McGeorge Law Review

Volume 35 | Issue 2 Article 4

1-1-2004

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I. INTRODUCTION

The 1999-2000 academic year saw the explosive growth of commercial websites posting what were alleged to be contemporaneous class notes for college and university courses taught all over the United States. Regularly enrolled students were hired by "dotcom" companies to prepare notes which were then distributed via the Internet. Criticism of this practice moved to a front burner in the academic community when the *Chronicle of Higher Education* published an article entitled *Putting Class Notes on the Web: Are Companies Stealing Lectures?*[1]

During the spring quarter of 2000, one such site posted notes for more than 200 courses offered on six of the general campuses of the University of California (UC), along with countless more from campuses of the California State University (CSU), Stanford University and the University of Santa Clara.[2]

In the typical case, what purported to be course notes for an affected faculty member's class suddenly appeared on one of the commercial websites without his/her knowledge or permission. It was not uncommon for a faculty member to find out what was going on only because students questioned the accuracy of what had appeared there.

Clearly the professional reputation of a faculty member could suffer greatly if notes of questionable quality and/or accuracy attributed to her/him were being posted where anyone could see them. The unauthorized dissemination of high quality notes could well be even more injurious to a professor. That is because many professors present their own as-yet-unpublished research findings in the classroom, and it is also quite common to have enrolled students critique all or part of an unpublished book manuscript. Faculty members quite properly believe that they alone should decide when, where and how to put such material into general circulation.

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* Professor Emeritus of Chemistry, University of California, Davis; Vice President for External Relations, Council of UC Faculty Associations; Acknowledgments: I most gratefully acknowledge the extraordinary education on intellectual property matters which Kimberly J. Mueller, Esq., gave me as AB 1773 made its way through the legislative process. I am likewise indebted to three valued friends and allies: Dr. Gerie Bledsoe, my counterpart from the California Faculty Association; Dennis Hall, the member of Dr. Gloria Romero's staff who turned our academics' ideas into legislative realities; and Myrna Hays, the Legislative Coordinator of the Council of UC Faculty Associations, who kept perfect track of every twist and turn along the road to the passage of AB 1773.

1. Goldie Blumenstyk, *Putting Class Notes on the Web: Are Companies Stealing Lectures?*, CHRON. OF HIGHER EDUC. Oct. 1, 1999.

2. The website was http://www.versity.com, but the site no longer provides notes or outlines.

On January 20, 2000, in response to this rapidly growing threat to the integrity of higher education, Assemblymember (now State Senator) Gloria Romero introduced legislation (AB 1773) intended to curb unauthorized note taking in California.[3] In all its versions the stated purpose of the act was to add Chapter 6.5 (commencing with section 66450) to Part 40 of the Education Code.[4] As introduced, the proposed chapter title read: CALIFORNIA CHAPTER 6.5. INTELLECTUAL PROPERTY.[5] Eight months later, when the act was enrolled, it had become: CHAPTER 6.5. UNAUTHORIZED RECORDING, DISSEMINATION, AND PUBLICATION OF ACADEMIC PRESENTATIONS FOR COMMERCIAL PURPOSES.[6]

This legislation was co-sponsored by the California Faculty Association (the labor union representing the CSU faculty) and the Council of University of California Faculty Associations (a systemwide, voluntary membership organization of UC Academic Senate members).[7] Dr. Romero is a former Professor of Psychology at CSU Los Angeles.

II. EXISTING LAW

A. *Extant Intellectual Property Laws*

In order to facilitate what follows, it will be helpful at this point to discuss rather briefly the applicable federal and state intellectual property laws and key judicial decisions that were in place when the Romero bill was introduced.

Generally, the Federal Copyright Act protects only "original works of authorship fixed in any tangible medium of expression, . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[8] Ideas are not afforded copyright protection.[9] Copyright rights include the exclusive rights to make copies of original works, to make derivative works, to distribute, to perform publicly, and to display.[10]

The Federal Copyright Act provides that the creator of an original, copyrightable work of authorship is its owner.[11] Ownership considerations are important because only copyright owners have standing to enforce their rights.[12]

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3. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1773, at 3 (Apr. 25, 2000).

4. AB 1773, 1999-2000 Leg., (Cal. Jan. 20, 2000); AB 1773, 1999-2000 Leg., (Cal. Apr. 24, 2000); AB 1773, 1999-2000 Leg., (Cal. May 22, 2000); AB 1773, 1999-2000 Leg., (Cal. May 30, 2000); AB 1773, 1999-2000 Leg., (Cal. June 15, 2000); AB 1773, 1999-2000 Leg., (Cal. Aug. 8, 2000); AB 1773, 1999-2000 Leg., (Cal. Aug. 18, 2000); AB 1773, 1999-2000 Leg., (Cal. Aug. 30, 2000).

5. AB 1773, 1999-2000 Leg., (Cal. 2000).

6. CAL. EDUC. CODE § 66450 (West 2000) (enacted by Chapter 574).

7. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1773, at 3 (Apr. 25, 2000).

8. 17 U.S.C.A. § 102(a) (West 1994).

9. *Id.* § 102(b).

10. *Id.* § 106.

11. *Id.* § 201(a).

12. *See id.* §§ 106, 201(a).

