

**SAN JOSE STATE UNIVERSITY
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SAN JOSE, CA 95192**

**SS-S17-1, Sense of the Senate Resolution, Requesting
Changes in the System wide Proposed Intellectual Property
Policy**

Legislative History: At its meeting of April 10, 2017, the Academic Senate approved the following Sense of the Senate Resolution presented by Senator Peter for the Professional Standards Committee.

**SENSE OF THE SENATE RESOLUTION
REQUESTING CHANGES IN THE SYSTEM WIDE PROPOSED
INTELLECTUAL PROPERTY POLICY**

Whereas, The CSU central administration has drafted a proposed intellectual property policy to be implemented system wide, and have requested “input and feedback no later than 60 days from” March 14, 2017; and

Whereas, The Academic Senate of SJSU has reviewed the draft policy; now therefore, be it

Resolved, That the ASCSU and the CSU should be apprised of our deep concerns with both the process used to create the proposed system policy and with a number of features present in its content; we have explained these concerns and our conclusions in the attached white paper; be it further

Resolved, That this resolution be distributed to the Chancellor, to the Executive Vice Chancellor and General Counsel, the Executive Vice Chancellor for Academic and Student Affairs, to the ASCSU, and to all campus Academic Senates.

Approved: April 5, 2017 by email after a 7-0-1 in-person committee vote on an earlier draft

Vote: 8-0-2

Present: Peter, Green, White, Lee, Kauppila, Hamedi-Hagh, Hwang, Reade, Marachi, Caesar

Absent: None

White Paper: Faculty Intellectual Property at SJSU and the CSU Proposed System IP Policy

Concern with Process

- 1) **An abrogation of collegiality.** The report acknowledges that 16 campuses have intellectual property policies of their own. The replacement of these 16 policies with a system wide policy may seem rational from the perspective of Long Beach, but we see it as an assault on collegial governance. Each campus policy, including our own, was written, debated, and amended through a collegial governance process featuring faculty, prior to being signed by our campus Presidents.

The proposed system policy that would replace these collegial documents, however, was not created in a collegial fashion. It was written by 16 administrators who have excluded faculty input prior to this 60 day window (p. 5). Furthermore, no effort was made to involve each of the 16 campuses that have their own policies. ***SJSU, in the heart of the most important region in the world for the creation of intellectual property, was completely unrepresented on the IP Committee by faculty or administration.***

The proposed system policy on intellectual property will abrogate collegial agreements between faculty and administration that have been carefully debated and negotiated over a period of years. For an entire issue-area, it replaces previous traditions of collegial governance with administrative authority. This is especially disturbing given that the American Association of University Professors (AAUP), notes that the “keys to proper intellectual property management are consultation, collaboration, and consent.”¹

- 2) **The false restriction based on collective bargaining.** From time to time we have received intimations that the reasons the collegial process was so badly abrogated had to do with collective bargaining. We hesitate to explain the CSU’s position on this since our campus has not been offered a detailed rationale from the CSU for its actions. The theory—or rumor—that we have heard is that the CSU believes that items that are possibly subject to collective bargaining cannot be discussed through the collegial governance system. Furthermore, the current CBA does possess an article—39—which discusses some (but far from all) aspects of Intellectual Property.

¹ AAUP Report from June 2014, “Defending the Freedom to Innovate: Faculty Intellectual Property Rights after *Stanford v. Roche*, p.4.
https://www.aaup.org/sites/default/files/files/aaupBulletin_IntellectualPropJune5.pdf

If this is in fact the CSU's position, it should rethink it. HEERA does set up a division of labor between collective bargaining and collegial governance, but that division of labor can in no way be thought to restrict the role of academic senates on this issue. The 16 campus policies on Intellectual Property have all existed for many years under the collective bargaining agreement, including during the time that article 39 has been in effect, and this provides *prima facie* evidence that article 39 and policies crafted by Academic Senates can indeed coexist. If in fact some of the policies are not in conformity with article 39, then CFA can be relied upon to point out the non-conforming policies so that the affected campuses can take corrective action.

