

**TAKING NOTE:  
ON COPYRIGHTING STUDENTS' LECTURE NOTES**

by Matthew M. Pagett\*

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*An essential element of individual property is the legal right to exclude others from enjoying it. If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified. But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it. These exceptions are confined to productions which, in some degree, involve creations, invention, or discovery.<sup>1</sup>*

– Justice Louis D. Brandeis

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<sup>1</sup> *Int'l News Serv. v. Assoc. Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

## I. INTRODUCTION

[1] According to *The Orion*, “an independent, student-run newspaper at California State University, Chico” (“CSU”),<sup>2</sup> two students at CSU were reported to their school’s Judicial Affairs office on November 16, 2011, for selling class notes from a lecture through the online note-selling service, Notehall.com.<sup>3</sup> Notehall.com solicited the students, including Ms. Kelsey Goishi, a junior majoring in communications studies, through the university’s e-mail client.<sup>4</sup> Through that medium, the service offered the students semester-long positions as professional note-takers, which could garner each student up to \$450 per semester.<sup>5</sup> In order to fulfill their duties for this position, Ms. Goishi and the student-employees were required to upload weekly lecture notes and, more importantly, “study guides,” which contained “explanations of all the information that [the students would] be tested on.”<sup>6</sup>

[2] After performing these tasks, the student-employees were expected to inform their classmates about the study guides by sending out a class-wide e-mail.<sup>7</sup> Ms. Goishi’s professor was “made aware” of the study guide for his class, which was then on sale for \$5, after a student sent out

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<sup>2</sup> *About the Orion*, THE ORION, <http://theorion.com/site/about/> (last visited Mar. 14, 2012).

<sup>3</sup> Molly Rose Livingston & Ashley Nakano, *Notehall Allows Students to Commit Academic Dishonesty*, THE ORION (Nov. 28, 2011), [http://theorion.com/features/article\\_4d317be4-1a47-11e1-a2e4-001a4bcf6878.html](http://theorion.com/features/article_4d317be4-1a47-11e1-a2e4-001a4bcf6878.html).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* The e-mail itself reportedly proclaimed: “Being a Note-Taker means making money just being a good student!” *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

such an e-mail. Afterward, Ms. Goishi was required to meet with both the office for Judicial Affairs and her instructor.<sup>8</sup> Though the personal consequences of this meeting for Ms. Goishi are unknown,<sup>9</sup> CSU sent Notehall.com a cease-and-desist letter a few months after the incident, citing both state law and university policy forbidding the sale, distribution, and publication of class notes for commercial purposes.<sup>10</sup> As a result, Notehall.com no longer allows students from CSU or other University of California campuses to upload notes through their system.<sup>11</sup> Interestingly, however, the company never acknowledged the validity of CSU's legal claim, simply noting that it was refusing service to these schools "[o]ut of respect for this policy."<sup>12</sup>

[3] While it has been asserted that Ms. Goishi's actions and the Notehall.com procedures for selling notes are a "clear violation" of

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<sup>8</sup> Livingston & Nakano, *supra* note 3.

<sup>9</sup> *Id.*

<sup>10</sup> See Erica Perez, *Colleges Crack Down on Selling, Sharing Notes*, CALIF. WATCH (Feb. 3, 2012), <http://californiawatch.org/dailyreport/colleges-crack-down-selling-sharing-notes-14744>.

<sup>11</sup> *Id.* When a student attempts to upload notes from CSU or a school associated with the University of California, they are met with the following error message (or one like it):

Unfortunately, No More Notes! . . . The California State University Student Conduct Code prohibits students from selling class notes, and subjects violators to potential disciplinary actions. *Out of respect for this policy*, Notehall does not offer its note taking services at your school. We apologize for the inconvenience, and share your disappointment with this CSU policy decision.

*Id.* (emphasis added).

<sup>12</sup> *Id.*

California state law and broadly speaking, “illegal,”<sup>13</sup> the extent to which this may be true and the circumstances under which either California law or U.S. copyright law may be violated is unclear. This article will review the relevant law on the question of whether a student owns the copyright in her or his own notes and attempt to answer that question. Part II addresses: (1) the primary elements of a copyrightable work under the Copyright Act of 1976, (2) the Fair Use Doctrine, (3) whether classroom notes constitute protected compilations, and (4) whether classroom notes could be considered “derivative works.” Part III discusses the federal preemption doctrine, whether states have the authority to legislate ownership of copyrighted works, and, if so, the effect of that authority, with special emphasis on California law. In Part IV, this article will address the particular factual circumstances discussed in Part I and evaluate whether Ms. Goishi and Notehall.com were in “clear violation” of state or federal law. Lastly, the author will postulate as to the certain circumstances that may or may not create a copyright or allow for the infringement of that right with regard to students’ lecture notes.

## II. BACKGROUND

### A. Fixation and Originality Under the Copyright Act of 1976

[4] Congress’s authority to protect individuals’ intellectual property comes from the United States Constitution, which states that “Congress shall have the Power . . . [t]o 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.”<sup>14</sup> The statute

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<sup>13</sup> Livingston & Nakano, *supra* note 3.

<sup>14</sup> U.S. CONST. art. I, § 8, cl. 8.

currently exercising this Congressional power is the Copyright Act of 1976 (“the Act”).<sup>15</sup>

[5] In pertinent part, the Act states that copyright protection is granted to “*original works of authorship fixed in a tangible medium of expression*,” including, but not limited to: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.<sup>16</sup> A

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<sup>15</sup> David Mirchin & William S. Strong, *Copyright Law, in MASSACHUSETTS CONTINUING LEGAL EDUCATION, INTELLECTUAL PROPERTY PRACTICE* § 7.1.8 (Jerry Cohen ed., 2011) (“The first statute to provide copyright protection, enacted in 1790, protected only maps, charts, and books. The Copyright Act of 1909 broadened available copyright protection. This act was replaced by the Copyright Act of 1976, which took effect on January 1, 1978, and . . . is the current copyright law.”).

<sup>16</sup> Copyright Act of 1976, 17 U.S.C. § 102(a) (2006). It should be noted that academic “lectures” are not included in the list of possibly copyrightable material. This omission is not sufficient to defeat a professor’s claim of copyright, however, as the statutory list is only *inclusive*, not *exclusive*, merely providing examples of likely copyrightable works. The idea that lecture notes may fall within the realm of copyrightable subject matter is bolstered by the fact that lecture notes are neither explicitly excluded by the administering agency as among those materials *not* covered by the Copyright Act. Such excluded works include:

- (a) words and short phrases such as names, titles, and slogans . . .
- (b) [i]deas plans, methods, systems, or devices . . .
- (c) [b]lank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like . . .
- (d) [w]orks consisting entirely of information that is common property containing no original authorship, such as, for example: Standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources.

