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Copyright in Higher Education: A Review of Modern Scholarship

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Copyright in Higher Education: A Review of Modern Scholarship

*Jacob H. Rooksby**

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INTRODUCTION

Of the four intellectual property regimes, copyright is the most central to the day-to-day functioning of higher education. Nearly every course of instruction involves the use of written, visual, intangible, and tangible materials, many if not most of which are subject to copyright protection. Students, faculty, and staff—essentially all the people who comprise higher education—produce and interact with copyrightable and copyrighted materials every day. Copyright relates directly to perhaps the most prominent of higher education’s goals: to educate students through teaching, and to produce scholarship and research that benefit mankind. All of these acts involve creating and using original works of expression, fixed

* Assistant Professor of Law, Duquesne University School of Law. I thank my colleagues who participated in the academic roundtable where this article was first introduced for their helpful feedback and support.

in tangible media. In short, there is no separating the centrality of copyright from the essence of higher education.

This article lays the foundation for enhancing our modern understanding of the function and application of copyright law in higher education. Through reviewing the history of copyright scholarship pertaining to higher education, I make the case that scholarly attention to copyright on campus has predominantly focused on two issues: (1) what I call the “copyright ownership question” (who owns copyright, with historic focus on the rights of faculty versus the rights of institutions), and (2) what I call the “copyright use question” (what kinds of uses of copyrighted material in higher education are fair uses, what kinds of uses should be fair uses, and why fair use is important in higher education).¹

This article delivers an unhurried narrative history of the scholarship concerning these two questions. Arraying this collective body of work should help future scholars situate normative proposals for improving the function and application of copyright law within higher education. In addition, reviewing this scholarship should help future scholars identify empirical projects that might build our understanding of the nature and extent of copyright ownership and use in higher education. The article’s conclusion discusses in more detail the kinds of scholarly projects that are ripe for future investigation in light of this history.

COPYRIGHT IN HIGHER EDUCATION: A REVIEW OF MODERN SCHOLARSHIP

The year was 1992 when noted law and higher education scholar Michael A. Olivas observed how little was then understood about the effect of legalization in higher education.² Professor Olivas called for “research that would measure institutional capacity to implement legal rules and measure it in a manner calibrated to balance institutional interests and the legal policy change. In short,

1. High-profile and recent litigation surrounding the second question has arguably overshadowed the first, leading to misperceptions in some quarters that the broad subject of copyright in higher education begins and ends with questions of who can use what, how much one can use, and in which contexts, without asking. See *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (upholding as fair use the digital scanning of books from the collections of a consortium of leading university libraries); *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014) (in case involving Georgia State University’s unlicensed use of copyrighted works in course e-reserves, remanding to district court for more careful, work-by-work fair use analysis).

2. Michael A. Olivas, *The Political Economy of Immigration, Intellectual Property, and Racial Harassment: Case Studies of the Implementation of Legal Change on Campus*, 63 J. HIGHER EDUC. 570, 571 (1992).

how do institutions absorb legal requirements, and how are they changed as a result? How is law implemented on campus?”³

While the community of scholars has made some progress in realizing this charge in the area of copyright on campus, much work remains to be completed, as I argue in the concluding section of this article.⁴ Here I set out the history of scholarship related to copyright in higher education, aligning discussions temporally around the copyright ownership question and the copyright use question.⁵

A. *Faculty, Universities, and the Ownership Question*⁶

1. *First Generation Concerns: Understanding the Law and Institutional Policies*

Prior to the passage of the 1976 Copyright Act, scant attention was paid to the question of whether faculty, as opposed to their institutional employers, owned copyright in their scholarly works. Although the 1909 Copyright Act contained a work-made-for-hire provision—which functioned to vest most employers with ownership over their employees’ copyrightable works⁷—custom, tradition, and a few old cases, including from other national contexts, suggested that a “teacher’s exception” to employer ownership of copyrights existed. As recently as 1969, in *Williams v. Weisser*,⁸ a state court embraced the idea that faculty enjoyed ownership of their intellectual output.⁹

3. *Id.*

4. See also Daniel R. Cahoy, *Toward a Fair Social Use Framework for College and University Intellectual Property*, 41 J.C. & U.L. 485, 518 (2015) (noting that we lack a “comprehensive understanding of college or ‘university IP’”).

