

1 **SAN JOSE STATE UNIVERSITY**
2 **Academic Senate**
3 **Professional Standards Committee**
4 **April 10, 2017**
5 **Final Reading**

AS 1530

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7 **Sense of the Senate Resolution**
8 **Requesting Changes in the**
9 **System wide Proposed Intellectual Property Policy**

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11 **Whereas,** The CSU central administration has drafted a proposed intellectual
12 property policy to be implemented system wide, and have requested “input
13 and feedback no later than 60 days from” March 14, 2017; and
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15 **Whereas,** The Academic Senate of SJSU has reviewed the draft policy; now
16 therefore, be it
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18 **Resolved,** That the ASCSU and the CSU should be apprised of our deep concerns
19 with both the process used to create the proposed system policy and with
20 a number of features present in its content; we have explained these
21 concerns and our conclusions in the attached white paper; be it further
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23 **Resolved,** That this resolution be distributed to the Chancellor, to the Executive Vice
24 Chancellor and General Counsel, the Executive Vice Chancellor for
25 Academic and Student Affairs, to the ASCSU, and to all campus
26 Academic Senates.
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30 **Approved:** *April 5, 2017 by email after a 7-0-1 in-person committee vote on an earlier*
31 *draft*

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33 **Vote:** *8-0-2*

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

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38 **Absent:** *None*
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White Paper: Faculty Intellectual Property at SJSU and the CSU Proposed System IP Policy

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Concern with Process

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- 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.

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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.***

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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

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- 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

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

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

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

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

114 **Concern with Content**

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

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

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

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132 may include, but not be limited to, funding for additional
133 employment, assigned time and other forms of payment, additional
134 operating expenses or additional equipment or facilities costs.” (p.
135 14.)

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

147
148 Compare this excessively broad definition with the UC definition:

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

158
159 This definition is narrow, and it takes pains to explain what exceptional resources
160 are NOT. The definition “significantly in excess of the usual support generally
161 available to similarly situated faculty members” is a far more reasonable
162 definition than “assigned time or other forms of payment” that takes no account of
163 whether such time is routine or truly exceptional.

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

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

168 Instructional Materials. In the UC policy, the UC gets license to use the approval
169 docs for educational purposes; the CSU version extends this license to the actual
170 course materials. This is a huge difference and a very troubling one. We believe
171 that the UC policy makes the proper distinction and the CSU proposed policy is
172 too broad in its claim to a permanent free license to faculty instructional
173 materials.
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175 The AAUP statement on intellectual property makes this distinction clear, and
176 while the UC IP policy conforms to the AAUP statement, the CSU proposed
177 policy does not:

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179 Course syllabi at many institutions are considered public
180 documents; indeed, they may be posted on universally accessible
181 websites. It is thus to be expected that teachers everywhere will
182 learn from one another's syllabi and that syllabi will be
183 disseminated as part of the free exchange of academic knowledge
184 Faculty lectures or original audiovisual materials, however, unless
185 specifically and voluntarily created as works made for hire,
186 constitute faculty intellectual property.³
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188 The CSU, however, asserts a very broad claim that "CSU Course Instructional
189 Materials include documents, digital products, or other materials developed for
190 instruction of CSU courses," and while copyright resides with the Author, the
191 CSU

192
193 retains a free-of-cost, perpetual and nonexclusive worldwide
194 license to use the Course Instructional Materials for research and
195 educational purposes, including without limitation the right to
196 reproduce, prepare derivative works, distribute, perform and display
197 the Course Instructional Materials (p.12.)
198

199 The CSU assertion means, in our view, that lectures, lecture notes, lecture
200 presentations (e.g., PowerPoint, Keynote), recordings of our lectures, online
201 courses as a whole, and other materials prepared by a CSU Professor to teach
202 his or her section, could permanently be used by the CSU free of charge, long
203 after a faculty member departed, retired, or died—or could be taken involuntarily
204 from one faculty member and shared with others at other campuses. The CSU
205 should return to the more limited language of the UC policy and the AAUP
206 statement on intellectual property.
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- 209 3) ***Written agreements should cover the ownership of intellectual property***
210 ***(including course materials) created with extraordinary support.*** In the UC
211 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>

212 will be handled when there is Extraordinary Support. In the CSU policy, rights
213 are automatically transferred to the CSU and the faculty member MAY be
214 granted license for educational use. According to the CSU proposed policy,
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216 Ownership of CSU course materials (including Course Approval
217 Documents and Course Instructional Materials) created with CSU
218 Extraordinary Support, including copyright, resides with the
219 University” (p. 12).
220