Between 1909 and 1976 the Federal Copyright Act provided and the courts held that the writings of faculty members were owned by them and not by their employing institutions.[13] This so-called "teacher exception" from the "work for hire" doctrine (one which gives the authorship and ownership of the works of an employee to the employer unless there is a contravening written contract) does not appear in the 1976 Copyright Act.[14] However, two opinions from the Seventh Circuit Court of Appeals have held that, although the 1976 Copyright Act could be read as giving the ownership of scholarly writings to the employee's institution, the work-for-hire principle does not apply owing to the broader recognition of the importance of academic freedom.[15]

College and university lecture courses typically take the form of live presentations by a faculty member who may use notes or similar documents to prompt his/her recollection of the material to be covered in that class session. If the lecturer's written notes, projected transparencies, class handouts, etc. contain "original works of authorship," they may qualify for federal copyright protection.[16]

In general, classroom lectures are not scripted; rather, each one is an unrehearsed presentation of particular elements of the overall subject matter that the lecturer has synthesized from various sources. It is virtually certain that two lectures given by the same individual covering nominally the same basic material will not be identical. If what the lecturer says is not "fixed," the "public performance . . . does not of itself constitute publication," and therefore does not trigger copyright protection.[17]

Because the intangible elements of classroom lectures (mainly verbal and "blackboard" presentations) are not subject to federal copyright protection, they can be addressed in state statutes.[18] Such statutes clearly would be precluded from regulating original "works . . . fixed in any *tangible* medium of expression. . . ."[19]

California Civil Code section 980 passes this test.[20] The relevant sentence in section 980(a)(1) states, "The author of any original work of authorship that is not fixed in any tangible medium of expression has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or similar work."[21] A federal court

13. *See e.g.*, Pub. Affairs Assoc., Inc. v. Rickover, 177 F. Supp. 601 (D.C. Cir. 1959); 17 U.S.C.A. § 1 et seq. *amended by* Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 codified as 17 U.S.C.A. §§ 101-810.

14. 17 U.S.C.A. §§ 102-810 (West 1994 & Supp. 2003).

15. Hays v. Sony Corp., 847 F.2d 412, 416-17 (7th Cir. 1988); Weinstein v. Univ. of Ill., 811 F.2d 1091, 1094 (7th Cir. 1987).

16. 17 U.S.C.A. § 102.

17. *Id.* § 101 (defining publication).

18. *Id.* § 301(b) (leaving unaltered state statutory and common law that is not covered by federal copyright law).

19. *Id.* (emphasis added).

20. CAL. CIV. CODE § 980 (West 1982 & Supp. 2000).

21. *Id.* § 980(a)(1).

recently observed that "the statute steers clear of any legal or equitable rights created under federal law, and thereby avoids federal preemption. . . ."[22]

In 1969, a California appellate court ruled in favor of a UCLA faculty member who sued the proprietor of a firm that (1) hired a student to take notes in his introductory-level anthropology course, (2) placed a copyright symbol in the name of the firm thereon, and (3) sold them off campus.[23] The faculty member asserted his ownership rights under section 980 (often termed common law copyright rights) and invasion of privacy, prevailed on both counts in both the trial and appellate courts, and was awarded compensatory and exemplary damages.[24]

In a key finding which bears strongly on the Romero bill, the appellate court was "convinced that in the absence of evidence the teacher, rather than the university, owns the common law copyright to his lectures."[25] The court noted that an example of such evidence would be an assignment of his copyright to the university.[26]

In another context, citing six authorities, the court wrote: "every case that has considered the problem of divestment [of copyright] from the limited versus general publication point of view has reached the conclusion that the giving of a lecture is not a general publication."[27] This finding preserves a lecturer's copyright protections. The court further stated, "An author who owns the common law copyright to his work can determine whether he wants to publish it and, if so, under what circumstances."[28]

B. AB 1773 Evolves

In its original (January 20, 2000) form, draft section 66450(a) of AB 1773 echoed California Civil Code section 980 and the *Williams v. Weisser* decision as discussed above.[29] It would have afforded faculty members "exclusive ownership in any presentation in a classroom . . . or any other place of instruction, performance, or exhibition."[30] It further would have required the prior written permission of a faculty member in order for any person to "record, by any means whatever, . . . any presentation to which this section applies, or . . . transfer the record of the presentation to a third person."[31]

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22. Trenton v. Infinity Broad. Corp., 865 F. Supp. 1416, 1427 (C.D. Cal. 1994).
23. Williams v. Weisser, 78 Cal. Rptr. 542, 543 (Cal. Ct. App. 1969).
24. *Id.*
25. *Id.* at 545.
26. *Id.*
27. *Id.* at 550.
28. *Id.* at 551.
29. *Id.*; AB 1773, 1999-2000 Leg., (Cal. Jan. 20, 2000).
30. AB 1773, 1999-2000 Leg., (Cal. Jan. 20, 2000).
31. *Id.*

Draft section 66451 gave the courts authority to grant enforcement relief including the issuance of an injunction, and to award actual damages and a civil penalty of up to $1,000 for the first violation "from any person who is not a student enrolled in the institution" at issue to "[a]ny person injured by a violation of this chapter. . . ."[32] This "student exemption" appeared in every subsequent version of the bill. Draft section 66452 called upon the institutions to adopt regulations regarding the violation of the statute by students, including appropriate penalties.[33]

The administrations of both UC and CSU formally opposed the original bill.[34] What follows in the next two paragraphs is abstracted from the legislative staff analysis of AB 1773 distributed just prior to its hearing by the Assembly Judiciary Committee on April 25, 2000.[35]

CSU deemed the then-extant version of the bill to be too restrictive in that it did not recognize the role of the campus presidents in the overall management of their institutions, including policies on commercial activities at their campuses.[36] In particular, they noted that section 42350.1 of Title 5 of the California Code of Regulations "specifically prohibits commercial transactions on a campus without the written permission of the campus president."[37] They agreed that prescribing the prior written permission of the faculty member would be appropriate, but should be consistent with existing campus policies.[38]

UC's opposition came from a different direction. They believed that the issue of "'who may take notes or make recordings and how such notes or recordings may be used and distributed is a matter best left to campuses in conjunction with their faculties.'"[39]

Although the UC administration did not so state, there can be little doubt that they did not want the legislature to get into the issue of the recording of classroom lectures. They noted that to date they had successfully used a number of strategies to restrain the abusive behaviors of unauthorized third parties.[40] These included the issuance of cease-and-desist letters invoking existing policies restricting the use of University property for commercial purposes, policies and regulations restricting access to University facilities by unauthorized individuals, policies restricting the use of the University's name, and University regulations on student conduct.[41] They asserted that within UC, "policies regarding classroom note taking and

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32. *Id.* § 66451.

33. *Id.* § 66452.

34. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1773, at 5 (Apr. 25, 2000).

35. *Id.*

36. *Id.*

37. *Id.* at 6.