5. The literature reviewed here focuses predominantly on the work of legal scholars in law reviews and books. Many of these topics have been addressed in compelling fashion by those outside of the legal academy, or by law students, but such works are generally beyond the purview of this article, as is a complete narration of relevant case law in each of these areas. Also, in the interest of concision, only the most pertinent articles and authors are discussed here—no doubt some scholarly contributions have been omitted, whether intentionally or unintentionally.

6. I use *universities* broadly to include all nonprofit institutions of higher education that offer baccalaureate and/or advanced degrees, including colleges.

7. 17 U.S.C. § 26 (1909) (*repealed and superseded by* Copyright Act of 1976, 17 U.S.C. §§101–810).

8. 78 Cal. Rptr. 542 (Cal. Ct. App. 1969).

9. *Id.* at 552. Work-made-for-hire is a doctrine of copyright law that, in its most common application, provides for corporate ownership of any original work created by an employee within the scope of his or her employment. 17 U.S.C. §101 (1976). The doctrine stands in contrast to the default presumption of ownership, which is that the work’s author is its owner.

The rationale behind the *Weisser* decision and the teacher's exception more broadly was that faculty are not like rank-and-file employees in other settings.¹⁰ Although in a broad sense colleges and universities require their faculty to engage in written work (for tenure and promotion purposes, most notably), faculty set their own hours, they set their own research agendas, and the writings they produce may or may not further their employers' interests. For these reasons, corporate ownership of scholarly output struck most who considered the question as unpalatable.

However, the common-law based teacher's exception was not expressly codified in the 1976 Copyright Act, which only set the stage for the ownership question to emerge after the Act's passage: should college and university professors still be presumed to own copyright in their scholarly output, or was such work subject to institutional ownership as work-made-for-hire?

Two early academic authors addressed this question and concluded that any common law exception to work-made-for-hire principles existing for teachers and scholars prior to the 1976 Copyright Act did not survive passage of the new law. Professor Todd Simon was the first to provide a lengthy history of the judge-made teacher's exception, which stood outside the application of the work-made-for-hire doctrine under the 1909 Copyright Act.¹¹ He argued that the 1976 Copyright Act "legislatively overruled" the exception, freeing colleges and universities to lay "claim to copyright in faculty writings under the traditional works made for hire analyses."¹²

Published a year later, Professor Leonard DuBoff's analysis of the ownership question was in accord with Professor Simon's, although Professor DuBoff found "no indication that Congress or the courts contemplated this result."¹³ He noted that the education lobby, while interested in how fair use was codified into the new copyright law, "was silent when the work for hire doctrine was discussed."¹⁴ As a way of reversing the effects of the 1976 Copyright Act on the ownership of copyrights in scholarly works, Professor DuBoff suggested inserting an exception for academic professionals into the language of the work-made-for-hire statute. His proposed language for the revised statute stated that "work prepared by an employee whose principal duties are to teach and lecture to students of the

10. *Weisser*, 78 Cal. Rptr. at 546-47.

11. Todd F. Simon, *Faculty Writings: Are They "Works Made for Hire" Under the 1976 Copyright Act?*, 9 J.C. & U.L. 485, 486-92 (1982-83).

12. *Id.* at 508-09.

13. Leonard D. DuBoff, *An Academic's Copyright: Publish and Perish*, 32 J. COPYRIGHT SOC'Y U.S.A. 17, 17 (1984).

14. *Id.* at 26.

employer shall not be considered a work made for hire,” unless the parties agree otherwise in a signed writing.¹⁵ Congress never acted upon the proposal.

