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"PROFITING AT MY EXPENSE": AN ANALYSIS OF THE COMMERCIALIZATION OF PROFESSORS' LECTURE NOTES

"The first duty of a lecturer: to hand you after an hour's discourse, a nugget of pure truth to wrap up between the pages of your notebook, and keep on the mantelpiece forever."—Virginia Woolf (1882-1941)

I. INTRODUCTION

After four years of undergraduate coursework, two years in graduate school, and an additional four years finishing his doctoral thesis, Professor Flat Broke prepared his first college-level, history lecture series for the fall semester. His preparation was rigorous. In fact, he spent the entire summer vacation researching and developing the challenging, as well as thought provoking lecture series on post-World War II history. He also included his personal experiences in the lecture. For example, he included anecdotes of his military tour of duty in the Persian Gulf.

On the first day of class, Professor Broke scanned the auditorium to get a good look at his first class. In the front row, he saw undergraduate student, Ms. Get Rich Quick, who had arrived early in order to set up her laptop and to prepare for the next hour of the professor's lecture. Upon seeing her plug in her laptop, as opposed to the traditional pen and paper, a somewhat curious professor strolled over to her desk. Professor Flat Broke had heard about the lucrative market for undergraduate lecture notes and with a bit of distress in his voice, he asked: "Are you planning to sell the lecture notes that you are about to take?"

The above scenario is not an unusual occurrence on today's college campuses, nor is student for-profit sharing of lecture notes a new phenomenon. Since the 1960s, students have been selling their lecture notes through professional commercial note services.² Until recently, "most note-taking

¹ The term "professor" means an instructor in a university or college employed to teach courses and to authorize credit for the successful completion of courses.

² Goldie Blumenstyk, *Putting Class Notes on the Web: Are Companies Stealing Lectures?*, CHRON. HIGHER EDUC., Oct. 1, 1999, 1999 WL 1022697.

companies were local operations that sold photocopied lecture notes, with the professor's approval, to students."³ Today, professors' lecture notes are being sold without permission and for large profits.⁴ In addition, with the advent of the Internet, students are now posting their professors' lecture notes via for-profit forums such as www.study24-7.com,⁵ Versity.com, and StudentU.com.⁶ Some of the Web sites require students to pay a subscription fee in order to receive the lecture notes; however, many of the Web sites receive revenue from corporate advertisers and provide free lecture notes. For example, Versity.com, which was founded in 1997 by four twenty-year-old college dropouts, received \$12 million in advertising dollars from corporate sponsors, which included Venrock and Sigma Partners.⁷ Similarly, StudentU.com received \$6 million in advertising dollars from NetStrategy.⁸

Using their advertising revenues, these corporate sponsored Web sites pay the student note-takers to upload their notes to the Web site. For example, depending on the amount of traffic that the student generates, Study24-7.com note-takers can earn up to \$1,000 per semester,⁹ while Versity.com note-takers earn \$8 to \$12 per lecture.¹⁰

The ease of access via the convenience of the Internet has many professors concerned about the theft of their hard work. There is a growing feeling of uneasiness among professors who wish to disseminate information to their students but resent the fact that someone else will profit from their research and preparation.¹¹

³ Mary Beth Marklein, *For Sale: A Prof's Intellectual Property or Just the Facts? Net Entrepreneurs Duly Note a Niche in Lecture Notes*, USA TODAY, Jan. 13, 2000, 2000 WL 5766056.

⁴ Student Notes, a commercial note service that operates on the University of Georgia's campus, sells notes for over 75 large lecture classes for \$8 each class. (A large lecture class is defined as more than 100 students.) In addition, it pays its note-takers an average of \$75 per class. The amount the student earns depends on the quality of the notes and the amount sold. Telephone Interview with Student Employee, Student Notes (Jan. 4, 2001).

⁵ Pat Lopes Harris, *Latest Web Debate: Who Owns College Notes?*, BUS. J., Nov. 5, 1999, 1999 WL 10352850.

⁶ Adrienne Sanders, *URLazy.com Professors Hate Them. Students Love Them. Web Sites are Posting Free Lecture Notes Online—and Drawing Heavy Fire from the Ivory Tower*, FORBES, May 15, 2000, 2000 WL 2125344.

⁷ *Id.*

⁸ *Id.*

⁹ Marklein, *supra* note 3.

¹⁰ Wendy R. Leibowitz, *At Yale's Demand, a Web Site Drops Lecture Notes from the University's Classes*, CHRON. HIGHER EDUC., Mar. 17, 2000, 2000 WL 8881280.

¹¹ Carol Lewis, *College Lecture Notes Posted on Net UNT Professors are Concerned that Web Sites and Students are Profiting from Their "Intellectual Property Rights"*, FORT WORTH STAR-TELEGRAM, Apr. 5,

This Note explores the many issues involved when students sell their professors' lecture notes to commercial note services. It addresses the federal copyright scheme and state common law protections. It also addresses the rationales and policies of protecting the lectures—most significantly, “sweat of the brow” protection and John Locke’s idea of natural rights. In addition, this Note looks to possible remedies in light of the anti-bootlegging statute, Europe’s protection of data compilations, and California’s recent state legislation protecting professors’ lectures. Based on the author’s research, the author concludes that there should be carefully crafted state legislation which provides protection for professors who do not want their lectures commercially distributed.

Part I of this Note describes the present state of affairs. Part II examines the shortcomings of currently available protections for professors’ lecture notes. Part III explores the issues of ownership, standing to sue, and the work for hire doctrine. This Note concludes in Parts IV and V by offering suggestions for professors and universities that face the dilemma of others profiting at their expense.