Material Not Subject to Copyright, 37 C.F.R. § 202.1 (2012); *see also* Stephanie L. Seeley, *Are Classroom Lectures Protected by Copyright Laws? The Case for Professors’ Intellectual Property Rights*, 51 SYRACUSE L. REV. 163, 171 (2001) (“It seems

work of originality is considered “fixed” when it is written down or captured in such a way that it becomes “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>17</sup>

[6] With regard to academia, the fixation language has been interpreted to *exclude* material presented orally in courses.<sup>18</sup> In *Fritz v. Arthur D. Little, Inc.*, the plaintiff taught leadership training seminars and sued the defendant for stealing his trade secrets by taking “copious notes” during those seminars.<sup>19</sup> The district court dismissed the plaintiff’s copyright claim, however, reasoning that that “[o]riginal words spoken aloud can be copied (and independently copyrighted) by all, if they have not *previously* been fixed in a tangible medium of expression.”<sup>20</sup> Pulling from Justice Holmes’s opinion in *Bleistein v. Donaldson Lithographing Co.*, the Court relied on the aphorism that “[o]thers are free to copy the original[, but t]hey are not free to copy the copy.”<sup>21</sup>

[7] Under that rationale, the question of “fixation” is brought to the forefront when considering whether a professor’s lecture may be subject to copyright protection. Pursuant to the language in *Fritz*, a professor or

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contradictory to deny professors copyright protection in their expression of ideas conveyed through a lecture since ‘the requirements for copyright protection are minimal . . . .’”).

<sup>17</sup> 17 U.S.C. § 101.

<sup>18</sup> *Fritz v. Arthur D. Little, Inc.*, 944 F. Supp. 95, 100 (D. Mass. 1996).

<sup>19</sup> *Id.* at 96, 100-01 (determining that “there is not a strong likelihood that plaintiffs will succeed on the merits of their copyright infringement claims”).

<sup>20</sup> *Id.* at 100 (emphasis added).

<sup>21</sup> *Id.* (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903)) (internal quotation marks omitted).

university must be able to show that the students' notes were not copies of an original, extemporaneous expression in order to have a valid copyright claim; rather she, he, or it must show that the notes were copies of methodically planned, outlined, and notated predeterminations. Thus, when evaluating whether a professor's lecture is "fixed," you must first ask whether the students' notes are copies of an original, spontaneous statement on the part of the professor or whether the students' notes are copies of the professor's "copy," i.e., her or his uniquely prepared presentation of original material.<sup>22</sup>

[8] This question speaks to the other major requirement for a work to be considered copyrightable under the Act, whether the presumptively copyrighted work is "original."<sup>23</sup> A prospective plaintiff can generally meet the originality requirement with little effort, simply showing that the work "possess some creative spark, 'no matter how crude, humble or obvious' it might be."<sup>24</sup> Because a professor is likely to organize his or her lecture with some modicum of creativity and thoughtfulness,<sup>25</sup> such a presentation would probably satisfy the originality requirement.<sup>26</sup>

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<sup>22</sup> *Fritz*, 944 F. Supp. at 99. It may be that this question can only be properly answered after an extensive factual inquiry to determine exactly which parts of a professor's lecture are unique and spontaneous representations, which parts were pre-prepared presentations, and, concurrently, which parts of the students' notes come from which parts of the professor's lecture. See generally *Bleistein*, 188 U.S. at 249-50 (referring to the process of "copy[ing] a copy" versus "copy[ing] an original," and noting that "the [first] copy is the personal reaction of an individual upon nature. . . . [p]ersonality always contains something unique. . . . [i]t expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone").

<sup>23</sup> 17 U.S.C. § 102(a) (2006).

<sup>24</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (noting that "[o]riginality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying").

<sup>25</sup> *Preparing to Teach the Large Lecture Course*, UNIV. OF ARK. WALLY CORDES TEACHING AND FACULTY SUPPORT CTR., <http://tfsc.uark.edu/118.php> ("Organize the

[9] In order for a plaintiff to demonstrate a proper claim of copyright infringement, one must prove: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”<sup>27</sup> To establish ownership of a valid copyright, the plaintiff must show both fixation and originality under the terms of the Act.<sup>28</sup> In addition, the work must be of a sort that is qualified to be considered for copyright protection.<sup>29</sup> While lectures are not explicitly protected under the Act, they are neither explicitly denied such protection. Under the standard discussed in this article, it seems likely that such expressions would meet the originality requirement.<sup>30</sup> There is a question, however, as to whether

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*topics in a meaningful sequence.* Lurching from one topic to another makes it difficult for students to assimilate and retain the material . . . Arrange the course topics thematically, chronologically spatially, in ascending or descending order, by cause and effect or problem and solution, or according to some other conceptual rationale.”); see BARBARA GROSS DAVIS, TOOLS FOR TEACHING 137 (2d ed., 2009) (explaining the importance of lecture organization).

<sup>26</sup> See *Feist*, 499 U.S. at 345 (“[I]t is beyond dispute that *compilations* of facts are within the subject matter of copyright.”). Interestingly, while the originality with which a professor organizes her or his lecture speaks to the copyrightability of a certain lecture, the ingenuity and originality with which a student takes his or her notes also speaks to the extent to which the student notes are a separate, unique creation—and not just a copy—warranting copyright protection in and of themselves.

<sup>27</sup> *Id.* at 361.

<sup>28</sup> See *id.* at 355 (“The two fundamental criteria of copyright protection are originality and fixation in tangible form.”) (quoting H.R. Rep. No. 94-1476, at 51 (1976)).

<sup>29</sup> See generally *supra* note 16; 17 U.S.C. § 102(a).

<sup>30</sup> It is helpful when thinking about whether a lecture should be considered a work subject to the Act to look to the “Idea/Expression” doctrine. This principle declares that only an individual’s particular “expression” of an idea is protected by copyright law, not the idea itself. Thus, the *way* in which a professor presented his material would be more relevant for purposes of the Act than the mere fact that he presented the material at all. See *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“[Copyright law] distinguishes between ideas and expression and makes only the latter eligible for copyright protection.”).

a lecture presented vocally and without visual aids is “fixed in a tangible medium” for the purposes of Section 102. While there seems to be support for the idea that fixity could occur given sufficient preparation on the professor’s part, it is unclear without delving more fully into the facts of a particular case.<sup>31</sup>

### B. The Fair Use Doctrine

[10] When a work is protected under the Act, use may be immune from an action of copyright infringement on the grounds that it is a “fair use” of the author’s protected expression.<sup>32</sup> The fair use exception is codified in Section 107 of the Act and states that the reproduction of a copyrighted work “for purposes of criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is *not* an infringement of copyright.”<sup>33</sup> In determining whether the fair use doctrine applies to any one particular situation, the statute directs courts to consider the following factors:

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

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<sup>31</sup> Parts of a lecture that are specifically planned out by a professor may be more likely to be considered “fixed.” Any part of a lecture that it could be reproduced would likely meet the fixation requirement (e.g., PowerPoint presentations, sound recordings, and outlines created by the professor and then published to the class).

<sup>32</sup> 17 U.S.C. § 107. Unlike the reactionary defenses discussed in the section above (e.g., lack of originality, etc.), the fair use doctrine is an affirmative defense to a claim of copyright infringement. *Id.*

<sup>33</sup> *Id.* (emphasis added).

effect of the use upon the potential market for or value of the copyrighted work.<sup>34</sup>

[11] The fair use doctrine has been referred to as “the most important defense to infringement,”<sup>35</sup> and the Supreme Court has interpreted the doctrine to “permit[] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster.”<sup>36</sup> While there is an argument to be made that the use and sale of a student’s lectures notes constitutes a “fair use,” many factors weigh against such a defense.<sup>37</sup>

[12] The first factor, “purpose and character,” turns on whether the use is “of a commercial nature.”<sup>38</sup> If the use is of a commercial nature, less weight is typically given to the argument that the use is acceptable under the fair use defense.<sup>39</sup> Even if a court determines that a particular use is “of a commercial nature,” however, such a determination does not fully

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<sup>34</sup> *Id.* (emphasis added).