38. *Id.*

39. *Id.*

40. *See generally* Letter of Opposition from Stephen A. Arditti, Assistant Vice President, UC Administration, to Sheila Kuehl, Assembly Judiciary Committee Chair (Apr. 19, 2000) [hereinafter Arditti letter] (on file with the *McGeorge Law Review*).

41. *Id.*

recording and policies regarding works of authorship are subjects of shared governance between the administration and faculty."[42]

UC did shut down some commercial note vendors on some campuses, but their success rate using the indirect, "territorial" strategies mentioned in the Arditti letter was not 100%.[43] Under the law (both then and now) only faculty members have standing to enforce their live lecture rights unless they have agreed in writing to share ownership thereto with their employing institutions.[44]

Early in the legislative process, "formal" UC faculty opinion as enunciated by the Academic Council of the Academic Senate (a seventeen-member body made up of a Chair and Vice Chair, the Chairs of the Academic Senate Divisions on the nine individual campuses, and the Chairs of six major, systemwide policy committees) mirrored that of the administration. According to the published minutes of its February 2000 meeting, the Academic Council Chair "noted that a bill introduced in the California Legislature, AB 1773, having to do with ownership of faculty lectures, probably is not in the best interest of the UC faculty."[45] There is no indication in the minutes that there was any discussion of the bill's content.[46]

The minutes of the April 12, 2000 Academic Council meeting state that the Chair "had been in Sacramento talking with legislative staffers and representatives about (AB 1773). He briefed the Council on the status of the bill and asked for Council advice on how to proceed in connection with it."[47] In response, "The Council agreed that the Romero bill ought to be opposed by the University on grounds that it is a legislative intrusion into the relationship between faculty and administration."[48]

The two faculty associations sponsoring AB 1773 obviously disagreed. Thus, at the Assembly Judiciary Committee hearing on April 25, 2000, two UC Davis faculty members (the Academic Council Chair and an officer of the Council of UC Faculty Associations), identically-attired in gray slacks and blue blazers, sat side by side at the witness table and offered diametrically opposing testimony regarding the need for the legislation in question.[49]

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42. *Id.*

43. *Id.*

44. 17 U.S.C.A. § 201 (West 1994).

45. University of California Academic Council of the Academic Senate, Council Minutes, Feb. 9, 2000.

46. *Id.*

47. University of California Academic Council of the Academic Senate, Council Minutes, Apr. 12, 2000.

48. *Id.*

49. *Id.*

C. Events Leading to the Version of AB 1773 Passed by the Assembly

Between January 20 and April 23, 2000, proponents and opponents of AB 1773 were in virtually continuous negotiations. It became apparent almost immediately that California Civil Code section 980 notwithstanding, the most odious word to UC in the original version of the bill was "ownership."[50] In a multi-sided conversation in a Capitol hallway, a staff aide from the Assembly Judiciary Committee told a member of Dr. Romero's staff that the bill would never get out of committee if "ownership" was in it. The latter responded that "ownership" was probably not negotiable, but "exclusive" might be.

On April 21, 2000, UC put forth a total rewrite of the bill. UC proposed replacing section 66450(a) with language to the effect that no one could record, sell, or distribute the recordings of live faculty lectures for a fee or other compensation, monetary or otherwise, or for any commercial purpose, except as permitted by applicable policies and regulations of the faculty member's employing institution.[51] With different detailed wordings, UC reiterated this theme throughout the legislative process, and eventually prevailed on this particular point.

UC's proposed section 66451 would have granted universities co-equal enforcement rights with the affected faculty member against those who misappropriated live lectures. Such a provision would be a statutory recognition that faculty members and their employing institutions are co-owners of the intellectual property in question, and would therefore negate the provisions of California Civil Code section 980(a)(1).[52] It is not surprising that the bill's sponsors rejected this proposal.

On April 24, 2000, the author amended the bill and among other changes did remove the words "exclusive ownership."[53] The Chapter title remained "Intellectual Property," but section 66450(a) of the amended version now read,

> Without the prior written authorization of the instructor of record, no agency or person, other than a student enrolled in the course . . . may record, by any means whatsoever, . . . any lecture or other presentation made in a classroom[,] laboratory, library, studio, or any other place of instruction, performance, or exhibition.[54] Any authorization by the instructor of record to record a presentation . . . shall specify and limit any subsequent use of the record of the presentation other than the uses set

50. *Cf.* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1773, at 3-6 (noting that there was disagreement on the issue of ownership).

51. AB 1773, 1999-2000 Leg., (Cal. Apr. 21, 2000).

52. *Id.*; CAL. CIV. CODE § 980(a)(1) (West 1982 & Supp. 2000).

53. AB 1773, 1999-2000 Leg., (Cal. Apr. 24, 2000).

54. *Id.* § 66450(a).

forth in this section, and any violation of this authorization shall be actionable under Section 66451.[55]

Amended section 66450(c) prohibited enrolled students from supplying class notes or any other records of the proceedings to a third party for the purpose of disseminating said information for commercial purposes *unless* they had the written permission of the instructor.[56] It also made students who violated this section subject to campus disciplinary procedures.[57] This particular amendment recognized that it was customary on many campuses for the student government or some other approved student organization to prepare and sell instructor-authorized notes to students who were formally enrolled in the course in question.[58] If this amendment were to be enacted, these services could be continued on a case-by-case basis.

Amended section 66451(a) stiffened the proposed civil penalty for violation of the statute to $10,000 for the first offense.[59] A new section 66451(b) gave the Attorney General and other specified public prosecutors the exclusive authority to prosecute actions for relief "in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation, or association or by any person acting for the interest of itself, its members, or the general public."[60] The bill sponsors welcomed this inclusion because it would spare individual faculty members the legal expenses they would otherwise have incurred protecting their property under, e.g., California Civil Code section 980.[61]

Section 66452 again called upon the institutions to adopt regulations dealing with student violators of the statute.[62]

This version of the bill passed out of the Assembly Judiciary Committee on April 25, 2000, by a vote of 10-4,[63] and out of the Assembly Appropriations Committee on May 10, 2000, by a vote of 14-5.[64]

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55. *Id.*

56. *Id.* § 66450(a) (emphasis added) (defining "commercial purposes" as "any purpose that has financial gain as an objective").