A. THE PRESENT STATE OF AFFAIRS: THE RESPONSE OF VARIOUS UNIVERSITIES TO THE COMMERCIALIZATION OF LECTURES NOTES

Various universities have responded to the commercialization of lecture notes in different ways.

1. *Prohibition Policies.* Many universities have developed policies and rules to end the commercial distribution of notes. For example, Kansas State University’s attorney drafted a statement for professors to attach to their syllabi. The statement reads:

Copyright 1999 [professor’s name] as to this syllabus and all lectures. Students are prohibited from selling (or being paid for taking) notes during this course to or by any person or commercial firm without the express written permission of the professor teaching this course.¹²

2000, 2000 WL 5003683 (North Texas professor said that he spent “years fine-tuning his lectures to make them interesting . . .”).

¹² Blumenstyk, *supra* note 2.

In addition, the University of California has a written policy that states: "Lecture notes are not to be used for commercial purposes or exchanged for compensation."¹³

The shortcoming of the prohibition policy is that the prohibition only applies to students who are actually enrolled in the course. The policy does not apply to non-students who merely "sit in" on a professors' class in order to obtain the lecture notes for their employer, the commercial note service.

2. *Cease and Desist Letters.* Many universities have issued cease-and-desist letters to note distributing Web sites, urging the Web sites to remove the notes or face legal proceedings.¹⁴ For example, Yale's general counsel sent a cease-and-desist letter to Versity.com in February of 2000.¹⁵ The company responded by removing from its Web site the lecture notes that it had obtained from its Yale student note-takers.¹⁶

The limitation of issuing cease and desist letters is that there are many transaction costs, *i.e.*, drafting the letter and continuously monitoring the company's activities.

3. *State Legislation.* State legislation prohibiting the commercialization of lecture notes is rare; however, California professors have recently lobbied for legislation to curb the practice of selling lecture notes. In fact, on September 22, 2000, the Governor signed into law a bill that bars the commercial dissemination of lecture notes without the permission of the instructor giving the lecture.¹⁷ The law provides protection for instructors

¹³ Harris, *supra* note 5.

¹⁴ A cease and desist order is defined as an order prohibiting a person or business firm from continuing a particular course of conduct. BLACK'S LAW DICTIONARY 223 (6th ed. 1990).

¹⁵ Leibowitz, *supra* note 10.

¹⁶ *Id.*

¹⁷ (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

whose lectures are not necessarily fixed in a tangible medium of expression as required by the Copyright Act of 1976. There are also civil penalties and provisions for injunctions to stop non-students who violate this law.¹⁸ The law leaves a violation by an enrolled student in the hands of the university.¹⁹

4. *The "Permission Only" Model.* Some universities only allow students to sell lecture notes via permission from the professor. However, like the prohibition policy, the "permission only" model is only applicable to students, not to the non-student employees of commercial note companies.

5. *The "Do Nothing" Approach.* In contrast to California's legislative approach, many universities have chosen to do nothing about the practice of selling lecture notes. For example, at the University of Michigan, where

expression.

(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.

CAL. EDUC. CODE § 66450 (West Supp. 2001).

- ¹⁸ (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 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).

CAL. EDUC. CODE § 66451 (West Supp. 2001).

- ¹⁹ (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.

CAL. EDUC. CODE § 66452 (West Supp. 2001).

Versity.com originated, administrators have decided not to take sides on the issue.²⁰ The problem with the “do nothing” approach is that it still leaves professors frustrated with the fact that they cannot prohibit the practice of selling lecture notes.

6. *Litigation.* There have not been many lecture note copyright infringement actions. In 1996, the University of Florida brought a copyright infringement action against a publisher of study guides.²¹ The defendant’s study guides were made using students who were hired by the defendant to attend class and take lecture notes. The University of Florida claimed “statutory copyright infringement pursuant to 17 U.S.C. § 101 et seq., as well as common law copyright infringement, of written and oral components of its professors’ lectures in fourteen courses taught during the 1990 spring semester, and one course taught in the 1989 fall semester.”²² The court granted summary judgment to the publisher on the copyright claim, reasoning that the statements in the lecture could be characterized as facts or ideas that do not belong to anyone.²³

After the University of Florida’s suit, the University of California followed by filing a suit against a commercial note service that had operated on its campus since 1995.²⁴ Instead of a copyright claim, the University of California alleged unauthorized use of the university’s name and trespassing on the University of California’s campuses in violation of the university’s unauthorized commercial activities policy.²⁵

The commercial note service failed to defend the lawsuit and as a result, on February 25, 1999, the University of California won a default judgment against the commercial note service.²⁶ After declaring default, the state judge who heard the case permanently barred the service from engaging in any commercial activity on University of California campuses.²⁷

Another California copyright decision is *Williams v. Weisser*, where a professor of anthropology sued a commercial note service for publishing and

²⁰ Ann LoLordo, *Taking Note Colleges at Odds with Note-takers for Hire*, NEW ORLEANS TIMES-PICAYUNE, May 22, 2000, 2000 WL 21258637.

²¹ University of Florida v. KPB, Inc., 89 F.3d 773, 39 U.S.P.Q.2d (BNA) 1603 (11th Cir. 1996).

²² *Id.* at 775 n.1.

²³ *Id.*

²⁴ Lewis, *supra* note 11.

²⁵ *Id.*

²⁶ A default judgment is defined as a “judgment entered against a party who has failed to defend against a claim that has been brought by another party.” BLACK’S LAW DICTIONARY 417 (6th ed. 1990).

²⁷ Lewis, *supra* note 11.

selling notes from his lectures.²⁸ The professor alleged copyright infringement under state copyright protection²⁹ and misappropriation of the literary property in his lectures.