<sup>35</sup> Mirchin & Strong, *supra* note 15, § 7.11.1.

<sup>36</sup> *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (quoting *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)).

<sup>37</sup> *But see Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (noting that “the single most important element of fair use” is the factor concerning the “Effect on the Market”). If a court were to rely most heavily on the market-effect factor, it might find that the commercial sale of student notes *does* fall within the fair use exception, largely because the professor and university would likely continue to generate the same level of revenue despite the proliferation of the professor’s lecture notes among his or her students. This rationale is discussed in more detail in paragraphs 15-17, *infra*.

<sup>38</sup> 17 U.S.C. § 107(1).

<sup>39</sup> *Harper & Row*, 471 U.S. at 566-67 (quoting M. Nimmer, Copyright §1.10[D] 1-87 (1st ed. 1984)).

exclude the possibility of utilizing the fair use defense.<sup>40</sup> For instance, in Ms. Goishi's situation—where she and other student-employees sold their notes for a moderate profit—a court might find that the other three factors taken together weigh more heavily in favor of a finding that, despite its commercial nature, the sale of the students' notes was a “fair use.”

[13] It is unclear whether the second fair-use factor, “the nature of the copyrighted work,” would lend itself, along with the other factors, to a finding that a student's notes are a “fair use” of a professor's lecture. The second factor is broad, but it has been interpreted in such a way that those works which are “intended” to have more copyright protection receive it.<sup>41</sup> Thus, under the intention standard, works that are *original* (as opposed to derivative), *creative* (as opposed to factual), and *unpublished* (as opposed to published) are generally considered to “merit greater protection.”<sup>42</sup> Such factors cut in favor of and against a student-employee who is working for an organization like Notehall.com. On one hand, the “unpublished”<sup>43</sup> nature of the transcribed lecture notes<sup>44</sup> is often a factor

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<sup>40</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (“In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred. The language of the statute makes it clear that the commercial or nonprofit education purpose of a work is *only one element* of the first factor enquiry into its purpose and character.”) (emphasis added).

<sup>41</sup> *Id.* at 586.

<sup>42</sup> *Peter Letterese & Assocs., Inc. v. World Inst. Scientology Enters., Int'l*, 533 F.3d 1287, 1312, 1319 (11th Cir. 2008) (holding that a church organization's dissemination of a book on sales techniques to train its members for positions within the church constituted a fair use of the book).

<sup>43</sup> 17 U.S.C. § 107. In this scenario, another interesting factual question that may need to be asked is *not* whether the actual lecture is unpublished (as most lectures are), but whether the lecture's *content* has previously been published. A particular lecture's class material might be more protected if the professor were to discuss a topic about which she or he intends (or has begun) to publish, but has not yet disseminated.

weighing against a finding of fair use.<sup>45</sup> On the other, classroom lectures typically constitute a mix of factors, including (a) originality, (b) derivation, (c) creativity, and (d) basis in fact. While factors (a) and (c) generally weigh against a finding of fair use, factors (b) and (d) typically weigh in favor of such a finding. Thus, such a mixture of factors would likely obfuscate the application of a clear precedential rule as to whether the “nature” of a classroom lecture protects that lecture against the affirmative defense of “fair use.”

[14] The third factor asks for the relative “amount and substantiality of the portion used” in the class notes when compared with the lecture as a whole.<sup>46</sup> Generally speaking, “[t]he more has been taken, the harder it is to justify as fair use . . . [because] fair use should as a rule take no more than is necessary to achieve the legitimate aims of the user.”<sup>47</sup> In this case, the students working for Notehall.com were expected to upload class notes at least once a week and to create a study guide for their class’s exam.<sup>48</sup> Thus, it was necessary for them to “take” something constituting almost the entirety of the lecture, at least with regard to substantive

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<sup>44</sup> It is presumed the copying of the lecture notes is sufficiently fixed to bestow copyright protection. Whether a particular student copies down a professor’s lecture word-for-word or merely takes notes on the general topics discussed is likely to play an important role in any such copyright infringement case.

<sup>45</sup> See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555 (1985) (“The obvious benefit to author and public alike of assuring authors the leisure to develop their ideas from fear of expropriation outweighs any short-term ‘news value’ to be gained from premature publication of the author’s expression.”). Under that standard, a professor’s lecture may be more likely to survive a fair use defense when it includes information that the professor intends to publish at a later date to the larger academic community (e.g., a study or project on which the professor is currently working).

<sup>46</sup> 17 U.S.C. § 107(3).

<sup>47</sup> *Mirchin & Strong*, *supra* note 15, § 7.11.1(j).

<sup>48</sup> See *Livingston & Nakano*, *supra* note 3.

content. There may be a question as to whether a student truly “takes” the professor’s lecture when she or he takes that information and processes it in a new form; if one assumes that a lecture is copyrighted in the first place, however, fair use is probably less likely to succeed as an affirmative defense to copying and selling the lecture notes.

[15] The last factor that courts measure when determining whether the fair use defense is applicable is “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>49</sup> While each factor is typically given equal weight today,<sup>50</sup> the fourth factor was at one time considered the predominate factor in any court’s consideration.<sup>51</sup> As a part of that consideration, the operative question for any court is: “Does the use reduce the money the copyright holder has received for the work or is likely to receive from the work?”<sup>52</sup> If so, then the fair use defense is unlikely to succeed.<sup>53</sup>

[16] At first blush, it would seem that this factor, which was once considered the most important of the four, cuts in favor of a student-employee who sells her class notes online. While the availability of class notes might affect the overall “grading curve” of a course, that availability

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<sup>49</sup> 17 U.S.C. § 107(4).

<sup>50</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (“All [four statutory factors] are to be explored, and the results weighed together, in light of the purposes of copyright.”) (citing William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 685-87 (1993)).

<sup>51</sup> See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 602 (1985) (Brennan, J., dissenting).

<sup>52</sup> Mirchin & Strong, *supra* note 15, § 7.11.1(k).

<sup>53</sup> *Id.*

is narrowly tailored for the purpose of helping those students who are enrolled in a certain course. The notes are rarely seen by individuals other than the students themselves and are not necessarily valuable beyond the life of the course. Taken in that light, the negative economic effect on either the professor or the university would seem to be slight, bolstering the idea that a student-defendant might be able to utilize the fair use defense after all.

[17] Such a reading of the Act fails to consider how a professor might use his or her lecture material outside of class, however. It may be inferred from the language of the Act that the value of the fourth factor turns on whether the professor's work is "unpublished."<sup>54</sup> Thus, if a professor discusses a topic about which she or he intends to publish, and her or his theories and conclusions are "leaked" to the public before they are fully prepared for publication, there may yet be some negative economic effect for the professor. The extent to which such a leak would be damaging is unclear, however. Because commercial note-sharing services are typically oriented toward a specific audience and used for a specific purpose (i.e., students seeking to gain a degree), it seems unlikely that a leak would cause more damage to the lecturer than that person's practice of discussing her or his theories and conclusions during a classroom lecture already does.