Writing in 1987, Professor Rochelle Cooper Dreyfuss essentially agreed with the arguments proffered by these and other authorities, albeit reluctantly, in answering the ownership question.¹⁶ Her discursive article identified three non-pecuniary interests that creative employees like faculty have in their work: a possessory interest (how the work comports with the author’s vision), an interest in the integrity of the work (how the work is commercialized), and a reputational interest (how the work is presented to the public).¹⁷ From a policy perspective, Professor Dreyfuss worried that the work-made-for-hire ownership paradigm created by the 1976 Copyright Act could be used to the detriment of these important faculty interests.¹⁸

While Professor Dreyfuss found it “unlikely that universities will begin to direct academic research, or even to assert copyright ownership over their faculties’ entire output,” she believed that “distortions” in scholarly output were likely to occur because of the university’s ability to claim ownership.¹⁹ She went on to suggest that if work-made-for-hire doctrine comes to interfere with the work of creative employees like faculty, then perhaps interpretation of the statute is wrong and needs changing.²⁰ She also rejected any suggestion that because universities claim ownership over faculty inventions that they should similarly lay claim to faculty copyrights.²¹ She argued that copyrights and patents should be treated differently, precisely because of the non-pecuniary interests that authors have in their works, which are markedly different from the interests that inventors have in their inventions.²²

A handful of later authors would soon question the assumptions of Simon, DuBoff, and Dreyfuss regarding faculty copyright and work-made-for-hire. Writing in 1990, Professor Russ VerSteeg re-

15. *Id.* at 35–36.

16. Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 599 (1987) (“[S]cholarly works should now belong to universities rather than to faculty members.”). However, Professor Dreyfuss stated that she did not “personally endorse” these conclusions. *Id.* at 593.

17. *Id.* at 605.

18. *Id.* at 604–05.

19. *Id.* at 612.

20. *Id.* at 638 (“[I]t is anomalous to construe a law designed to encourage creative efforts in a manner that impedes that objective.”).

21. *Id.* at 641.

22. Dreyfuss, *supra* note 16, at 641.

ferred to whether the teacher's exception to work-made-for-hire doctrine survived passage of the 1976 Copyright Act as "an open question."²³ A widely cited article by Professor Laura Lape, published two years later, expressed a similar view.²⁴ Professor Lape argued that the new copyright law "does not preclude the continued existence of an exception for professors[,] and that "to the extent that the judge-made exception for professors from work-made-for-hire provisions ever existed, it continues to exist."²⁵ Writing in 1998, Professor Robert Gorman provided a moral defense of the proposition that faculty own copyright in their scholarly output, arguing that "[t]o treat faculty writings as works made for hire would affront, in the most fundamental way, the tenets of academic freedom."²⁶

Out of this group of authors, Professor Lape's article was cited particularly widely,²⁷ perhaps because it also made empirical contributions to the literature. She collected written copyright policies at seventy leading research universities and analyzed their contents.²⁸ A key finding of hers was that forty-two of the policies provided that universities owned copyright in faculty works if "significant" or "substantial" university resources were deployed in their creation.²⁹ Eighteen of those forty-two policies provided examples or definitions of what was contemplated by the words *substantial* or *significant*, whereas the others left those words undefined.³⁰

On the whole, Professor Lape's review of university copyright policies suggested that most of them demonstrated concern for faculty interests. The concern manifested in various ways, from "symbolic

23. Russ VerSteege, *Copyright and the Educational Process: The Right of Teacher Inception*, 75 IOWA L. REV. 381, 412 (1990).

24. Laura G. Lape, *Ownership of Copyrightable Works of University Professors: The Interplay Between the Copyright Act and University Copyright Policies*, 37 VILL. L. REV. 223 (1992). The same year brought an important publication and empirical investigation of patent policies and faculty ownership in higher education. See Pat K. Chew, *Faculty-Generated Inventions: Who Owns the Golden Egg?*, 1992 WIS. L. REV. 259. Professor Chew noted "[i]t is unclear why universities allow faculty ownership of copyrightable work, but do not allow faculty ownership of other faculty work." *Id.* at 275, n.64.