The issue before the trial court was whether a college professor may recover damages for misappropriation or unauthorized reproduction or sale thereof.³⁰ The court held that the defendant was prohibited from using the professor's lectures because the professor owned the common law copyright in them.³¹ The court stated:

The principle which pervades the whole of that reasoning is, that where the persons present at a lecture are not the general public, but a limited class of the public, selected and admitted for the sole and special purpose of receiving individual instruction, they may make any use they can of the lecture, to the extent of taking it down in shorthand, for their own information and improvement, but cannot publish it.³²

The court also stated that:

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.³³

After awarding the professor damages, the court concluded by stating that the "defendant was not an innocent layman, caught in the complexities of the law, but a businessman who, for personal profit, was determined to

²⁸ *Williams v. Weisser*, 273 Cal. App. 2d 726, 163 U.S.P.Q. (BNA) 42 (1969).

²⁹ Before the American Revolution, copyright was a creature of state law, either by statute or by interpretation of the common law. As federal law has gradually come to occupy more and more of the scope of copyright, the role of state law has been correspondingly reduced. Nonetheless, state common law still provides copyright-style protection in some areas that federal law does not.

ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 810 (2d ed. 2000).

³⁰ *Williams*, 273 Cal. App. 2d 726.

³¹ *Id.*

³² *Id.* at 741 (quoting *Caird v. Sime*, 12 A.C. 326, 347-48 (1887)).

³³ *Id.* at 742.

pursue a certain course of action even if it meant riding roughshod over the rights of others.”³⁴

II. THE SHORTCOMINGS OF THE AVAILABLE PROTECTIONS

A. FEDERAL COPYRIGHT LAW

According to the Patent and Copyright Clause of the United States Constitution, “The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³⁵ Under this clause, Congress may enact legislation to grant temporary monopolies, i.e. copyrights, to people who create literary works.

In allowing for copyright protection, the Framers of the Constitution sought “to promote the Progress of Science and useful Arts.”³⁶ Furthermore, the Framers “intended to increase and not to impede the harvest of knowledge.”³⁷ Therefore, the Framers included the “limited times” language to allow for the restriction of the duration of copyrights. In essence, limiting the scope of copyrights ensures that “works are freely disseminated and that the next generation of authors can make use of the ideas of the prior generation in creating still more works.”³⁸

In accordance with the Constitution’s Copyright Clause, Congress passed the Copyright Act of 1790 that granted protection to authors of books for fourteen years and allowed renewal for fourteen more years.³⁹ In addition, the 1790 Act “allowed copyrights to be registered with the local district court and notice to be published in local newspapers.”⁴⁰

In 1909, Congress overhauled the 1790 Copyright Act to broaden the scope of copyright protection. For example, Congress broadened protection from merely protecting books to protecting “all writings.”⁴¹ In addition,

³⁴ *Id.* at 744.

³⁵ U.S. CONST. art. I, § 8, cl. 8.

³⁶ *Id.*

³⁷ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545, 225 U.S.P.Q. (BNA) 1073, 1075 (1985).

³⁸ MERGES, *supra* note 29, at 352.

³⁹ *Id.* at 347.

⁴⁰ *Id.*

⁴¹ *Id.*

Congress expanded the duration of a copyright from fourteen to twenty-eight years and allowed for renewal for twenty-eight more years.⁴²

In 1976, Congress again revised copyright provisions and passed the Copyright Act of 1976, "which (with some modifications) governs most works today."⁴³ Under the 1976 Act, the scope of copyright protection was expanded to include all written works that were fixed in a tangible medium of expression. In addition to the scope expansion, the duration of copyright protection was expanded to include the life of the author plus fifty years.⁴⁴

Today, a work protected by federal copyright law has the following elements:

1. *threshold for protection*

- a. modicum of originality—A work must display a modicum of originality and
- b. be fixed in a tangible medium of expression;⁴⁵

2. *copyrightable subject matter*

In essence, ideas are not copyrightable; however, the author's expression of an idea is copyrightable.⁴⁶

3. *formalities*

To bring an infringement action, United States authors must register their work with the United States Copyright Office.⁴⁷

4. *authorship and ownership*

The work must have been created by the party bringing suit, or rights in the work must have been transferred by the author to the party bringing suit.⁴⁸ and

5. *duration*

A copyright lasts for the life of the author plus seventy years.⁴⁹

⁴² *Id.*

⁴³ *Id.*

⁴⁴ This provision has been amended to the life of the author plus 70 years. 17 U.S.C. § 302(a) (2000).

⁴⁵ MERGES, *supra* note 29, at 349.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

Copyright protects a work from the moment of creation. An author does not need to register the work with the Copyright Office. However, if the author decides to sue someone for copyright infringement, the author must register the work. A valid copyright grants the owner the following rights:

Copying. The owner has the exclusive right to make copies of her work. She may sue a copier for infringement if the copying is “material” and “substantial,” even if the copy is in a different form or is of only part of the whole.

Derivative Works. The owner has the exclusive right to prepare derivative works, which are works based on the original but in different forms or otherwise altered (such as translations, movies based on books, etc.). These derivative works are themselves copyrightable, to the extent that they contain their own original expression . . . the right to create derivative works overlaps with the right to make copies.

Distribution. The owner has the right to control the sale and distribution of the original and all copies or derivative works, including licensed copies. However, this right extends only to the first sale of such works. The owner does not have the right to limit resale by purchasers of her works (except in certain limited circumstances).

Performance and Display. The owner has the right to control the public (but not private) performance and display of her works, including both literary and performance-oriented works. This right extends to computer programs and other audiovisual works. The owner generally does not have the right to prevent the public display of a particular original or copy of a work of art, however.⁵⁰

The rights listed above are limited. For example, they are subject to the fair use doctrine, which is “a balancing test that allows limited use of copyrighted material.”⁵¹

⁵⁰ *Id.* at 349-50.