[18] Thus, while certain "fair use" factors may cut in favor of the idea that a student-employee and note-taker might be able to assert the fair use defense, the greater weight of the evidence would seem to support the idea that a professor's lecture, if copyrightable, could withstand such an assertion.

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<sup>54</sup> See 17 U.S.C. § 107 ("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.").

### C. Compilations and Derivative Works

[19] When evaluating factual scenarios like those surrounding class lectures, it is also important to determine whether the lecture itself, the resulting student notes, or a portion of those notes, could be protected as compilations or derivative works.<sup>55</sup> Section 101 of the Act defines a protected “compilation” as “a work formed by the collection and assembling of preexisting materials . . . that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an *original work of authorship*.”<sup>56</sup> The same section defines a “derivative work” as:

a work based upon one or more preexisting works, such as . . . any . . . form in which a work may be recast, transformed, or adapted. A work consisting of . . . elaborations[] or other modifications which, as a whole, represent an *original work of authorship* . . . .<sup>57</sup>

It is important to note that, for both definitions, the language of the Act focuses on the fact that such works must be so different from preexisting works that they constitute an “original work of authorship.”<sup>58</sup> A compilation sufficient to be considered an original work of authorship is created when the preexisting works are selected and arranged in an original way.<sup>59</sup> For derivative works, this happens when the preexisting

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<sup>55</sup> *See id.* at § 103(b) (noting that “derivative works” and compilations are encompassed within the penumbra of copyrighted works, but only regarding “the material contributed by the author of such work[s], as distinguished from the preexisting material employed in the work”).

<sup>56</sup> *Id.* at § 101 (emphasis added).

<sup>57</sup> *Id.* (emphasis added).

<sup>58</sup> *See id.*

work is “recast, transformed, or adapted” in such a way that the derivation becomes an original work in and of itself.<sup>60</sup>

### 1. Compilations

[20] Little case law exists on the narrow issue of whether a student’s class notes or a professor’s lectures constitutes a protected compilation. Generally speaking, the Supreme Court of the United States has stated that, while “facts are not copyrightable[,] compilations of facts generally are.”<sup>61</sup> In *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, the Court addressed whether a telephone utility’s listing of names, towns, and telephone numbers was copyrightable.<sup>62</sup> Noting that the listings “could not be more obvious,” the Court determined that they were not sufficiently original to merit copyright protection.<sup>63</sup> The Court reasoned that, in order for a compilation of facts to be sufficiently original to merit copyright protection, it must be “selected, coordinated, or arranged” in an original way.<sup>64</sup> Thus, because the telephone utility’s

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<sup>59</sup> *See id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344-45, 348 (1991) (distinguishing between “nothing but raw data—i.e., wholly factual information not accompanied by an original written expression,” which is not copyrightable, and works “possess[ing] some minimal degree of creativity,” which are protected by copyright law).

<sup>62</sup> *See id.* at 342-44.

<sup>63</sup> *Id.* at 362-63 (“We conclude that the names, towns, and telephone numbers copied by Feist were not original to Rural and therefore were not protected by the copyright in Rural’s combined white and yellow pages directory.”).

<sup>64</sup> *See id.* at 358 (“The key to the statutory definition is the second requirement. It instructs courts that, in determining whether a fact-based work is an original work of authorship, they should focus on the manner in which the collected works have been ‘selected, coordinated, and arranged.’”).

listing was “entirely typical” and “devoid of even the slightest trace of creativity,” lacking “more than a *de minimis* quantum of creativity,” it was not copyrightable.<sup>65</sup>

[21] Although the Supreme Court has not answered the question of whether a student’s lecture notes constitute a copyrightable compilation, one federal district court has held that a professor’s pre-prepared practice questions were copyrighted works.<sup>66</sup> Because a compilation must be the result of an original selection, coordination, or arrangement of facts,<sup>67</sup> the contents of an in-class lecture could reasonably meet the criteria for this standard as long as the fixation requirements are met.<sup>68</sup> If those requirements are not met, and a professor’s lecture is not considered a copyrightable work, it is still possible that a student’s own class notes, capturing that work, could constitute a protected compilation.

[22] To address that question, it is helpful to look at the statutory language, discussed at length in *Feist*, which requires the selection, coordination, or arrangement of facts in an original way.<sup>69</sup> That mandate strikes at the very heart of this article. While “facts are never original,” in and of themselves, they can become so when they are selected, coordinated, or arranged in an original way.<sup>70</sup> With regard to student

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<sup>65</sup> *Id.* at 362-63.

<sup>66</sup> See *Faulkner Press, L.L.C. v. Class Notes, L.L.C.*, 756 F. Supp. 2d 1352, 1360 (N.D. Fla. 2010).

<sup>67</sup> See *Feist*, 499 U.S. at 360.

<sup>68</sup> The practice questions had previously been written down in the professor’s textbook, helping meet the fixation requirement. See *Faulkner Press*, 756 F. Supp. 2d at 1356.

<sup>69</sup> See *Feist*, 499 U.S. at 358.

<sup>70</sup> See *id.* (“Facts are never original, so the compilation author can claim originality, if at all, only in the way the facts are presented.”).

notes, it is important to consider the fact that the *Feist* standard does not require a piece be original in its selection, coordination, *and* arrangement.<sup>71</sup> Rather, originality is required in only one of these areas.<sup>72</sup> Thus, it is likely difficult, though not impossible, for a student to show that the contents of her class notes are the result of originality in their selection and organization (as they are likely the result of the professor's selections, not the student's). However, that student may be able to argue that she has arranged the professor's lecture in a way that is sufficiently original to warrant copyright protection. In addition, a student who supplements her professor's lecture notes with her own notes (taken from her independent research, for example), could probably show original selection as well. Her success would depend, in large part, on the particular factual circumstances surrounding her notes and how those notes were created and amended during the studying process. Such an showing is discussed in greater detail *infra* Part V.

## 2. Derivative Works

[23] If a professor's lecture is able to qualify for copyright protection, it is also possible that a student's notes, which are based on that lecture, could be considered a copyrightable derivative work of the professor's lecture. In such a case, a student would have to show that his or her class notes have "recast, adapted, or transformed" the professor's lecture in an original way<sup>73</sup> and, further, that the professor or the institution (i.e., the

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<sup>71</sup> See generally 17 U.S.C. § 101 (2006) ("A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, *or* arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works.") (emphasis added).

<sup>72</sup> See *Faulkner Press*, 756 F. Supp. 2d at 1357.

<sup>73</sup> See 17 U.S.C. §§ 101, 103.

copyright holder) gave the student permission to prepare such a work.<sup>74</sup> While it has been argued that students' class notes cannot be considered protected compilations or derivative works "because the student is not adding any creativity to the process," that argument is premised on the idea that "[it is] the student's job is to take down the professor's words, exactly from the lecture itself."<sup>75</sup>

[24] When determining whether a student might own the copyright in his or her class notes, as a derivative work, the first question is whether the student has the permission of the copyright holder, either the professor or the institution, to make the derivative work.<sup>76</sup> Section 106(2) of the Act confers on the author of an original work the right to "prepare derivative works" and Section 103(a) further notes that unlawfully procured copyrighted works are not given protection as derivative works.<sup>77</sup> In interpreting the word "unlawfully" from Section 103, the Seventh Circuit has noted that "[it] means only . . . that the right to make a derivative work does not authorize the maker to incorporate into it materials that infringe

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<sup>74</sup> *See id.* at §103(a) ("[P]rotection for a work employing pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully."); *see also id.* at § 106(2); *Gracen v. Bradford Exch.*, 698 F.2d 300, 302 (7th Cir. 1983) ("[E]ven if [Defendant's] painting and drawings had enough originality to be copyrightable as derivative works *she* could not copyright them unless she had authority to use copyrighted materials from the movie. '[P]rotection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.'" (quoting 17 U.S.C. § 103(a)).

