IX issues

QUESTION - It would be good to have a documentable "Continuous Improvement Process" on shared governance that would start with a measuring of metrics that document how "alive and well" Faculty Governance is at MU. Do you agree? Could this become a priority? Do you have any suggestions on how to proceed?

RESPONSE - This might not be a bad idea. Harry Tyrer suggested this last year. I would not call it a super high priority for me at this time. This year is swamped with issues that most would regard as highest priority—MUSOP, BAAC, racial discrimination, Title IX. But again, it is important and worth pursuing. Also, with the coming of the new Chancellor, I see shared governance being insisted.

It is clear that Dr. Roberts cares about Faculty Governance, would like to see it work, and sees the approach to improving Faculty Governance as including the giving "the benefit of doubt" to the administration when possible. Yes, there are areas were Faculty Governance works.

However, the data indicate that the administration is picking and choosing when to include Faculty Governance at an early enough stage to make a difference. The data indicate that except for standing committees, Faculty Governance is broken because it is at the whim of administrators.

In those instances where administrators have agendas, Faculty Governance is often by-passed all-together, by simply providing a news release or an update—it is difficult for Faculty Authority to be exercised if the Faculty are neither informed of an action item nor given background information.

A proper metric on the health of Faculty Governance is would include an accounting of the weight given to Faculty Governance on decisions where certain administrators have agendas. The Faculty Council might be informed just prior to an action or news release, or may be informed by the news release. It is here where Faculty Governance consistently fails at MU. The Columns on Responsibility, Freedom, and Integrity should drive this point home.

We have faculty leaders on campus who want to see Shared Governance improved, but we do not have a Continuous Improvement Process that will help us stay the course.

FREEDOM COLUMN (Continued)

the right not to file for patent based on administrative decisions to keep IP as proprietary. At universities, denying faculty the right to file patent applications does not safeguard any "proprietary" IP.

Principle #3 – The CRR describes administration's role as to patent and license for commercialization. The University does not have the right to "sell a faculty member's research program" without his/her consent as this would undermine a faculty member's research academic freedom. It is possible for a patent to be licensed to a company where an intent of the company is to use the license to pursue research and development funding; such licensing is a violation of the intent of the CRR unless performed consent of the employee-inventor that might be pursuing research funding in competition with the company.

Principle #4 – The over-arching goal of patent policies is "To promote the Progress of Science and Useful Arts … ". Selling a faculty member's research program not only violates this goal, it undermines the principle of research academic freedom. In fact, the selling of a faculty member's research program without inventor consent detracts from underlying principles of a university. A case can be made that any action is a violation of this goal other than a) licensing to a third party with commercialization or b) release back to the inventor.

Principle #5 – The administration does not have the right to create documents (assignments, waivers, etc.) that passively or actively violate Principle's #1-#4.

So, what do you the reader think? Do you believe that you or other administrative officials at the university have the right to:

A. purposely abandon technology without employee-inventor consent and to the extent that the technology becomes non-patentable without offer of unconditional release of the patent rights back to the employee inventor.
B. license (or sell) technology for purposes of acquiring research funding by the licensee that would either compete with the research program of the employee- inventor or position the licensee to create competitive inventions, and
C. use of threats of abandonment (allowing intellectual property to become unpatentable) to be used as a tactic whereby administration attempts to enforce a unilaterally-dictated license back to employee inventor.

For most employee-inventors, the answer to each of these questions is straight forward. It is "No"!

And furthermore, what strange set of circumstances would lead an administrator to believe he or she could get away with these actions.

Dr. Foley was asked these questions, but he did not answer them.

A few months after Dr. Foley arrived, he indicated that he would have town hall meetings/discussion on the handling of patentable intellectual property at MU. That never happened. However, this past Fall he did host the LETS TALK panel on intellectual property. If you showed up for that meeting, you learned that LETS TALK stands for *LET you listen to uS TALK*. It consisted of over two hours of talks by about 12 people, most of whom were in some aspect of administration. The schedule showed 10 minutes at the end for questions.

The university should be a vibrant setting for debate and advancement of ideals. The reality is however different.

This Spring, the AAUP will host an open forum discussion on the topic of what U.S. law says your rights are as an employee inventor and how several aspects of the patentable IP handling policies at MU are in direct conflict with U.S. law. Dr. Foley will be invited to participate.