⁵¹ MERGES, *supra* note 29, at 350.

1. *Feasibility of Protection for Professors' Lecture Notes Under Federal Copyright Law.* Does federal copyright law prevent a commercial note service from copying a lecture delivered by a professor? The answer is: it depends. The legality of buying and selling lecture notes or of posting lecture notes on the Internet seems to be a gray area of the law.⁵² In essence, the answer to this question depends on the lecture meeting the fixation requirement, ownership of the lecture, and the nature of the lecture.

2. *The Threshold for Protection: Modicum of Originality and Fixation in a Tangible Medium of Expression.* As previously stated, the thresholds for federal copyright protection are: originality and fixation in a tangible form. Without these two, there is no copyright protection.

In regard to originality, courts have set a very low standard to meet this criterion.⁵³ The "original works of authorship" language in the Constitution "does not include requirements of novelty, ingenuity," or artistic merit.⁵⁴ In *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, the court held that a copyrightable work need not be:

strikingly unique or novel All that is needed to satisfy both the Constitution and the statute is that the "author" contributed something more than a "merely trivial" variation, something recognizably "his own." Originality in this context "means little more than a prohibition of actual copying." No matter how poor artistically the "author's" addition, it is enough if it be his own.⁵⁵

According to Robert P. Merges, "[a]s developed by the courts, originality entails *independent creation* of a work featuring a *modicum of creativity*. Independent creation requires only that the author not have copied the work from some other source."⁵⁶

a. *Meeting the Originality Requirement.* Since the standard for originality is low, most lectures will probably meet the originality require-

⁵² "Gray" implies that something is wrong with this practice, but does not necessarily imply illegal as the term "black market" suggests.

⁵³ MERGES, *supra* note 29, at 354.

⁵⁴ *Id.*

⁵⁵ *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03, 90 U.S.P.Q. (BNA) 153, 157 (2d Cir. 1951).

⁵⁶ MERGES, *supra* note 29, at 354.

ment. In essence, if a professor gathers the information that he or she needs to deliver a lecture and arranges the material into a comprehensive form, it is likely that a court will find that these lecture notes meet the originality requirement.

b. Meeting the Fixation or Tangible Form Requirement. To the extent that a speech, lecture, or other vocal performance is not reduced to tangible form, it is outside the scope of the 1976 Copyright Act. Protection exists if the author reduces the lecture to writing or to any tangible form (i.e. a recording), before the lecture is given.⁵⁷

According to Robert P. Merges, there are two reasons for the fixation requirement. First, "material that does not communicate (directly) to people is undeserving of copyright protection."⁵⁸ Second, "fixation helps in proving authorship" and in preventing a large number of frivolous infringement suits.⁵⁹ In addition, "the concept of fixation is important since it not only determines whether the provisions of the statute apply to a work, but it also represents the dividing line between common law and statutory protection."⁶⁰

3. The Actual Lecture—Three Possible Scenarios. In order to obtain copyright protection, a lecture must be fixed in a tangible medium of expression. There are three ways in which a lecture may be delivered and possibly meet the fixation requirement.

a. The Script. A lecture can be read from a prepared script. Under this scenario, a professor writes out her lecture word for word before actually giving the lecture. Then, the professor delivers the lecture from the script, reading each word. This scenario is closely analogous to a playwright's script and an actor reciting from it. Like a playwright's script, this form of lecturing meets the fixation requirement because the prior writing before delivery/performance consists of a tangible form. It is important to note that if this lecture meets the other copyright requirements, then no one, including students, could audio-record or copy the lecture word for word and publish/distribute copies without the professor's permission. Copyright law protects the professor's work.

⁵⁷ ARTHUR R. MILLER & MICHAEL H. DAVIS, *INTELLECTUAL PROPERTY PATENTS, TRADEMARKS, AND COPYRIGHT IN A NUTSHELL* 303 (2d ed. 1990).

⁵⁸ MERGES, *supra* note 29, at 367.

⁵⁹ *Id.*

⁶⁰ *Id.* at 364.

b. *"Off the Cuff"—Mere Oral Delivery.* The next form of lecture occurs when a professor lectures extemporaneously, such as from his personal experience, thoughts, research, or observations. There is no prepared script, but there is a significant amount of prior learning in the lecture.

Since this lecture is not fixed in a tangible form, *i.e.* a writing, as in the first scenario, this lecture probably does not meet the fixation requirement. However, the students in the class who audio-record or record the lecture in their own lecture notes could contemporaneously fix the lecture in a tangible form for the professor. In resolving this issue, we need to know whether or not the professor gave students authority to fix the lecture in a tangible form before the lecture began. If the professor gave the students permission to record the lecture, then the students' recording of the lecture is sufficient to establish a tangible medium of expression. However, if the students did not have permission to audio-record the lecture, then it is unlikely that a professor's lecture will meet the "tangible medium of expression" requirement.

c. *The Middle Ground—Oral Delivery With Few Written Notes.* The middle ground occurs when the professor lectures from a prepared outline of his lecture, but improvises as he goes along. For example, a history professor may outline his lecture in the chronology of the events that led up to World War II, and then add his own personal experiences during the delivery of the lecture.

If the written portions of the lecture meet the other requirements of copyrightability, then the lecture will probably be considered fixed to the extent that it is written down.

4. *The Copyrightable Subject Matter Requirement.* *Are Lecture Notes Copyrightable Subject Matter?* The most significant hurdle of copyright protection of lectures is the copyrightable subject matter element. Case law establishes that ideas and facts are not copyrightable. In essence, facts belong to us all.