57. *Id.*

58. *See generally id.*

59. *Id.* § 66451(a).

60. *Id.* § 66451(b).

61. CAL. CIV. CODE § 980 (West 1982 & Supp. 2000) (an example of a law that would allow for individual faculty members to incur the legal expense of protecting their property).

62. AB 1773, 1999-2000 Leg., (Cal. Apr. 24, 2000).

63. Assembly Judiciary Committee Vote-Roll Call (Apr. 25, 2002), *available at* http://leginfo.ca.gov/pub/99-00/bill/asm/ab_1751-1800/ab_1773_vote_20000425_000003_asm_ comm.html (last visited Feb. 11, 2004) (copy on file with the *McGeorge Law Review*).

64. Assembly Appropriations Committee Vote-Roll Call (May 10, 2000), *available at* http://leginfo.ca.gov/pub/99-00/bill/asm/ab_1751-1800/ab_1773_vote_20000510_000001_asm_ comm.html (last visited Feb. 11, 2004) (copy on file with the *McGeorge Law Review*).

On May 22, the author trivially amended the bill to reduce the civil penalties for violation of the statute to the more modest levels which persisted thereafter; viz., $1,000 for a first violation, $5,000 for a second, and $10,000 to $25,000 for any subsequent ones.[65]

The May 22, 2000, version of the bill passed the Assembly on June 1 by a vote of 51-22.[66]

D. Intermezzo—A Concurrent Faculty Initiative

Early in May of 2000, a faculty member on the UC Davis campus learned from a student that what purported to be contemporaneous course notes for her upper-division psychology course were being posted on a commercial website.[67] She read the material in question, and on May 9 told the class that the quality and content of what she had seen there were grossly inadequate. She then publicly asked the anonymous note-taker to stop his/her activities immediately.

The notes that appeared on the website for the May 9 lecture mentioned the instructor's dissatisfaction, but then said "I am continuing to post notes since I have signed a contract to take notes and my boss has told me to continue[;] I will listen to him since he is paying me."[68] On May 11 the professor sent an e-mail complaint to the firm, expressing her concern about the unauthorized posting of the notes in question.[69] The firm apparently received the complaint, because on May 16 the note-taker reported that he/she had submitted notes for the May 11 and May 16 lectures for posting, but the firm had them "on hold."

Because the headquarters of the offending firm were in San Diego, the Council of UC Faculty Associations viewed this case as an ideal opportunity to reassert the faculty ownership of live lectures under the provisions of Civil Code section 980.[70] Accordingly, on May 22, 2000, an independent intellectual property practitioner who had been advising the bill's faculty sponsors on AB 1773 issues from the outset, sent the firm (via FAX and e-mail) a "Demand to Cease Infringing Use and Display of Notes of Live Lectures Given By Professor [name deleted]."[71]

Citing Civil Code section 980(a)(1) and *Williams v. Weisser*, the letter noted that the "unauthorized use and display of notes based on the Live Lectures is a violation of [the named professor's] ownership rights in the Live Lectures as

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65. AB 1773, 1999-2000 Leg., (Cal. May 22, 2000).

66. Assembly Floor Vote-Roll Call (June 1, 2000), *available at* http://leginfo.ca.gov/pub/99-00/bill/asm/ab_1751-1800/ab_1773_vote_20000601_0646PM_asm_ floor.html (last visited Feb. 11, 2004) (copy on file with the *McGeorge Law Review*).

67. The website was http://www.versity.com, but the site no longer provides notes or outlines.

68. *Id.*

69. The author would like to keep the contents of this e-mail confidential.

70. *See generally* CAL. CIV. CODE § 980 (West 1982 & Supp. 2000).

71. The author would like to keep the contents of this e-mail and fax confidential.

established by California statute and common law."[72] Since the professor's good faith efforts at communication had received no response and the academic term was continuing apace, she demanded through counsel that the firm immediately cease and desist its use and display of any and all notes and related materials based on her lectures, and confirm in writing its agreement to comply within twenty-four hours. Failing that, she reserved the right to seek legal relief to the full extent available in the courts.

Within the stipulated time, frame all the notes for the complainant's course were removed from the website, but in its written response to the faculty member's "demand" letter, the firm "unequivocally" denied that the lecture notes for that particular UC Davis psychology course "violate any rights" of the named professor.[73] Nevertheless, no new notes for any of the more than forty other UC Davis courses they had been covering were posted for the remainder of the term.[74] The existing ones were not, however, removed.[75]

E. Instructor's Permission Disappears from AB 1773

Throughout the month of May, the universities' negotiators continued trying to reconfigure the bill to dilute or abolish the explicit statutory authority of individual instructors. On May 23, 2000, UC proposed a series of amendments to the May 22 version of the bill, two of which—with significant modifications—set the stage for the final document.[76]

Somewhat rearranged and paraphrased, their draft language for section 66450(a) (by implication) would have barred the contemporaneous recording of academic presentations if the business, agency or person in question did so for a fee or other compensation "[*e*]*xcept as authorized* by policies developed in accordance with subdivision (a) of Section 66452. . . ."[77]

The proposed section 66452(b), new in concept, called upon the administrations of the various institutions "in consultation with faculty, in accordance with applicable procedures, [to] develop policies to prohibit the unauthorized recording, dissemination, and publication of academic presentations for commercial purposes."[78]

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72. The author would like to keep the contents of this e-mail confidential. *See also* CAL. CIV. CODE § 980; Williams v. Weisser, 78 Cal. Rptr. 542 (Cal. Ct. App. 1969).

73. The author would like to keep the contents of this letter confidential. The website was http://www.versity.com, but the site no longer provides not or outlines.

74. The website was http://www.versity.com, but the site no longer provides notes or outlines.

75. *Id.*

76. *See* SENATE COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 1773 (July 5, 2000), at 3-4 (noting that UC and CSU ceased opposition to the bill following amendments).

77. AB 1773, 1999-2000 Leg., (Cal. June 15, 2000) (emphasis added).

78. *Id.* § 66452(a).