The report of the CSU Intellectual Property Committee itself points out the fallacy in the argument that collective bargaining somehow rules out full senate consultation. As it describes article 39 in its section on "Need for Labor Negotiations" (p. 9) it points out that the article only concerns certain narrow and specific provisions related to intellectual property. The draft policy (and we might add our campus policies) address a vast range of issues unrelated to article 39. To rule out collegial governance on an entire issue area merely because a narrow part of that area has been bargained is unreasonable.

Furthermore, the CBA and collegial governance already work in an integrated fashion on a wide range of topics including (most especially) appointment, retention, tenure, and promotion. The fact that the CBA sets a few parameters on ARTP issues has never been taken as an excuse to suppress collegial governance on those vital policies. Why then would similar parameters be used to suppress full collegial participation on intellectual property? If every topic area mentioned in the CBA were off limits to collegiality, then there would be very little collegiality left indeed.

Fortunately, we suspect that this unreasonable argument that the CSU is alleged to have made is in fact little more than rumor. The CSU, after all, has decided to allow the ASCSU to comment on the proposed policy, which seems to be an admission that collective bargaining does not in fact rule out the full operations of the collegial governance system. We choose to accept this interpretation of the actions of the CSU, and proffer this paper as our own collegial response to the proposed policy.

Concern with Content

We have spent some time comparing the proposed policy with our own policy and with the UC policy. Given the short time frame for providing feedback, we cannot claim to have done a careful analysis. However, we have noticed several provisions that we believe will weaken the protection of intellectual property for faculty compared with some campus and UC policies.

- 1) **Definition of Extraordinary Support excessively broad.** With all of these policies, the absolute crux of the matter comes down to how “extraordinary support” is defined. The reason for this is that all IP policies give ownership of IP rights to the author (usually faculty) unless the CSU provides “extraordinary support,” in which case the CSU will claim some level of ownership.

The proposed policy’s definition of “Extraordinary Support,” however, is overly broad. It

may include, but not be limited to, funding for additional employment, assigned time and other forms of payment, additional operating expenses or additional equipment or facilities costs.” (p. 14.)

This is an expansive definition that does not establish limits on the term. We are particularly concerned that the inclusion of “assigned time” would result in classifying a preponderance of faculty intellectual property as subject to the “extraordinary support” provision. IP developed on sabbaticals, for example, or nearly any IP produced at campuses that have achieved a 3/3 load (such as SDSU), or by junior faculty who have been given a course release(s) to get started, or by anyone else who has earned a release from a 12 WTU load—could be subjected to this overly broad definition of extraordinary support. This definition needs to be rewritten to exclude all these routine uses of assigned time.

Compare this excessively broad definition with the UC definition:

Exceptional University Resources University Resources (including but not limited to University Facilities and University Funds, as described below) significantly in excess of the usual support generally available to similarly situated faculty members. Customary secretarial support, library facilities, office space, personal computers, access to computers and networks, and academic year salary are not considered exceptional university resources.²

This definition is narrow, and it takes pains to explain what exceptional resources are NOT. The definition “significantly in excess of the usual support generally available to similarly situated faculty members” is a far more reasonable definition than “assigned time or other forms of payment” that takes no account of whether such time is routine or truly exceptional.

- 2) **University’s license to course materials created without extraordinary support is too broad.** In both the UC policy and in the CSU proposed policy, the faculty member retains copyright to Course Approval Documents and Course

² <http://copyright.universityofcalifornia.edu/resources/ownership-course-materials.html>

Instructional Materials. In the UC policy, the UC gets license to use the approval docs for educational purposes; the CSU version extends this license to the actual course materials. This is a huge difference and a very troubling one. We believe that the UC policy makes the proper distinction and the CSU proposed policy is too broad in its claim to a permanent free license to faculty instructional materials.