<sup>75</sup> *See Seeley*, *supra* note 16, at 187 ("Accordingly, due to the student's lack of creativity, there is not enough originality to assert that the lecture is significantly different from the class notes . . .").

<sup>76</sup> *See Gracen*, 698 F.2d at 302.

<sup>77</sup> 17 U.S.C. §§ 103(a), 106(2).

someone else's copyright."<sup>78</sup> That is to say, one party cannot use another's copyrighted material without a "right to obtain [it]."<sup>79</sup> This rule does not translate well in the context of class notes, however.

[25] In the classroom, a professor is presumably well aware of the fact that his or her students are taking notes. Indeed, the value of any classroom experience is the conveyance of information from teacher to student and the retention of that information over time.<sup>80</sup> Since the classroom environment is not often visited in U.S. copyright law, however, it is unclear whether taking notes is sufficient to constitute implicit "permission" for the creation of a derivative work, despite the implicit permission that seems to flow from this activity.<sup>81</sup> Such an inference would depend, in part, on both (1) the professor's own understanding of the students' right to the lecture material and the extent to which that understanding is communicated to the students, and (2) if one exists, the school's policy on the matter.<sup>82</sup>

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<sup>78</sup> *Pickett v. Prince*, 207 F.3d 402, 406 (7th Cir. 2000).

<sup>79</sup> *Id.*

<sup>80</sup> *See, e.g., The Collegiate University: Building Exceptional Faculty-Student Engagement*, WAKE FOREST U. (Dec. 8, 2008), [strategicplan.wfu.edu/whitepaper.html](http://strategicplan.wfu.edu/whitepaper.html) (last visited Nov. 2, 2012).

<sup>81</sup> It should be noted that a lawsuit would be highly unlikely if the copyright holder were to provide the student with explicit permission to create a derivative work.

<sup>82</sup> Some schools have set explicit policies proclaiming that students do not have a copyright interest in the notes that those students take during class. *See, e.g.,* COURSE NOTE-TAKING AND MATERIALS, POLICY STATEMENT, UNIV. CAL. BERKELEY (Dec. 5, 2011), available at <http://campuspol.chance.berkeley.edu/policies/coursenotes.pdf> (noting that instructors retain the right to prohibit students from taking notes in class and, further, stating that "[e]xcept as approved in advance by the instructor, students may not more broadly share their notes or other Class Materials. Furthermore, except as authorized . . . students may not reproduce, share, or distribute notes or other Class Materials made available by an instructor for commercial purposes or

[26] When determining the likelihood that a student's class notes might constitute a derivative work, the second question that a court must ask is whether the student's notes are sufficiently original.<sup>83</sup> Although the *Feist* Court stated that "[t]he standard for originality is low,"<sup>84</sup> some courts have applied a slightly higher standard to derivative works.<sup>85</sup> In *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.* ("*ERG*"), the Ninth Circuit employed a test which required derivative works to exhibit a level of originality that: (1) is more than trivial, and (2) "reflect[s] the degree to which [the work] relies on preexisting material" unrelated to the scope of "any copyright protection in that preexisting material."<sup>86</sup> The court explained that the second prong is meant to ensure copyright protection is not given to derivative works which are "virtually identical" to the original work.<sup>87</sup> Applying that test, the court held that three-dimensional inflatable

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compensation"). This is discussed in more detail in the Preemption and Analysis sections, *infra* Parts III & IV.

<sup>83</sup> See *Pickett*, 207 F.3d at 405 ("[O]riginality is required for a derivative work.").

<sup>84</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991) ("[O]riginality is not a stringent standard; it does not require that facts be presented in an innovative or surprising way.").

<sup>85</sup> Compare *Pickett*, 207 F.3d at 405 (expressing disbelief that the "requisite incremental originality . . . slight as it need be" could not be shown), and *Feist*, 499 U.S. at 345 ("Original . . . means only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity. . . . [T]he requisite level of creativity is extremely low"), with *Entm't Research Grp. v. Genesis Creative Grp.*, 122 F.3d 1211, 1220 (9th Cir. 1997) ("[T]o support a copyright the original aspects of a derivative work must be more than trivial. Second, the original aspects of a derivative work must reflect the degree to which it relies on preexisting material and must not in any way affect the scope of any copyright protection in that preexisting material.") (citing *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 909 (2d Cir. 1980)), *cert. denied*, 523 U.S. 1021 (1998) [hereinafter *ERG*].

<sup>86</sup> *ERG*, 122 F.3d at 1220.

<sup>87</sup> *Id.*

costumes, which are based on copyrighted, two-dimensional cartoon designs,<sup>88</sup> are not sufficiently different from the cartoons to survive the second prong, despite the complexities that come with creating a three-dimensional object out of a two-dimensional drawing.<sup>89</sup>

[27] The Ninth Circuit’s reasoning in *ERG*, focusing on the way in which a derivative work is created, can be applied in this factual scenario as well. If a student is selling her notes (or an outline based on those notes) through an organization like Notehall.com, the issue of whether that student has a copyright in her notes (or her outline) will depend on the extent to which the student has “recast, transformed, or adapted” the professor’s lecture in a way that is both (1) more than trivial, and (2) not virtually identical to the professor’s work.<sup>90</sup> Much of this determination turns on the particular facts in any one case. For instance, if the student takes the time and effort to substantially alter the way in which the information from her lecture is presented, then the new, altered form would be more likely to garner its own copyright protection. Such a possibility is discussed in more detail *infra* Part V.

### III. STATE LAW & FEDERAL PREEMPTION

[28] Much of this article is premised on the idea that a professor’s class lecture must meet Section 101’s standard for fixation in order to be protected under the Act. In certain instances, however, it is possible for an

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<sup>88</sup> *Id.* at 1214 n.2 (“For example, Pillsbury purchased ‘Pillsbury Doughboy’ costumes, Toys ‘R’ Us purchased ‘Geoffrey the Giraffe’ costumes, and Quaker Oats purchased ‘Cap’n Crunch’ costumes.”).

<sup>89</sup> *Id.* at 1224 (noting that “granting [the plaintiff costume designer] a copyright in its costumes would have the practical effect of providing *ERG* with a de facto monopoly on all inflatable costumes depicting the copyrighted characters”).

<sup>90</sup> *See* 17 U.S.C. §101 (2006); *ERG*, 122 F.3d at 1220.

“unfixed” class lecture be protected from copyright infringement under the laws of the several states.