"Commercial purposes" *per se* was not explicitly defined in the draft statute, but the proposed text of section 66450(c)(2) effectively did so.[79] The language in question would have afforded *both* the employing institutions *and* the affected instructors the right to seek relief and civil penalties in the courts for violations of the statute by a nonstudent "*who seeks to obtain financial or economic gain.*"[80]

The faculty sponsors of the bill initially opposed the proposed changes to sections 66450 and 66451(a). In their view, such a statute in and of itself could not prevent a determined campus administration from videotaping an entire course, even over the objections of the instructor of record.[81] They would simply have to assert that the recordings were not being prepared "for a fee or other compensation," i.e., that the camera operator was already on the instructional technology payroll, and that the recordings would not result in a "financial or economic gain" for the institution.[82] The renewed attempt to afford the institutions equal standing with their faculty members in the pursuit of violators was again rejected.

On May 30, 2000, the author again amended the bill, still with the chapter heading "Intellectual Property."[83] The amended section 66450(a) began:

> Except as provided in Section 66452, no business, agency, or person, including, but not necessarily limited to, an enrolled student, shall prepare, cause to be prepared, give, sell, transfer, or otherwise distribute or publish, for a fee or other compensation, *or for any commercial purpose*, any contemporaneous recording of an academic presentation in a public higher education classroom.[84]

It should be noted that this language—like the totality of that in UC's proposal of May 23—would probably still allow an institution to videotape a course over the objections of the instructor if there was no commercial purpose immediately evident in their doing so.

The conjoined words "academic presentation" did not appear in any of the previous versions of the bill.[85] This term was defined in a new section 66450(d)(1) as any "academic or aesthetic presentation, made by an instructor of record as part of an authorized course of instruction [in a California public higher education

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79. *Id.* § 66540(c)(2).

80. *Id.* § 66541(a) (emphasis added).

81. *Cf.* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1773, at 6 (Apr. 25, 2002) (documenting the concern of university administrators regarding their "role in the oversight and process of approving authorized sales or distribution of recordings of instructional materials").

82. AB 1773, 1999-2000 Leg., (Cal. June 15, 2000).

83. AB 1773, 1999-2000 Leg., (Cal. May 30, 2000).

84. *Id.* § 66450(a) (emphasis added).

85. AB 1773, 1999-2000 Leg., (Cal. Jan. 20, 2000); AB 1773, 1999-2000 Leg., (Cal. Apr. 24, 2000); AB 1773, 1999-2000 Leg., (Cal. May 22, 2000).

institution] that is not fixed in a tangible medium of expression."[86] This definition makes it clear that the legislation entirely focuses on typical classroom activities.

"Commercial purpose" was defined in section 66450(d)(2) to mean "any purpose that has financial or economic gain as an objective."[87]

The amended section 66450(c) now absolutely prohibited enrolled students from transferring a record of an academic presentation to any person for the purpose of disseminating it for commercial purposes.[88]

Section 66451(a) was amended to allow an individual injured by a violation of the statute to recover court costs and attorney's fees in addition to actual damages and a civil penalty.[89] Section 66451(b) now stated that actions for relief "may be prosecuted" (rather than "shall be prosecuted exclusively") by the Attorney General, etc.[90]

The substance of the amended section 66452 was unchanged from that in the May 22 version of the bill; i.e., it would have had the affected institutions formulate and promulgate policies *only* regarding the recording of lectures by students.[91]

F. "Intellectual Property" Becomes "Unauthorized Recording, Dissemination, [etc.]"

With the bill now in the Senate, representatives of the universities and the faculty sponsors continued seeking language that would both satisfy the faculty members' concerns noted above and induce the administrations to drop their formal opposition to the legislation. Early in June, UC proposed changing the bill heading to "Chapter 6.5. Unauthorized Recording, Dissemination, and Publication of Academic Presentations for Commercial Purposes."[92] More importantly, they offered attractive language for a new subparagraph of section 66452 that was gladly accepted by the bill's author and its sponsors.[93] The change in question was the addition of the sentence: "[n]othing in this chapter is intended to change existing law as it pertains to the ownership of academic presentations."[94]

The addition of this statement signaled the universities' acknowledgement that in the absence of contrary evidence, faculty members own their lectures (for so long as Civil Code section 980 remains substantively intact and evolving case law

86. AB 1773 § 66450(d)(1), 1999-2000 Leg., (Cal. May 30, 2000).
87. *Id.* § 66450(d)(2).
88. *Id.* § 66450(c).
89. *Id.* § 66451(a).
90. *Id.* § 66451(b).
91. *Id.* § 66452; AB 1773, 1999-2000 Leg., (Cal. May 22, 2000).
92. AB 1773 § 66452(b), 1999-2000 Leg., (Cal. June 15, 2000).
93. *Id.* § 66452.
94. *Id.* § 66452(a).

does not invalidate *Williams*).[95] Operationally, it would afford an agreed-upon starting point in any consultative or contractual negotiations subsequent to the enactment of AB 1773 that could lead to "contrary evidence."

UC also proposed eliminating altogether the language of section 66450(c) as amended on May 30, prohibiting enrolled students from transferring records of academic presentations to third parties for commercial purposes.[96] Arguably, the existing subparagraph in the May 30 amended version of section 66452 dealing with the establishment and promulgation of policies regarding the violation of this chapter by students should suffice to permit student-operated note-taking services to exist on campuses that choose to have them.[97]

On June 15, 2000, the author amended the bill to incorporate these two UC proposals.[98] The universities then dropped their opposition to the bill.[99] As amended, it passed out of the Senate Judiciary Committee on June 29 by a vote of 7-0[100] and out of the Senate Education Committee on July 5 by a vote of 8-1.[101]

G. The Final Steps

The provisions of the version of AB 1773 that passed the Assembly would have applied only to the three segments of California public higher education.[102] The Senate Judiciary Committee asked to have the state's private colleges and universities included as well.[103] Accordingly, on August 8, 2000, the bill was again amended to delete all the institutional names from section 66450, and to include in section 66452 requests for the governing boards of private postsecondary institutions (along with UC, CSU and the California Community Colleges) to establish policies to prohibit the unauthorized recording of academic presentations, and to adopt "specific regulations governing a violation of this chapter by students. . . ."[104]

On August 18, the bill was again amended to include a new section 66451(c) stating (in part) that "It does not constitute a violation of this chapter for a business, agency, or person solely to provide access or connection to or from a facility,

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95. CAL. CIV. CODE § 980 (West 1982 & Supp. 2000); Williams v. Weisser, 78 Cal. Rptr. 542 (Cal. Ct. App. 1969).