The AAUP statement on intellectual property makes this distinction clear, and while the UC IP policy conforms to the AAUP statement, the CSU proposed policy does not:

Course syllabi at many institutions are considered public documents; indeed, they may be posted on universally accessible websites. It is thus to be expected that teachers everywhere will learn from one another's syllabi and that syllabi will be disseminated as part of the free exchange of academic knowledge. Faculty lectures or original audiovisual materials, however, unless specifically and voluntarily created as works made for hire, constitute faculty intellectual property.³

The CSU, however, asserts a very broad claim that "CSU Course Instructional Materials include documents, digital products, or other materials developed for instruction of CSU courses," and while copyright resides with the Author, the CSU

retains a free-of-cost, perpetual and nonexclusive worldwide license to use the Course Instructional Materials for research and educational purposes, including without limitation the right to reproduce, prepare derivative works, distribute, perform and display the Course Instructional Materials (p.12.)

The CSU assertion means, in our view, that lectures, lecture notes, lecture presentations (e.g., PowerPoint, Keynote), recordings of our lectures, online courses as a whole, and other materials prepared by a CSU Professor to teach his or her section, could permanently be used by the CSU free of charge, long after a faculty member departed, retired, or died—or could be taken involuntarily from one faculty member and shared with others at other campuses. The CSU should return to the more limited language of the UC policy and the AAUP statement on intellectual property.

- 3) ***Written agreements should cover the ownership of intellectual property (including course materials) created with extraordinary support.*** In the UC policy, faculty get to reach agreement with the university about how ownership

³ American Association of University Professors, "Statement on Intellectual Property," 2013. <https://www.aaup.org/report/statement-intellectual-property>

will be handled when there is Extraordinary Support. In the CSU policy, rights are automatically transferred to the CSU and the faculty member MAY be granted license for educational use. According to the CSU proposed policy,

Ownership of CSU course materials (including Course Approval Documents and Course Instructional Materials) created with CSU Extraordinary Support, including copyright, resides with the University” (p. 12).

Now compare with the UC Statement:

Ownership of the rights to Course Materials created, in whole or in part, by Designated Instructional Appointees with the use of Exceptional University Resources shall be governed by a written agreement entered into between the Originator(s) and the University. The agreement shall specify how rights will be owned and controlled and how any revenues will be divided if the materials are commercialized.⁴

We were particularly chagrined to learn that the AAUP cited a CSU Long Beach administrative memo protecting faculty ownership of materials developed for online instruction as an exemplar of resistance to the “emerging pattern of coopting the faculty’s instructional intellectual property.”⁵ Presumably that model campus policy at CSULB will be swept away by the system policy.

We believe that an IP policy should make it clear that any surrender of faculty IP rights to the University—even when extraordinary support is given—should be made in writing and in advance to avoid misunderstanding, confusion, and litigation down the road. UC policy gives this right, but the proposed CSU policy does not.

- 4) ***Response to Bayh-Dole Act is excessive.*** The CSU draft proposal notes that the requirements of the Bayh-Dole Act allow universities to patent federally-funded inventions and to retain those royalties. However, the draft CSU policy goes further:

we recommend the adoption of the obligations required under the Bayh-Dole Act as a reasonable set of objectives for the CSU to apply to all inventions whether or not they are federally funded (p. 7).

Although the expansion to include inventions that are made with university resources may be considered reasonable by some, it is not clear how faculty will

⁴ <http://copyright.universityofcalifornia.edu/resources/ownership-course-materials.html>

⁵ American Association of University Professors, “Defending the Freedom to Innovate: Faculty Intellectual Property Rights after *Stanford v. Roche*, June 2014, p. 8. <https://www.aaup.org/report/defending-freedom-innovate-faculty-intellectual-property-rights-after-stanford-v-roche>

be involved with the determination of ownership of their own inventions. In contrast, the AAUP clearly states

Universities...have tried to claim that the only way they can guarantee that faculty members will honor these responsibilities [under Bayh-Dole] is by taking ownership of all faculty inventions, but obviously there are contractual alternatives to what amounts to a wholesale institutional grab of significant developments of faculty scholarship. Indeed, faculty members have long been able to honor these requirements without assigning their intellectual property rights to the University.⁶

Furthermore, the landscape for faculty intellectual property rights changed as a result of the 2011 *Stanford v. Roche* decision.