The United States Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service, Inc.*, established the doctrine that facts are not copyrightable.⁶¹ In *Feist*, a public utility sued a publishing company for taking white page listings without consent and publishing a competing directory. The plaintiff argued that their white page listings should receive

⁶¹ *Feist Publ'ns, Inc. v. Rural Tel. Servs., Inc.*, 499 U.S. 340, 18 U.S.P.Q.2d 1275 (BNA) (1991).

copyright protection. The Court held that facts are not copyrightable, but compilations of facts⁶² are protected as to coordination, selection, and arrangement, albeit the level of protection is very thin.⁶³ The Court stated:

Facts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted. A factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement. In no event may copyright extend to the facts themselves.⁶⁴

In essence, there is a thin level of protection for original compilations of facts. The result of this “thin level” of protection means that others, including one’s competition, may extract the facts from another’s copyrighted compilation. In light of this realization, the Court stated:

This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.⁶⁵

While to some, it may seem unfair that a competitor may be able to extract the substance of another’s hard work/sweat, in *Feist*, the Court specifically rejected the sweat of the brow theory of protection and stressed that the emphasis of copyright law is not the benefit of authors, but the benefit to the public.⁶⁶ The sweat of the brow approach is the idea of extending copyright protection to the compiler who has exerted an appreciable amount of time and work into his or her factual compilation, but because of the nature of the works (*i.e.* facts), federal copyright protection is not available. The Court stated:

⁶² The Court defined a “compilation of fact” as a collection of pre-existing material, facts, or data. *Id.* at 357.

⁶³ *Id.* at 340.

⁶⁴ *Id.* at 350-51.

⁶⁵ *Id.* at 349.

⁶⁶ *Id.* at 353.

It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not "some unforeseen byproduct of a statutory scheme." *Harper & Row*, 471 U.S., at 589 (dissenting opinion). It is rather, "the essence of copyright," *ibid.*, and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." Art. I, § 8, cl. 8 (citations omitted). To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. (citations omitted). This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is *neither unfair nor unfortunate*. It is the means by which copyright advances the progress of science and art. (emphasis added).⁶⁷

a. *The Gray Areas*. In light of the *Feist* holding, in order to determine if a professor's lecture qualifies as copyrightable subject matter, there must be an analysis of the content of the lecture. Lecture notes can be works of low authorship (*i.e.*, compilations of facts) or high authorship (*i.e.*, a work of fiction or a novel), depending on the content of the lecture.

b. *Meeting the Feist Requirements*.

i. *A Lecture on Just the Facts*. If the professor is just lecturing on the facts, the professor may not be able to protect the content of the lecture because *Feist* establishes that no one may own facts. Therefore, it does not violate federal copyright law if a student extracts the facts from a lecture and sells those facts to a commercial note service.

ii. *A History Lecture*. A history lecture is a discourse of facts on certain aspects of the past. For example, a history lecture could detail the settling of America, African-American history, or post-civil war history.

⁶⁷ *Id.* at 349-50.

In light of *Feist*, a history lecture would probably qualify as a mere compilation of facts and as a result, receive a thin level of protection. In essence, as established in *Feist*, a history professor could show that her lecture is original as to selection and arrangement. For example, the professor could focus on themes instead of chronological order in regard to arrangement and include only post civil war information in regard to selection. However, in regard to the facts that the professor includes in the lecture, another person, such as a student note-taker, could freely and without violating the professor's copyright, extract the facts.

iii. *A Philosophy Lecture*. Philosophy is the rational investigation of the truths and principles of being, knowledge, or conduct. The philosophy lecture seeks to ascertain as well as offer views or theories on profound questions in ethics, metaphysics, logic, and other related fields. Thus, a philosophy lecture seems to be less factual than a history lecture and will probably contain many of the professor's original ideas and interpretations. Therefore, if the lecture meets the other requirements of copyrightability, it is likely that the contents of the philosophy lecture will probably be protected under copyright law.

iv. *Business School Lectures (i.e., Economics, Accounting, and Marketing Lectures)*. A business lecture includes topics such as profits, partnerships, corporations, commerce, manufacturing, and service, among many other things. Like a history lecture, it is likely that a business lecture will consist mostly of facts, and thus will be subject only to the thin level of copyright protection that governs compilations.

B. FAIR USE

The extraction of facts from the original work may be protected as fair use.⁶⁸ The fair use analysis involves a balancing process by which a complex

⁶⁸ 17 U.S.C. § 107. Limitations on Exclusive Rights:

Fair Use. Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

number of variables determine whether other interests should override the rights of creators. The Copyright Act explicitly identifies four factors: (1) the purpose and character of the use, including its commercial nature; (2) the nature of the copyrighted work; (3) the proportion that was "taken"; and (4) the economic impact of the "taking."⁶⁹

Under the fair use analysis and assuming that the lecture is copyrightable, a court may find fair use by the commercial note service. First, in light of factor one, the nature and purpose of the use, a court is likely to find that the commercial note service is making a commercial use of the professor's work; however, commercial use does not always mean that there is not a fair use.⁷⁰ The second factor, the nature of the copyrighted work, is likely to not favor the professor if the lecture is highly factual. The third factor, the proportion taken, is likely to not favor the commercial note service, since the aim of a commercial note service is to reproduce a substantial amount of what the professor said. The fourth, and what some scholars consider the determinative factor, economic impact of the taking, is likely to favor the commercial note service, since the professor or the university could easily sell its own version of the notes. In essence, students would more likely buy the professor's version of the notes as opposed to the commercial note service's version. In addition, some students may very well buy both sets of notes.

C. STATE COMMON LAW

Even if federal copyright law does not protect a work, a work may still be protected under state common law.⁷¹ Unlike federal law, state common law generally provides protection for works of authorship that are not fixed

- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

⁶⁹ BLACK'S LAW DICTIONARY 598-99 (6th ed. 1991).

⁷⁰ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584, 29 U.S.P.Q.2d (BNA) 1961 (1994).