96. AB 1773, 1999-2000 Leg., (Cal. June 15, 2000).

97. AB 1773 § 66452, 1999-2000 Leg., (Cal. May 30, 2000).

98. AB 1773 § 66452, 1999-2000 Leg., (Cal. June 15, 2000).

99. SENATE COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 1773 (July 5, 2000).

100. Senate Judiciary Committee Vote-Roll Call (June 29, 2000), *available at* http://leginfo.ca.gov/pub/99-00/bill/asm/ab_1751-1800/ab_1773_vote_20000629_000002_sen_comm.html. (last visited Feb. 11, 2004) (copy on file with the *McGeorge Law Review*).

101. Senate Education Committee Vote-Roll Call (July 5, 2000), *available at* http://leginfo.ca.gov/pub/99-00/bill/asm/ab_1751-1800/ab_1773_vote_20000705_000001_sen_comm.html (last visited Feb. 11, 2004) (copy on file with the *McGeorge Law Review*).

102. AB 1773 § 66452, 1999-2000 Leg., (Cal. June 15, 2000).

103. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1773 (June 29, 2000).

104. AB 1773 §§ 66450, 66452, 1999-2000 Leg., (Cal. Aug. 8, 2000).

system, or network over which that business, agency, or person has no control. . . ."[105] This exemption does not extend to any business etc. that is in any way "actively involved in the creation, editing, or knowing distribution of a contemporaneous recording that violates this chapter."[106]

The bill, as finally amended, passed the Senate Appropriations Committee on August 23 by a vote of 8-4[107] and the Senate as a whole on August 29 by a vote of 22-13.[108] On August 30, the Assembly concurred in the Senate amendments by a vote of 56-17,[109] and on September 22, 2000, AB 1773 (Romero) was signed into law by Governor Davis.[110]

The full text of the bill as chaptered follows:

> **§ 66450. Prohibitions; application to rights of disabled students** (a) Except as authorized by policies developed in accordance with subdivision (a) of section 66452, no business, agency, or person, including, but not necessarily limited to, an enrolled student, shall prepare, cause to be prepared, give, sell, transfer, or otherwise distribute or publish, for any commercial purpose, any contemporaneous recording of an academic presentation in a classroom or equivalent site of instruction by an instructor of record. This prohibition applies to a recording made in any medium, including, but not necessarily limited to, handwritten or typewritten class notes.
>
> (b) Nothing in this section shall be construed to interfere with the rights of disabled students under law.
>
> (c) As used in this section:
>
> > (1) "Academic presentation" means any lecture, speech, performance, exhibit, or other form of academic or aesthetic presentation, made by an instructor of record as part of an authorized course of instruction that is not fixed in a tangible medium of expression.

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105. AB 1773 § 66451(c), 1999-2000 Leg., (Cal. Aug. 18, 2000).

106. *Id.*

107. Senate Appropriations Committee Vote-Roll Call (Aug. 23, 2000), *available at* http://leginfo.ca.gov/pub/99-00/bill/asm/ab_1751-1800/ab_1773_vote_20000823_000003_sen_comm.html (last visited Feb. 11, 2004) (copy on file with the *McGeorge Law Review*).

108. Senate Floor Vote-Roll Call (Aug. 29, 2000), *available at* http://leginfo.ca.gov/pub/99-00/bill/asm/ab_1751-1800/ab_1773_vote_20000829_1053AM_ sen_floor.html (last visited Feb. 11, 2004) (copy on file with the *McGeorge Law Review*).

109. Assembly Floor Vote-Roll Call (Aug. 30, 2000), *available at* http://leginfo.ca.gov/pub/99-00/bill/asm/ab_1751-1800/ab_1773_vote_20000830_1131PM_asm_ floor.html (last visited Feb. 11, 2004) (copy on file with the *McGeorge Law Review*).

110. CAL. EDUC. CODE §§ 66450-66452 (West 2000) (reenacted by Chapter 574).

(2) "Commercial purpose" means any purpose that has financial or economic gain as an objective.

(3) "Instructor of record" means any teacher or staff member employed to teach courses and authorize credit for the successful completion of courses.[111]

66451. Actions for relief; prosecution (a) Any court of competent jurisdiction may grant relief that it finds necessary to enforce this chapter, including the issuance of an injunction. Any person injured by a violation of this chapter, in addition to actual damages, may recover court costs, attorney's fees, and a civil penalty from any person who is not a student enrolled in the institution at which the instructor of record makes his or her academic presentation and who seeks to obtain financial or economic gain through the unauthorized dissemination of the academic presentation. The amount of the civil penalty shall not exceed one thousand dollars ($1,000) for the first offense, five thousand dollars ($5,000) for the second offense, and for any subsequent offense, a penalty of not less than ten thousand dollars ($10,000) or more than twenty-five thousand dollars ($25,000).

(b) Actions for any relief pursuant to this chapter may be prosecuted in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city, or city and county, in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation, or association or by any person acting for the interests of itself, its members, or the general public.

(c) It does not constitute a violation of this chapter for a business, agency, or person solely to provide access or connection to or from a facility, system, or network over which that business, agency, or person has no control, including related capabilities that are incidental to providing access or connection. This subdivision does not apply to a business or agency that is owned by, or to a business, agency, or person that is controlled by, or a conspirator with, a business, agency, or person actively

111. *Id.* § 66450.

involved in the creation, editing, or knowing distribution of a contemporaneous recording that violates this chapter.[112]

66452. Postsecondary institutions; development of policies and regulations (a) The Regents of the University of California and the governing boards of private postsecondary institutions are requested to, the Trustees of the California State University shall, and the governing board of each community college district may, in consultation with faculty, in accordance with applicable procedures, develop policies to prohibit the unauthorized recording, dissemination, and publication of academic presentations for commercial purposes. Nothing in this chapter is intended to change existing law as it pertains to the ownership of academic presentations.