[29] Section 301 of the Act provides that “all legal or equitable rights . . . in works of authorship that are fixed in a tangible medium of expression . . . are governed *exclusively* by this title.”<sup>91</sup> That is to say, federal copyright law preempts all copyright laws concerning works that are fixed in a tangible medium of expression. Thus, no state law that attempts to create copyright protection for such works will be valid. However, the Act carves out an exception for those works of authorship that “do[] 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.”<sup>92</sup> Therefore, a state law providing copyright protection for “non-fixed” or unfixed works of authorship would not be preempted by the Act, despite the fact that the law would have to do with the subject matter of copyrights.<sup>93</sup>

#### A. California Civil Code §§ 980-89

[30] As of this writing, only California has taken advantage of the “fixity exception” to the Act.<sup>94</sup> In California Civil Code Section 980

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<sup>91</sup> Copyright Act of 1976, 90 Stat. 2541 (current version codified at 17 U.S.C. § 301(a)) (emphasis added).

<sup>92</sup> Copyright Act of 1976, 90 Stat. 2541 (current version at 17 U.S.C. § 301(b)(1)) (emphasis added).

<sup>93</sup> See *Trenton v. Infinity Broad. Corp.*, 865 F. Supp. 1416, 1427 (C.D. Cal. 1994) (noting that a California state law, which provides copyright protection for unfixed works, “steers clear of any legal or equitable rights created under federal law, and thereby avoids federal preemption under [the Act]”).

<sup>94</sup> STEPHEN FISHMAN, *THE COPYRIGHT HANDBOOK: WHAT EVERY WRITER NEEDS TO KNOW* 112 (Ilona Bray ed., 11th ed. 2011) (“California has a law that broadly recognizes

(“Section 980”), the California State Legislature mandates that “[t]he author of any original work of authorship that is *not fixed* in any tangible medium of expression has an exclusive ownership in the representation or expression thereof.”<sup>95</sup> Thus, in California—unlike anywhere else—lack of fixation is not a bar to copyright protection.

[31] The California Court of Appeals addressed Section 980 briefly in 1969—before the implementation of the U.S. Copyright Act of 1976—in *Williams v. Weisser*, where it considered a set of facts somewhat reflective of those described here in Part I.<sup>96</sup> In that case, the defendant-company (“the Company”) published and sold notes from the plaintiff-professor’s (“the Professor”) course in Anthropology at the University of California at Los Angeles.<sup>97</sup> The Company paid one of the Professor’s students to attend the Professor’s class, take notes based on his lectures, type up those notes, and deliver them to the Company for publication and sale.<sup>98</sup> After the California Superior Court granted the Professor’s motion to enjoin the Company’s actions on the grounds that its actions were prohibited, *inter alia*, for violating the Professor’s “common law copyright in his lectures,” the case went before the California Court of Appeals.<sup>99</sup>

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rights in unfixd original works of authorship[, while o]ther states don’t have such laws . . . .”) (citation omitted).

<sup>95</sup> CAL. CIV. CODE § 980 (West 2012).

<sup>96</sup> *Williams v. Weisser*, 78 Cal. Rptr. 542, 543 (Ct. App. 1969).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

[32] Given the Professor's reliance on "common law copyright,"<sup>100</sup> the court focused its analysis primarily on whether the Professor or the university owned the copyright in his lecture. In addition, the court asked whether the professor had a right to preclude the defendant from distributing the notes resulting from that lecture, on privacy grounds.<sup>101</sup> The court first determined that the professor owned the copyright in his lecture.<sup>102</sup> Second, on the privacy issue, the court found that the Professor

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<sup>100</sup> At that time, state copyright law—if any—governed protection for unpublished works unless those works had been specifically registered with the U.S. Copyright Office. See U.S. COPYRIGHT OFFICE, COPYRIGHT BASICS 6 (2012), available at [www.copyright.gov/circs/circ01.pdf](http://www.copyright.gov/circs/circ01.pdf) ("Under the law in effect before 1978, copyright was secured either on the date a work was published with a copyright notice or on the date of registration if the work was registered in unpublished form.").

<sup>101</sup> *Williams*, 78 Cal. Rptr. at 550-51.

<sup>102</sup> *Id.* at 545-50. Although the court could not address the statutory causes of action available under the Copyright Act of 1976, which did not exist at that time, its holding is consistent with the still generally accepted exception to the "Works Made for Hire" section of the Act. The Act defines a "work made for hire" as "a work prepared by an employee within the scope of his or her employment." 17 U.S.C. § 101 (2006). The copyright in such works is generally considered to reside with the employer, here the University. *Id.* at § 201(b). However, courts have crafted an exception for professors because, "[a]lthough college and university teachers do academic writing as a part of their employment responsibilities and use their employer's paper, copier, secretarial staff, and (often) computer facilities in that writing, the *universal assumption and practice* [is] that (in the absence of an explicit agreement as to who had the right to copyright) the right to copyright such writing belong[s] to the teacher rather than to the college or university." *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416 (7th Cir. 1988) (discussing the historical teacher exception and noting that "[t]he reasons for a presumption *against* finding academic writings to be work made for hire are as forceful today as they ever were.") (emphasis added), *abrogated on other grounds by* *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). *But see* Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 599 (1987) ("The dispositive issue is whether production of scholarly material is 'within the scope of employment,' that is, a part of the job. Since scholarship clearly is a factor in decisions regarding tenure, promotion, salary increases, sabbatical leaves, and reduced teaching loads, scholarly works should now belong to universities rather than to faculty members.").

did in fact have a privacy interest in prohibiting the Company from disseminating a product that could be associated with him, especially given the fact that the product was not a fully accurate representation of the professor's lecture.<sup>103</sup> More importantly, for the purposes of this article, the court of appeals held that Section 980(a), which provides copyright protection for "unfixed works," was not implicated because the Professor's lecture "consist[ed] of the extensive notes which he had compiled before the beginning of the course . . . includ[ing] charts and diagrams placed on the classroom blackboard," all of which were prepared before the beginning of the course.<sup>104</sup> Thus, the court concluded, *Williams* was "not a case where the concrete expression of the 'composition' consist[ed] solely of an intangible oral presentation."<sup>105</sup>

[33] The broad, national implication that one may draw from the court's determination in *Williams* is that there is a greater likelihood that a court might consider a professor's lecture to be "fixed" when the notes informing it were prepared *before* the beginning of the semester and when the lecture relies on charts and diagrams to communicate to the students.<sup>106</sup> Further, the inference is that, in order for Section 980 to be implicated, a professor's lecture must be entirely unfixed.<sup>107</sup> In other words, the lecture must be an extemporaneous presentation without notes, diagrams, and significant pre-semester preparation in order to qualify for protection under Section 980.<sup>108</sup>

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<sup>103</sup> *Williams*, 78 Cal. Rptr. at 550-51.

<sup>104</sup> *Id.* at 543.

<sup>105</sup> *Id.* (citations omitted).

<sup>106</sup> *See id.*

<sup>107</sup> CAL. CIV. CODE § 980 (West 2012).

<sup>108</sup> *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 675 (7th Cir. 1986).