⁷¹ Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression.

17 U.S.C. § 301(b)(1) (2000).

in a tangible medium of expression. However, like federal copyright law, state common law only gives exclusive ownership to the representation or expression of the work. State common law does not protect ideas.⁷²

An example of a state common law case addressing the tangible medium of expression issue is *Estate of Hemingway v. Random House, Inc.*, where the estate of Earnest Hemingway sued the publisher of a book composed of conversations between the author and the deceased before he died.⁷³ The issue was: "whether conversations of a gifted and highly regarded writer may become the subject of common-law copyright, even though the speaker himself has not reduced his words to writing."⁷⁴

The court defined common-law copyright as "the term applied to an author's proprietary interest in his literary or artistic creations before they have been made generally available to the public."⁷⁵ The court also noted that the creation of the work itself is what is protected, not necessarily the tangible embodiment.⁷⁶ In ruling for the defendant, the court left open the question of who owns the intellectual property of a speaker in such situations where the statements would clearly be protected by federal copyright law if they had been in tangible form, i.e. a writing. Instead, the court ruled on a more narrow ground. The court found implied authority to publish the conversations because Hemingway had never objected to the publishing of the conversations during his lifetime.⁷⁷

Another state copyright law decision is *Williams v. Weisser*, where a professor sued a student who attempted to sell copies of notes from the professor's lectures.⁷⁸ The professor filed a copyright infringement lawsuit. The issues before the trial court were: "whether a college professor has literary property rights in his lectures delivered by him at a university and whether he may recover damages for misappropriation or unauthorized

⁷² MERGES, *supra* note 29, at 810.

⁷³ *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 160 U.S.P.Q. (BNA) 561 (N.Y. 1968).

⁷⁴ *Id.* at 253.

⁷⁵ *Id.* at 254.

⁷⁶ *Id.*

⁷⁷ *Id.* at 256; "Some commentators, and the Office of Copyright, indicate that interviews should be protected by a 'dual' copyright. Under the dual theory, both the interviewer and the interviewee can claim copyright in their respective expressions, absent an agreement to the contrary." Vicki L. Ruhga, Note, *Ownership of Interviews: A Theory for Protection of Quotations*, 67 NEB. L. REV. 675, 676 (1988).

⁷⁸ *Williams v. Weisser*, 273 Cal. App. 2d 726, 163 U.S.P.Q. (BNA) 42 (1969); see *supra* note 28 and accompanying text.

reproduction or sale thereof."⁷⁹ The court held that the student was prohibited from using the professor's lectures because the professor owned the common law copyright in them.⁸⁰

D. NATURAL LAW

Another justification for the ownership and protection of professors' lecture notes is John Locke's theory of property. According to John Locke, "labor over a previously un-owned piece of property (intellectual or physical) can vest ownership rights in the laborer."⁸¹ In essence, whatever one takes from nature and joins with his own labor, becomes his property—so that it is intuitively wrong to let someone else use his labor.

Under this theory, professors argue that they have gathered previously un-owned facts and joined their own labor and knowledge to develop lectures. In essence, through the joining of the previously unowned and their labor, the lectures become their property. Thus, in accordance with John Locke's theory, it is intuitively wrong to let someone else use their labor and property.

III. STANDING TO SUE

Provided a professor meets the fixation and originality requirements, does a professor have standing to sue a commercial note service? The answer to this question depends on who owns the notes. Two possible owners of the lecture notes are the professor, who thought of the original work or selection, and the university, under its work for hire doctrine.

A. THE WORK FOR HIRE DOCTRINE

Under the Copyright Act of 1976, ownership of a copyright "vests initially in the author or authors of the work."⁸² In essence, "the author is the party who actually creates the work—the person who translates an idea

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ MERGES, *supra* note 29, at 347 ("Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labor with it, and joined to it something that is his own, and thereby makes it his property.").

⁸² 17 U.S.C. § 101 (2000).

into a fixed, tangible expression entitled to copyright protection. However, the 1976 Act created an exception for 'works made for hire.' ”⁸³ Section 101 defines “work made for hire” as:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.⁸⁴

Thus, according to section 101 of the 1976 Copyright, there are two ways to create a work for hire. The first is “for an employee to create a work within the scope of his or her employment.”⁸⁵ According to the Restatement of Agency, an employee’s conduct is within the scope of employment when it is of the kind that the employee was hired to perform, it occurs substantially within authorized time and space limits, and it is actuated, at least in part, by a purpose to serve the employer.⁸⁶ The second way to create a work for hire is for a hiring party to specially order or commission a work falling within one of nine specified categories and for the parties to expressly agree in writing that the work is for hire.⁸⁷

There are very few cases that address the issue of whether a university or a professor owns the copyright to teaching materials prepared by a faculty member. The cases that exist seem to follow the “teacher exception” to the work for hire rule in that absent explicit agreement to the contrary between the institution and the faculty member, the professor owns the work.⁸⁸

⁸³ Georgia Holmes & Daniel A. Levin, *Who Owns Course Materials Prepared by a Teacher or Professor? The Application of Copyright Law to Teaching Materials in the Internet Age*, 2000 BYU EDUC. & L.J. 165, 167.

⁸⁴ 17 U.S.C. § 101 (2000).

⁸⁵ Holmes & Levin, *supra* note 83, at 167.

⁸⁶ Restatement (Second) of Agency § 228 (1) (1992).

⁸⁷ 17 U.S.C. § 101 (2000).

⁸⁸ Holmes & Levin, *supra* note 83, at 186. See also *Cnty. for Creative Non-Violence v. Reid*, 490 U.S.