(b) The Regents of the University of California and the governing boards of private postsecondary institutions are requested to, the Trustees of the California State University shall, and the governing board of each community college district may, adopt or provide for the adoption of specific regulations governing a violation of this chapter by students, along with applicable penalties for a violation of the regulations. The regents are requested to, the trustees shall, and the governing board of each community college district may, adopt procedures to inform all students of those regulations, with applicable penalties, and any revisions thereof.[113]

H. UC's Attempts to Deal with AB 1773 and Related Issues

On August 19, 1992, after extensive consultation with the campus administrations and all levels of the Academic Senate, the University of California promulgated a "University of California Policy on Copyright Ownership."[114]

As it pertains to federally copyrightable material, this policy incorporates the "teacher exemption" to the "work for hire" doctrine in the following manner: it defines a scholarly/aesthetic work as work originated by a "designated academic appointee" (as defined) resulting from independent academic effort.[115] It continues:

Ownership of copyrights to scholarly/aesthetic works shall reside with the designated academic appointee originator, unless they are also sponsored works or contracted facilities works, or unless the designated academic

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112. *Id.* § 66451.

113. *Id.* § 66452.

114. University of California, *University of California Policy on Copyright Ownership* (Aug. 19, 1992), *available at* http://www.ucop.edu/ucophome/coordrev/policy/8-19-92att.html (last visited Feb. 11, 2004) (copy on file with the *McGeorge Law Review*).

115. *Id.*

> appointee agrees to participate in a project which has special provisions on copyright ownership pursuant to Section VI.C of this Policy.[116]

Over the years, the university made several inconclusive attempts to deal with the ownership of course materials—some of which are not subject to federal copyright protection.[117] In the spring of 1999, partly in response to the threatening commercialization of course contents via the Internet, UC created a Standing Committee on Copyright composed of eight administrators of various kinds and six Academic Senate members, chaired by a campus Executive Vice Chancellor. As is true of nearly all such university committees, its membership changes periodically, and the 2003-2004 committee has only six of the original fourteen members on it.

In March of 2001, the Standing Committee prepared and sought "informal review" of a three-page "Draft Policy on Ownership and Use of Course Materials."[118] One of the items contained therein was a proposed "Policy on Recordings of [Academic][Instructional] Presentations."[119] The transmittal letter from the University Provost said that this latter draft policy "addresses the specific issues raised by the passage of . . . AB1773, in the 2000 legislative session.[120] Consistent with AB1773, this draft proposes a uniform policy on the recording of classroom presentations for commercial purposes."[121]

Many campus and system-wide Academic Senate committees offered detailed comments, as did the campus administrations. Over a two-year period, the Standing Committee successfully formulated a final "Policy on Ownership of Course Materials," which President Richard C. Atkinson issued on September 25, 2003, to take effect immediately.[122] This policy provides a comprehensive definition of "Course Materials," with a long, but not exclusive, list of examples.[123] It states that, with some delineated exceptions,

> ownership of the rights to *Course Materials*, including copyright, shall reside with the *Designated Instructional Appointee* who creates them. However, the University retains a fully paid-up, royalty-free, perpetual,

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116. *Id.*

117. *Id.*

118. University of California, *Committee Report on Draft Policy on Ownership of Course Materials*, *available at* http://ucop.edu/copyright/courseownership/background.html (last visited Feb. 12, 2004) (copy on file with the *McGeorge Law Review*).

119. University of California, Policy on Recordings of [Academic] [Instructional] Presentations (Mar. 22, 2001), *available at* http://www.ucop.edu/copyright/2003-02-27/DRAFTPolicyonRecording.pdf (last visited Feb. 12, 2004) (copy on file with the *McGeorge Law Review*).

120. Letter from C. Judson King, Provost and Senior Vice President, University of California, to Chancellors, University of California, May 15, 2001 (copy on file with the *McGeorge Law* Review).

121. *Id.*

122. University of California, *Policy on Ownership of Course Materials* (Sept. 25, 2003), *available at* http://www.ucop.edu/copyright/courseownership/PolicyonCourseOwnershipfinal.pdf (last visited Mar. 21, 2004) (copy on file with the *McGeorge Law Review*).

123. *Id.*

> and non-exclusive worldwide license to any *Course Approval Documents* for the purpose of continuing to teach the course of instruction for which the documents were prepared, with the non-exclusive right to revise and update as required for this purpose.[124]

On February 15, 1935, UC President Robert Gordon Sproul issued Orders of the President No. 3, called "Privileges and Duties of Members of the Faculty."[125] A passage in section APM-005 pertinent to the present discussion reads as follows:

> No individual or department has any absolute right to give any course he or the department may wish to give. Courses are integral parts of curricula and are, as such, means to certain ends. A Standing Order of the Board of Regents requires the Senate to "authorize and supervise all courses of instruction in the academic and professional colleges and schools." In practice, the Senate delegates this duty to its Committee on Courses of Instruction. Authorization and supervision of curricula are entrusted to the various colleges. The courses which constitute these curricula are, then, of interest to the Faculties of the Colleges, as well as to the Senate.[126]

In practice, this means that courses fill particular needs in curricula that must be met no matter who the particular instructor might be. The new "Policy on Course Ownership" thus recognizes that the detailed contents of a particular offering of an accredited course are the intellectual property of the faculty member who originated them, but the subject matter to be covered therein, as delineated by the departmental, college or campus-wide curriculum, is not.[127]

At present, UC's approach to the recording of academic presentations is still a work in progress. In a letter to University Provost C. Judson King dated June 14, 2002, the then-Chair of the Standing Committee on Copyright, UCLA Executive Vice Chancellor, Wyatt R. Hume, wrote in part:

> The draft Policy on Recordings of [Academic] [Instructional] Presentations drew a considerable amount of commentary, very little of it favorable. The commentary revealed widely differing positions on fundamental issues of who should control the creation and use of

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124. *Id.* (recognizing that in the University of California a "course" is not *per se* associated with a particular instructor).