### B. California Civil Code §§ 66450-52

[34] Perhaps due to the fact that one could interpret Sections 980 through 982 of the California Civil Code to protect only classroom lectures that are poorly prepared or un-prepared, or the fact that student notes could be considered uniquely original compilations or derivative works in their own right, the California State Legislature passed another amendment to the California Civil Code on August 30, 2000.<sup>109</sup> The amendment, which is located in Sections 66450 through 66452 of the Code, provides, *inter alia*:

(a) Except as authorized by policies developed by the University in accordance with subdivision (a) of Section 66452, no business, agency, or person, including . . . 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.<sup>110</sup>

The Code further stipulates that “[t]his prohibition applies to a recording made in *any* medium,” including “handwritten or typewritten class notes.”<sup>111</sup> Thus, students in California are prohibited from selling or

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<sup>109</sup> See Charles P. Nash, *On the Ownership of Academic Presentations: The Evolution of California Education Code Sections 66450-66452*, 35 MCGEORGE L. REV. 205, 218 (2004). Nash provides a fascinating history of the proposal and eventual passing of sections 664050-52 of the California Civil Code, which prohibit the sale of students’ lecture notes, and notes that the bill was originally put forth to “curb unauthorized note taking in California.” *Id.* at 206.

<sup>110</sup> CAL. ED. CODE § 66450 (2012).

<sup>111</sup> *Id.* (emphasis added).

publishing their class notes, regardless of copyright ownership, without the express permission of the university.

[35] In accordance with the language of Section 66450, which allows for properly constructed university policies to preempt the prohibition forbidding the sale of class notes, many universities in California have set out specific policies clarifying their respective positions.<sup>112</sup> For instance, the University of California at Berkeley has adopted a policy generally in accordance with the state's prescriptions, proclaiming that professors own the copyright in their own lectures, pursuant to Section 980(a). However, the school asserts that students are prohibited from selling their notes "[e]xcept as approved in advance by the instructor . . . ."<sup>113</sup> Additionally, and importantly, the University has also established a "Campus Class Note Subscription Service" through which notes may be sold, but only with the authorization of the University, the Academic Senate, and the course instructor.<sup>114</sup> That utility circumvents the privacy issue discussed in *Williams* by providing instructors with the right to "review and approve the notes prior to their distribution and sale."<sup>115</sup>

[36] While California is the only state to have proclaimed that instructors have a copyright in unfixed works existing within its borders,<sup>116</sup> *universities* in other states have set similar policies.<sup>117</sup> For

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<sup>112</sup> Perez, *supra* note 10.

<sup>113</sup> COURSE NOTE-TAKING AND MATERIALS, POLICY STATEMENT, UNIV. CAL. BERKELEY, *supra* note 82, at 1.

<sup>114</sup> *Id.* at 2.

<sup>115</sup> *Id.*

<sup>116</sup> FISHMAN, *supra* note 94.

example, the University of North Carolina at Chapel Hill (“UNC-CH”) has stated in its Copyright Policy: “[s]tudent [w]orks that constitute notes of classroom and laboratory lectures and exercises shall not be used for commercial purposes by the student generating such notes.”<sup>118</sup> Of course, if a student were to own the copyright in her or his own notes, regardless of the UNC-CH policy on the matter, federal copyright laws and the concomitant rights of authorship that come with them would preempt any such prohibition.<sup>119</sup> On the other hand, if a student were not able to meet the requirements of fixation and originality, then a non-California-based university’s policy might control.

#### IV. ANALYSIS

[37] Though Ms. Goishi’s dilemma is a recent one, it is not an uncommon occurrence for students to be rebuked or punished because of their attempts to publish, disseminate, or sell their class notes online—as the *Williams* case shows.<sup>120</sup> In fact, the issue was recently litigated in one

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<sup>117</sup> See, e.g., OFFICE OF UNIVERSITY COUNSEL, COPYRIGHT POLICY OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, (Jan. 1, 2009), available at <http://www.unc.edu/campus/policies/copyright%20policy%2000008319.pdf>.

<sup>118</sup> *Id.* at 14.

<sup>119</sup> See, e.g., 17 U.S.C. § 101 *et seq.* (2006).

<sup>120</sup> See, e.g., Spencer H. Hardwick, *Finalsclub.org Passes Punch*, THE HARV. CRIMSON (Feb. 18, 2009), <http://www.thecrimson.com/article/2009/2/18/finalscluborg-passes-punch-span-stylefont-weight-boldcorrection/> (discussing a “growing course preparatory Web site . . . which allows students to share notes, create study groups, and blog about lectures and sections,” reporting that one Harvard professor had forced a student to remove a blog concerning his course, and noting that the Harvard University Office of the General Counsel had determined that “a lecture is automatically copyrighted as long as the professor prepared some tangible expression of the content—notes, an outline, a script, a video, or audio recording”); see also Ryan Singel, *Lawsuit Claim: Students’ Lecture Notes Infringe on Professor’s Copyright*, WIRED (Apr. 4, 2008), <http://www.wired.com/threatlevel/2008/04/prof-sues-note/>.

of the few modern-day cases addressing the narrow issue of whether a student or professor owns the copyright in their respective lecture notes.<sup>121</sup> Though the case was largely litigated in connection to the Digital Millennium Copyright Act (“DMCA”), which proved to be inapplicable to the students’ notes, the case provides a helpful starting point for evaluating the viability of a copyright infringement claim relating to the dissemination and sale of a student’s lecture notes today.<sup>122</sup>

[38] In *Faulkner Press L.L.C. v. Class Notes L.L.C.*, the plaintiff, a professor<sup>123</sup> who owned the properly registered copyrights in both his lecture notes and the textbooks which he authored,<sup>124</sup> filed a copyright infringement suit against a note-selling company that had “hir[ed] student note takers as independent contractors to provide lecture summaries and study materials” at the university.<sup>125</sup> The professor alleged that the company’s student-employees had taken notes that improperly included certain practice questions from his textbooks as well as other materials from the lecture, including an outline that the professor showed during class.<sup>126</sup>

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<sup>121</sup> See *Faulkner Press L.L.C. v. Class Notes L.L.C.*, 756 F. Supp. 2d 1352, 1355-58 (N.D. Fla. 2010).

<sup>122</sup> See *id.* at 1356, 1359.

<sup>123</sup> The professor was joined in this action by the company that published his textbooks. See *id.* at 1355.

<sup>124</sup> These textbooks were required reading for the course. See *id.* at 1361 n.1.

<sup>125</sup> *Id.* at 1355.

<sup>126</sup> *Faulkner Press*, 756 F. Supp. 2d at 1356. The professor also brought claims against the note-selling company for improperly using information in the professor’s textbooks under the Digital Millennium Copyright Act. However, the Northern District of Florida determined that the act of taking notes during a professor’s class did not violate the Act. See *id.* at 1359-60.

[39] The court acknowledged that the professor's pre-prepared practice questions were protected by copyright, but found that the student's lecture summaries could be excepted from enforcement of the Act on grounds of fair use.<sup>127</sup> Thus, the court remanded the case back to the jury to determine the exact nature of the notes taken.<sup>128</sup> The court's decision speaks to the heart of the issue courts outside of California must resolve when determining the validity of a copyright infringement claim made by a professor or institution against a student. Based on the court's determination in *Faulkner Press*, the way in which the student takes her or his notes may affect a court's determination as to the notes' ability to continue to be sold.

[40] In the *Terms & Conditions* section of the Notehall.com website, the company states that all of its content must be "independently created, transformative, and non-derivative."<sup>129</sup> It goes on to say that a student's notes:

[S]hould not be a transcript or recording of another's [sic] independent efforts . . . . It should go beyond simply summarizing material covered in class or in written or recorded materials, but include information raised by students in or outside of class, and independent thought, analysis and commentary. Class notes, for example, must be substantially rewritten after class and include independent thought and analysis, research and information; notes that use a lecturer's [sic] words or that are not carefully reviewed, rethought and rewritten after

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<sup>127</sup> *Id.* at 1358-59.