The various policies that support the teacher exception rule are:

- (1) Given the traditionally limited commercial value of a teacher's lecture notes, an educational institution would typically have no reason to want copyright ownership of such lecture notes.
- (2) In the college and university context, professors move from one college or university to another, creating a course at one institution and developing it at another. If a professor developed lecture notes (or other teaching materials) at one college or university, and that institution owned the professor's lecture notes or teaching materials, then it would be difficult for the professor to move to another institution, as the first institution would be able to enjoin him from using the materials he had developed there.
- (3) In determining who owns a professor's lecture notes or other teaching materials, the institution hiring would have to find out the precise extent to which the new professor's lectures have taken concrete shape when he first comes to work because a contract for employment does not imply an assignment to the institution of any copyright which the professor already owns.
- (4) In the college and university context, a professor's lectures are a unique kind of intellectual product and should not automatically be treated like other intellectual products that employees create.
- (5) Abolishing the teacher exception would wreak havoc in the settled practices of academic institutions.⁸⁹

730, 741, 10 U.S.P.Q.2d (BNA) 1985, 1989-90 (1989) (ruling that if the work was prepared by an employee within the scope of employment, then it was a work for hire pursuant to subsection one of the work for hire definition of 17 U.S.C. § 101—basically suggesting that the court should look to the common law of agency); *Sherrill v. Grieves*, 57 Wash. L. Rep. 286, 290 (D.C. 1929) (stating "the court does not know of any authority holding that such a professor is obliged to reduce his lectures to writing or if he does so that they become the property of the institution employing him"); *Williams v. Weissner*, 78 Cal. Rptr. 542, 546, 163 U.S.P.Q. (BNA) 42, 44 (Cal. Ct. App. 1969) (holding that in absence of contrary evidence, teacher, not university, owned common-law copyright to his lectures).

⁸⁹ See *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416, 7 U.S.P.Q.2d (BNA) 1043, 1047 (7th Cir. 1988) (explaining the "teacher exception" under which academic writing was presumed not to be a work for hire, the merit of the exception being that the academic author was entitled to copyright his writings. In

(6) There is a lack of fit between the policy of the work for hire doctrine and the conditions of academic production. (citations omitted)⁹⁰

Courts have also noted that university lectures are “sui generis” in that they are a unique intellectual product, and they should not “[a]bsent compulsion by statute or precedent,” be automatically treated like other intellectual products that employees create.⁹¹

B. CONTRACTING AROUND THE WORK FOR HIRE DOCTRINE

In light of the above cases and analysis, many universities have decided to use contracts in order to clarify the work for hire doctrine relationships they have with their employees.

In its efforts to protect the rights of professors, the University of Georgia has adopted an ownership of intellectual property policy.⁹² Based on its text,

addition, a “college or university does not supervise its faculty in the preparation of academic books and articles, and is poorly equipped to exploit their writings, whether through publication or otherwise.” *Id.* at 416. The court also believed that the 1976 Copyright Act inadvertently abolished the teacher exception; however, the court looked to policy reasons to continue the exception).

⁹⁰ Holmes & Levin, *supra* note 83, at 187.

⁹¹ *Id.* at 175 (quoting *Williams*, 78 Cal. Rptr. at 547). *Sui generis* is defined as of its own kind or class. See also *Univ. of Colo. Found. v. Am. Cyanamid*, 880 F. Supp. 1387, 1400, 35 U.S.P.Q.2d (BNA) 1737, 1747 (D. Colo. 1995) (assuming that an academic article written by university professors was a work for hire).

⁹² Ownership of Intellectual Property developed by University Personnel shall reside with the Originator of such Intellectual Property provided that:

- (1) there was no significant use of University resources in the creation of such Intellectual Property; and
- (2) the Intellectual Property was not developed in accordance with the terms of a sponsored project agreement; and
- (3) the Intellectual Property was not developed by faculty, staff, or students as a specific University assignment.

It shall be the responsibility of the Originator of the Intellectual Property to demonstrate that this classification applies.

Ownership of Intellectual Property developed by University Personnel through an effort that makes significant use of University resources, called UGA-assisted individual efforts, shall be shared by the Originator and the University. In general, the University shall not construe the provision of office space, access to library resources, or off-line office computers as constituting significant use of University resources. Significant use of University resources shall include, but not be limited to, use of research funding, use of University-paid time within the employment period, use of support staff, use of telecommunication services, and use of facilities other than office or library resources.

Ownership of intellectual property generated entirely on personal time and solely as a result of individual initiative, and not involving the use of UGA facilities or resources, resides with the individual.

it appears that a professor who uses the University of Georgia's Internet access or research access, such as Lexis or Westlaw, to prepare a lecture may lose full ownership of the research—that is, if the lecture is copyrightable in the first place. However, the professor who writes a lecture during his or her leisure time (using his or her own research resources) or while traveling may not lose portions of ownership.

IV. REMEDIES

On the whole, copyright protection for professors' lectures depends on the lectures meeting the requirements of federal copyright law or state common law.

If professors cannot find relief in federal copyright statutes and in state common law, other remedies are still possible. For example, state legislatures could pass *sui generis* legislation—protecting the sweat of the brow of the professors who spend a great deal of time putting lectures together.

A. POTENTIAL LEGISLATION

1. *Federal Legislation.* Congress could pass federal legislation that protects the professors' lectures. In essence, Congress could pass legislation similar to the anti-bootlegging statute, which deals with the unauthorized fixation and trafficking of sound recordings and music videos.⁹³ Basically,

It is the responsibility of the individual to demonstrate that such intellectual property made, discovered, or developed while the individual is employed by the UGA meets these required criteria.

University of Georgia, Research Policies & Procedures Handbook, Chapter 2, http://www.ovpr.uga.edu/rpph/rph_chp2.html (last visited Jan. 4, 2001).