125. *Privileges and Duties of Members of the Faculty*, *available at* http://www.ucop.edu/acadadv/acadpers/apm/apm-005.pdf (last visited Mar. 5, 2004) (copy on file with the *McGeorge Law Review*).

126. *Id.*

127. *See Policy on Ownership of Course Materials*, *supra* note 122.

> recordings of classroom presentations, differences that could not easily be reconciled by the Committee.[128]

Hume then cited several examples contributing to their dilemma, and noted that

> issues of academic policy, business policy and practice, and appropriate use of the University name and facilities for commercial purposes appear to be more central to this matter than do issues of copyright; indeed, the draft policy does not address issues of copyright ownership at all. The Committee is therefore concerned that it might not be the right group to move this policy forward, and that there might be other University officials or advisory groups that might be more effective in developing and finalizing policy in this area.[129]

He did, however, conclude by saying that the Committee would be "happy" to proceed with further development of this policy.[130]

On September 12, 2002, Provost King wrote to UC Irvine Executive Vice Chancellor M. Gottfredson, the new Chair of the Standing Committee on Copyright, asking the Committee, *inter alia*, "to continue to develop a policy proposal on Recordings of Academic Presentations for formal review."[131] Accordingly, one of the Committee's objectives for it's next meeting, on February 27, 2003, was to "Review the draft policy on Recording of [Academic] [Instructional] Presentations, [and to] set out plans for revision and review."[132] According to the notes of the meeting the Committee considered two revised drafts of the policy, but took no action.[133] The Committee member representing the Office of the General Counsel of the Regents observed that the material the Committee reviewed "prohibits distributing notes/recordings, not the notes/recordings themselves, and pointed out the distinction between the right to record and the right

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128. Letter from W.R. Hume, Chair of the Standing Committee on Copyright, UCLA Executive, to C. Judson King, University Provost, June 14, 2002, *available at* http://www.ucop.edu/copyright/2003-02-27/HumetoKing2002-06-14.pdf (copy on file with the *McGeorge Law Review*).

129. *Id.*

130. *Id.*

131. Letter from C. Judson King, University Provost and Senior Vice President, to Mike Gottfredson, Chair of the Standing Committee on Copyright, UC Irvine Executive Vice Chancellor, Sept. 12, 2002, *available at* http://www.ucop.edu/copyright/2003-02-27/KingtoGottfredson2002-09-12.pdf (copy on file with the *McGeorge Law Review*).

132. University of California, *Standing Committee on Copyright Agenda, available at* http://www.ucop.edu/copyright/scc_agenda_022703.html (last visited Mar. 5, 2004) (copy on file with the *McGeorge Law Review*).

133. University of California, *Standing Committee on Copyright Notes, available at* http://www.ucop.edu/copyright/scc_notes_022703.htm (last visited Mar. 5, 2004) (copy on file with the *McGeorge Law Review*).

to distribute recordings."[134] The Committee staff was asked to prepare a revised draft for consideration at the next meeting.[135]

On April 29, 2003 the Committee considered two draft policies, which had quite different intents. The system-wide Director of Library Planning and Policy Development presented a "Policy on Distribution of Recordings of Course Presentations" while the University Counsel offered a "Policy on Recordings of Courses and Other Instructional Presentations."[136] The minutes of this meeting reflect the Committee's sense that the draft dealing with the recording of presentations rather than their use "took a new approach to the issue that had not previously been discussed by the Committee; for this reason the consensus was to use (the other one) as the basis for discussion and action."[137]

At the Standing Committee's next meeting, held February 4, 2004, the member from the Office of the General Counsel (OGC) noted that

> Campuses have frequently sought assistance from the OGC regarding means to control abuses of the classroom by companies producing and selling course notes and OGC has found that there is no University-wide policy or regulation applicable to this situation. . . .OGC feels that the proposed policy, which controls distribution of course recordings, may not prove sufficient to cover some situations where "distribution" is not involved, and believes that it would be useful to have a policy that in addition controls that act of creating a record.[138]

Paragraph A.d. of the OGC's draft policy on "Recordings" fully confirms the suspicion of AB 1773's faculty sponsors that the University would at some stage assert that it has an inherent right to record classroom presentations.[139] It reads:

> The Chancellor or Chancellor's designee may arrange for the recording of a course or presentation if the Chancellor has determined that *such recording is in the best interests of the University and the instructor/presenter was informed* prior to teaching said course or making said presentation that the University may want to record such course for educational purposes.[140]

According to the meeting notes, after extensive discussion, the sense of the Standing Committee (in pertinent part) was that: "Expanding the policy to include

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134. *Id.*
135. *Id.*
136. *Standing Committee on Copyright Agenda*, *supra* note 132.
137. *Standing Committee on Copyright Notes*, *supra* note 133.
138. *Id.*
139. *Standing Committee on Copyright Agenda*, *supra* note 132.
140. *Id.* (emphasis added).

control over creation of records could be impractical, would likely raise faculty concerns about academic freedom and administrative intrusion into the classroom, and would surely require extensive consultation with the [Academic] Senate."[141] The Committee also felt that, "The current draft policy, which has received informal review by campuses and the faculty, is needed immediately to help campuses with the frequently-occurring problem of controlling commercial exploitation of lecture notes."[142] Accordingly, the Committee consensus "was to make minor changes in the wording of the draft Policy on Distribution of Recordings of Course Presentations and move it forward to formal University-wide review."[143]

The principal reason the Standing Committee gave for shelving consideration of a draft policy on "Recordings of Courses and Other Instructional Presentations" is shockingly disconsonant with the University of California's tradition of Shared Governance. As a consequence, it would not be unreasonable for the Academic Council to intervene on behalf of the faculty and request that a draft policy addressing the recording of academic presentations be prepared and vetted with all deliberate speed. AB 1773, which calls for one to be developed, was enacted more than three years ago.

141. *Id.*
142. *Id.*
143. *Id.*

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