<sup>128</sup> *Id.* at 1359.

<sup>129</sup> *Chegg.com Terms of Use*, NOTEHALL (last updated Oct. 22, 2012), <http://www.notehall.com/index/termsfuse>.

class are not useful to or appreciated by students, and not permitted on Chegg sites.<sup>130</sup>

Under these terms, a student's study guide created based on those facts discussed in the professor's lecture and even a student's class notes would likely meet the standard required for a work to qualify as a uniquely original piece of authorship that has been captured in the fixed medium of a student's class notes. Therefore, if a student is able to "transform" his or her work in such a way that they are no longer what they were *during* the lecture, then the student would have created his or her own original work of authorship. In either case, there would likely be a factual issue, just as there was in *Faulkner Press*, as to the extent of the "transformation" of the student's notes.<sup>131</sup>

[41] It may also be helpful to consider the way in which a court might address a situation like the one described in Part I. If a student were sued for copyright infringement by her professor or university, a court might address that case in the following way:

[42] First, it is important to determine whether the professor's lecture would merit copyright protection at all. One can make that determination by looking at whether the lecture is fixed and, further, whether it constitutes an "original work."<sup>132</sup> It is presently unclear whether an orally transmitted lecture can be considered "fixed." However, given the court's ruling in *Williams*, fixation may exist if the professor is able to show sufficient evidence that her or his lectures were well-planned before their delivery and that they were based on extensive notes.<sup>133</sup> If the lecture

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<sup>130</sup> *Id.*

<sup>131</sup> *Faulkner Press*, 756 F. Supp. 2d at 1358-59.

<sup>132</sup> See discussion *supra* Part II.A.

<sup>133</sup> See *Williams v. Weisser*, 78 Cal. Rptr. 542, 545 n.4 (Ct. App. 1969).

notes are *not* fixed, but the lecture was presented within the jurisdiction of California, then a copyright would exist under Section 980 of the California Civil Code, which provides protection for unfixed works.<sup>134</sup> In addition, the *sale* of the class notes would be prohibited, regardless of fixation, under Section 66452 of the Code.<sup>135</sup> It is unclear, however, as to whether a professor's lecture would also satisfy the originality requirement. Given that the requirement has been found to be generous, it seems likely that a student's lecture notes would meet it, even if only as a compilation.<sup>136</sup>

[43] The second question that a court might ask, when addressing this issue, is whether the professor or university owns the copyright. Given the traditional exception to the "work made for hire" doctrine,<sup>137</sup> there is a strong argument that a court would determine ownership in favor of the professor. In either case, the court would also need to address whether the student's notes are excepted from copyright liability under the fair use defense, weighing each of the four factors against one another. Though it is perhaps unlikely, the court might determine in the alternative that the students had the professor's or university's implicit permission to create a derivative work from the professor's lecture, and, thus, that the work was protected.

[44] Third and finally—regardless of whether a professor's lecture is found to be copyrightable under the Act—a court would need to determine whether the student had sufficiently transformed the lecture. A court

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<sup>134</sup> See discussion *supra* Part III.A.

<sup>135</sup> See discussion *supra* Part III.B.

<sup>136</sup> *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 487, 490 (2d Cir. 1976) ("The test of originality is concededly one with a low threshold . . .") (citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 100, 103 (2d Cir. 1951)).

<sup>137</sup> See 17 U.S.C. § 101 (2006).

could so find on the grounds that the student work is a compilation or simply an original creation.<sup>138</sup> In such an instance, the question would remain the same: whether the student work is fixed and, further, whether it is original.<sup>139</sup> While the fixation requirement would likely be met with little effort—since class notes meant for transference and sale are necessarily fixed in a medium—it is unclear whether the student’s work would be considered sufficiently original. Again, this would likely turn on the particular factual circumstances surrounding any one case.

## V. CONCLUSION

[45] As a student in California, Ms. Goishi likely has little legal recourse.<sup>140</sup> By passing sections 980 and 66450, the California legislature has made it exceedingly difficult for students to use their class notes for anything other than studying without the permission of the professor or university.<sup>141</sup> Still, Ms. Goishi’s particular situation is not the only case of a student attempting to sell her professor’s lecture notes in the several states. Thus, it is important to address the legality of doing so outside of California as well.

[46] If Ms. Goishi were a student outside of California, it seems that the copyrightable nature of her lecture notes would largely depend on the *quality* of those notes and the extent to which they were revised after class. In particular, the study guide that Ms. Goishi created may be more

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<sup>138</sup> See 17 U.S.C. § 103(b); *Feist Publ’n, Inc. v. Rural Tel. Co.*, 499 U.S. 342, 355-59 (1991) (discussing the requirements for a compilation that is copyrightable).

<sup>139</sup> *Feist*, 499 U.S. at 354 (stating that fixation and originality are the two fundamental requirements for a copyright).

<sup>140</sup> See CAL. EDUC. CODE § 66450 (West 2012).

<sup>141</sup> See CAL. CIV. CODE § 980(a)(1) (West 2012); CAL. EDUC. CODE § 66450(a) (prohibiting the use of handwritten class notes for any commercial purpose).

likely to achieve protection under U.S. copyright law as an original work of authorship. As long as the guide constituted more than a simple pasting of her notes from the lecture (i.e., she thoughtfully worked to develop it as an original source of information), it should be considered a copyrightable derivative work.

[47] The quote at the beginning of this article is excerpted from Justice Brandeis’s dissenting opinion in the 1918 Supreme Court decision *International News Service v. Associated Press*.<sup>142</sup> In that case, the Associated Press brought suit against an organization called the International News Service for the fraudulent obtainment of information that the plaintiff gathered and its use for its own news service.<sup>143</sup> The majority held in favor of the plaintiff, relying on the commercial value of the information to that person.<sup>144</sup> That holding prompted Justice Brandeis to note that, “the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas . . . [are] free as the air to common use” once they have been voluntarily communicated, with the exception of instances of “creation, invention, or discovery.”<sup>145</sup>

[48] The “Brandeis Rule” should be given effect in the broader context of student classroom notes. Largely speaking, a professor’s lectures are communicated “free as the air” without being fixed in any permanent form. In addition, they often constitute transmissions of facts already known in particularly lucid or helpful ways by the general public, and they rarely “creat[e], invent[], or discover[]” in and of themselves.<sup>146</sup> Thus,

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<sup>142</sup> *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

<sup>143</sup> *Id.* at 231 (majority opinion).

<sup>144</sup> *Id.* at 245-46.

<sup>145</sup> *Id.* at 250 (Brandeis, J., dissenting).

<sup>146</sup> *Id.*

excepting those instances in which a professor's lecture proves to be original or inventive in-and-of itself, student notes should be transmitted among students free as the air. This would allow students to have greater access to the information that they need to succeed. Finally, in accordance with the Brandeis Rule, student note-selling services like Notehall.com should give way to free note-selling services provided by the universities themselves, which would facilitate quality scholarship and sharing among all of the institutions' inhabitants.<sup>147</sup>

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<sup>147</sup> See, e.g., COURSE NOTE-TAKING AND MATERIALS, POLICY STATEMENT, UNIV. CAL. BERKELEY, *supra* note 82, at 2.