⁹³ Unauthorized fixation and trafficking in sound recordings and music videos

(a) Unauthorized Acts. Anyone who, without the consent of the performer or performers involved—

(1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation,

(2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance, or

(3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixation occurred in the United States, shall be subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright.

(b) Definition. As used in this section, the term "traffic in" means transport, transfer, or otherwise dispose of, to another, as consideration for anything of value, or make

Congress could carve out an exception for professors as to their unscripted lectures, analogous to the unscripted music exception.⁹⁴

Congress could also pass legislation that protects compilations of facts, as the European Union has done.⁹⁵

2. *State Legislation.* As previously mentioned, California's legislature has recently passed the most innovative and comprehensive protection of professors' lecture notes by establishing civil penalties for non-students who publish professors' lecture notes without the professors' permission.⁹⁶ In addition, the statute leaves the choice of punishing students who sell professors' lecture notes to the university. This legislation is the first of its kind, and it seems to protect professors who feel that others are profiting at their expense. Another benefit of the statute is that it does not forbid the whole world from using the lecture notes; it only applies to students and commercial note services. Third, the statute allows for licensing so that professors could also benefit from their hard work.⁹⁷ Fourth, since it was not passed as copyright legislation and because it applies to unfixed works, it does not seem to interfere with the federal copyright scheme.

There are some concerns about California's law that may prompt other states to not adopt a similar statute or to seriously modify the statute. First,

or obtain control of with intent to transport, transfer, or dispose of.

(c) Applicability. This section shall apply to any act or acts that occur on or after the date of the enactment of the Uruguay Round Agreements Act [enacted Dec. 8, 1994].

(d) State law Not Preempted. Nothing in this section may be construed to annul or limit any rights or remedies under the common law or statutes of any State.

17 U.S.C. § 1101 (2000).

⁹⁴ The anti-bootlegging statute has been challenged as unconstitutional. In *United States v. Moghadam*, 175 F.3d 1269, 1273, 50 U.S.P.Q.2d 1801, 1804 (11th Cir. 1999), the court declined to decide whether the fixation concept of the Copyright Clause could be expanded to encompass live performances that are merely capable of being reduced to a tangible form, but have not been. The court also noted potential problems with the relation of the statute to the "authors" and "for Limited Times" language of the Constitution. *Id.* at 1274 n.9. However, the court held that the statute had a sufficient connection to interstate and foreign commerce to fall within Congress' legislative authority under the Commerce Clause. *Id.* at 1282.

⁹⁵ The European Union's Directive provides legal protection for databases (compilations of fact). The object of the directive is *sui generis* and it intends to ensure protection of any investment in obtaining, verifying, or presenting the contents of a database. In addition, the investment may include the expending of time, effort, and energy. Council Directive 96/9, art. 7, 1996 O.J. (L 77) 20, 25. The United States Congress is considering similar legislation; however, like the anti-bootlegging statute, there are serious concerns about the constitutionality of such a statute.

⁹⁶ See *supra* note 17 and accompanying text.

⁹⁷ A "license" is authority to carry on a trade or business, which would otherwise be unlawful. BLACK'S LAW DICTIONARY 920 (6th ed. 1990).

California's statute seems to grant monopoly protection to schools that manage their own lecture note services. In essence, the statute keeps a non-university affiliated note service from competing with the university's note service. In light of antitrust concerns, it is unlikely that many states will wish to grant universities these monopolies. Second, even though California's statute was not passed as a copyright law, the statute seems to contradict the policies of copyright law as established in *Feist*, where the Supreme Court concluded that copyright law is not to protect facts and authors, but to benefit the public knowledge.⁹⁸ In contrast with this policy, the California statute seems to be consistent with John Locke's natural rights theory and the sweat of the brow theory.⁹⁹

V. CONCLUSION

On the whole, it seems as if students and commercial note services are truly profiting at the expense of the professors who spend countless hours preparing, researching, and developing their lectures.

What is a professor to do? Many professors have looked to federal copyright law, only to find that there are gray areas. In essence, federal copyright law does provide protection for the professor who meets the copyright requirements of fixation in a tangible medium of expression, modicum of originality, and copyrightable subject matter. However, there is no federal copyright protection for the professor who fails to meet one of the requirements.

The most significant hurdles of meeting the copyright requirements seem to be the fixation and copyrightable subject matter requirements. In essence, in order to receive copyright protection, a professor needs to fix his or her lecture in a tangible form, *i.e.* a writing or a recording. The professor also needs to arrange his or her lecture using original arrangement and selection, so as to meet the *Feist* requirements for protecting compilations of facts. In regard to the copyrightable subject matter element, acquiring copyright protection would depend on the content of the lecture. As a result, the facts of a professor's lecture could be extracted without violating copyright law. Thus, federal copyright law protection for lectures has many shortcomings and may leave the professor without a significant cause of action.

⁹⁸ *Feist Publ'ns, Inc. v. Rural Tel. Servs., Inc.*, 499 U.S. 340, 349-50 (1991).

⁹⁹ See *supra* note 81 and accompanying text.

Furthermore, even if a professor meets the copyright requirements, under the work for hire doctrine, he or she still may not be able to sue the commercial note service. In essence, the work for hire doctrine could place ownership of the lecture in the hands of the university that the professor works for and therefore, not give the professor standing to bring a copyright infringement action since the professor would not meet the ownership requirement.

In addition to filing copyright infringement suits, professors could also petition for both federal and state legislation. This Note advocates comprehensive state legislation similar to the legislation passed by California, but without the monopoly granting features. Thus, professors should petition both their universities and their legislatures to follow California's lead and pass comprehensive policies and legislation protecting their lectures. Professors could also petition Congress for an exception to the Copyright Act, similar to the anti-bootlegging statute that was recently passed for unscripted music.

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