The US Supreme Court...in its landmark 2011 decision in *Stanford v Roche*...firmly rejected the claims by Stanford and other institutions favoring federally sanctioned, compulsory university ownership of faculty research inventions.⁷

Indeed, AAUP drives home that the US Constitution, Federal Patent Law, and the above-referenced Supreme Court ruling all hold that “inventions are owned initially by their inventors,” and moreover, Bayh-Dole “does not alter the basic ownership rights granted to inventors by law.”⁸ We believe that this aspect of the IP policy should make clear that inventions can be created by faculty in many ways (without university facilities, in conjunction with a non-federal sponsor) and that faculty ownership as determined by campus policies should be retained or negotiated in instances when inventions are created without federal support or with university resources. The decision to craft a CSU system policy that extends a claim of ownership beyond federally funded research is not required by law and stands on shaky legal ground since Roche.

- 5) ***Scrutinize the proposed policy with an eye to incorporate the AAUP “Intellectual Property Principles Designed for Incorporation into Faculty Handbooks and Collective Bargaining Agreements.”*** The AAUP has spent years perfecting 11 principles that should govern intellectual property at universities. Any policy on IP could benefit from a careful and thoughtful edit to incorporate these 11 principles. The principles can be read in full at the conclusion of the cited AAUP article.⁹ A few highlights of these principles include:

11. Faculty assignment of an invention to...the university...will be voluntary and negotiated, rather than mandatory.

⁶ AAUP, “Defending...” p. 6.

⁷ AAUP, “Defending...” p. 6

⁸ AAUP “Statement on Intellectual Property”; AAUP, “Defending...” p. 7.

⁹ AAUP, “Defending...” pp. 17-19.

12. The faculty senate or an equivalent body will play a primary role in defining the policies...that will guide university-wide management of inventions...
13. Just as the right to control research and instruction is integral to academic freedom, so too are faculty members' rights to control the disposition of their research inventions.
15. When lifesaving drugs and other critical public-health technologies are developed in academic laboratories...the university...will ensure broad public access in both the developing and the industrialized world.
16. ...The freedom to share and practice academic discoveries...whether legally protected or not, is vitally important for the advancement of research and scientific inquiry.
17. The university...and faculty will always work to avoid exclusive licensing of patentable inventions....

A group of faculty experts in intellectual property should be given sufficient time to scrutinize the proposed CSU policy to determine any changes that are needed to bring it up to the AAUP standards.

Conclusions

The CSU draft proposal on intellectual property weakens existing protections of faculty IP rights and does not measure up in quality to the standards enumerated by the AAUP or even UC system policy or existing campus policies. The proposal is not a policy that faculty would have written or assented to, had they been permitted to be a part of the drafting process.

The CSU, however, should be concerned about this proposal not only because faculty are incensed. The CSU is attempting to improve its stature in research, but the promulgation of a policy that is hostile to faculty IP rights will likely drive our most successful researchers out of the academy altogether or to other institutions that have more flexible policies regarding intellectual property. In order to generate more research dollars, the CSU needs to make itself more attractive to research faculty, not less attractive. Tightening the rules to pinch every penny will drive the dollars away.

In an effort to be as constructive as possible under the circumstances, we suggest:

- 1) A modified version of the proposed system IP policy should be distributed as a model to the campuses. Each campus that lacks an appropriate IP policy should be required to create or amend one to bring it up to standards by the end of AY 2017-18. Failure to do so could result in the issuance of the draft system policy as a Presidential Directive on that campus. This would allow the collegial governance system to function, allow for substantive faculty input, protect local differences in the research enterprise, and also secure most of the stated objectives of the reform.

- 2) If a system wide policy must be adopted, then the SJSU Academic Senate recommends that the draft policy not be immediately adopted. Instead, it should be rewritten with the participation of faculty from throughout the CSU system, and then not adopted until endorsed by the ASCSU.