221 Now compare with the UC Statement:
222

223 Ownership of the rights to Course Materials created, in whole or in
224 part, by Designated Instructional Appointees with the use of
225 Exceptional University Resources shall be governed by a written
226 agreement entered into between the Originator(s) and the
227 University. The agreement shall specify how rights will be owned
228 and controlled and how any revenues will be divided if the materials
229 are commercialized.⁴
230

231 We were particularly chagrined to learn that the AAUP cited a CSU Long Beach
232 administrative memo protecting faculty ownership of materials developed for
233 online instruction as an exemplar of resistance to the “emerging pattern of
234 coopting the faculty’s instructional intellectual property.”⁵ Presumably that model
235 campus policy at CSULB will be swept away by the system policy.
236

237 We believe that an IP policy should make it clear that any surrender of faculty IP
238 rights to the University—even when extraordinary support is given—should be
239 made in writing and in advance to avoid misunderstanding, confusion, and
240 litigation down the road. UC policy gives this right, but the proposed CSU policy
241 does not.
242

- 243 4) **Response to Bayh-Dole Act is excessive.** The CSU draft proposal notes that
244 the requirements of the Bayh-Dole Act allow universities to patent federally-
245 funded inventions and to retain those royalties. However, the draft CSU policy
246 goes further:
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248 we recommend the adoption of the obligations required under the Bayh-
249 Dole Act as a reasonable set of objectives for the CSU to apply to all
250 inventions whether or not they are federally funded (p. 7).
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252 Although the expansion to include inventions that are made with university
253 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>

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

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

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

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

273
274 Indeed, AAUP drives home that the US Constitution, Federal Patent Law, and
275 the above-referenced Supreme Court ruling all hold that “inventions are owned
276 initially by their inventors,” and moreover, Bayh-Dole “does not alter the basic
277 ownership rights granted to inventors by law.”⁸ We believe that this aspect of the
278 IP policy should make clear that inventions can be created by faculty in many
279 ways (without university facilities, in conjunction with a non-federal sponsor) and
280 that faculty ownership as determined by campus policies should be retained or
281 negotiated in instances when inventions are created without federal support or
282 with university resources. The decision to craft a CSU system policy that
283 extends a claim of ownership beyond federally funded research is not required by
284 law and stands on shaky legal ground since Roche.

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

294 11. Faculty assignment of an invention to...the university...will be
295 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.

- 296 12. The faculty senate or an equivalent body will play a primary role in
297 defining the policies...that will guide university-wide management of
298 inventions...
299 13. Just as the right to control research and instruction is integral to
300 academic freedom, so too are faculty members' rights to control the
301 disposition of their research inventions.
302 15. When lifesaving drugs and other critical public-health technologies
303 are developed in academic laboratories...the university...will
304 ensure broad public access in both the developing and the
305 industrialized world.
306 16. ...The freedom to share and practice academic
307 discoveries...whether legally protected or not, is vitally important for
308 the advancement of research and scientific inquiry.
309 17. The university...and faculty will always work to avoid exclusive
310 licensing of patentable inventions....
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312 A group of faculty experts in intellectual property should be given sufficient time
313 to scrutinize the proposed CSU policy to determine any changes that are needed
314 to bring it up to the AAUP standards.
315

316 **Conclusions**

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318 The CSU draft proposal on intellectual property weakens existing protections of faculty
319 IP rights and does not measure up in quality to the standards enumerated by the AAUP
320 or even UC system policy or existing campus policies. The proposal is not a policy that
321 faculty would have written or assented to, had they been permitted to be a part of the
322 drafting process.
323

324 The CSU, however, should be concerned about this proposal not only because faculty
325 are incensed. The CSU is attempting to improve its stature in research, but the
326 promulgation of a policy that is hostile to faculty IP rights will likely drive our most
327 successful researchers out of the academy altogether or to other institutions that have
328 more flexible policies regarding intellectual property. In order to generate more
329 research dollars, the CSU needs to make itself more attractive to research faculty, not
330 less attractive. Tightening the rules to pinch every penny will drive the dollars away.
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332 In an effort to be as constructive as possible under the circumstances, we suggest:
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- 334 1) A modified version of the proposed system IP policy should be distributed as a
335 model to the campuses. Each campus that lacks an appropriate IP policy should
336 be required to create or amend a one to bring it up to standards by the end of AY
337 2017-18. Failure to do so could result in the issuance of the draft system policy
338 as a Presidential Directive on that campus. This would allow the collegial
339 governance system to function, allow for substantive faculty input, protect local
340 differences in the research enterprise, and also secure most of the stated
341 objectives of the reform.

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- 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.