25. Lape, *supra* note 24, at 237, 268.

26. Robert A. Gorman, *Intellectual Property: The Rights of Faculty as Creators and Users*, 84 ACADEME 14, 16 (May–June 1998). Professor Gorman also argued that "university ownership of scholarly works . . . would profoundly contradict the assumptions and practices of the academic community." *Id.*

27. See, e.g., Bill L. Williamson, *(Ab)Using Students: The Ethics of Faculty Use of a Student's Work Product*, 26 ARIZ. ST. L.J. 1029, 1037 (1994); Rochelle Cooper Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1161, 1186 (2000); Michael W. Klein, "The Equitable Rule": *Copyright Ownership of Distance-Education Courses*, 31 J.C. & U.L. 143, 150 (2004).

28. Lape, *supra* note 24, at 252–55.

29. *Id.* at 257–58.

30. *Id.*

assertions of commitment to academic freedom to royalty provisions and express disclaimers by the university of copyright in certain works.”³¹ However, universities primarily possessed monetary interests in faculty works, with institutions asserting an interest in works that held commercialization potential, such as software.³²

In addressing the question of what university copyright policies *should* look like, Professor Lape resisted laying out a model policy and argued instead that different institutions should approach the copyright ownership question individually, based on such factors as expense of production, profitability of the work in question, and the relative wealth of the institution.³³ She did, however, regard as essential “that the university allocate to itself only those aspects of the copyright in which it truly has an interest.”³⁴

Giving the copyright ownership question in higher education additional, nuanced thought throughout the 1990s and 2000s was noted copyright scholar Robert Gorman. Perhaps Professor Gorman’s signature contribution in this area was his advocacy for viewing the copyright ownership question through the lens of academic freedom.³⁵ He eschewed the suggestion that faculty work is work-made-for-hire, except under the narrowest of circumstances. Writing in 2000, he rejected the proposition that faculty lecture notes are works-made-for-hire, even though faculty are directed to teach courses within the scope of their employment.³⁶ He distinguished lecture notes from examinations and syllabi created by faculty, which he believed presented “a closer question.”³⁷ Even then, in

31. *Id.* at 261.

32. *Id.* at 264–65.

33. *Id.* at 267–68.

34. Lape, *supra* note 24, at 268. Following on the heels of Professor Lape’s work, one student author argued that faculty should own their copyrights and inventions, without obligation to assign them to their university employers. See Sunil R. Kulkarni, Note, *All Professors Create Equally: Why Faculty Should Have Complete Control Over the Intellectual Property Rights in Their Creations*, 47 HASTINGS L.J. 221 (1995); see also Todd A. Borow, Note, *Copyright Ownership of Scholarly Works Created by University Faculty and Posted on School-Provided Web Pages*, 7 U. MIAMI BUS. L. REV. 149, 166–69 (1998) (providing strategies for professors to obtain copyrights in their scholarly works); Ashley T. Barnett, Note, “Profiting at My Expense”: *An Analysis of the Commercialization of Professors’ Lecture Notes*, 9 J. INTELL. PROP. L. 137, 155–59 (2001) (exploring work-made-for-hire issue in context of faculty standing to sue to prevent commercialization of their lecture notes).

35. Academic freedom is a proposition with thin judicial support, but generally speaking stands for the idea that faculty should be able to determine for themselves how they will teach and what they will speak and write about, without undue influence from administrators or governmental authorities. See JUDITH AREEN & PETER F. LAKE, *HIGHER EDUCATION AND THE LAW* 351–440 (2nd ed., 2014).

36. Robert A. Gorman, Kenneth W. Gemmill Professor of Law, Univ. of Pa. Law Sch., Copyright Conflicts on the University Campus, Address at the First Annual Christopher A. Meyer Memorial Lecture (2000), in 47 J. COPYRIGHT SOC’Y U.S.A. 291, 302–03.

37. *Id.* at 303.

view of the importance of academic freedom and the frequent rate at which faculty move between institutions, he was inclined to think that faculty should own copyright in those materials as well.³⁸

Debate over the ownership question continued into the 2000s.³⁹ Professor Ashley Packard wrote in 2002 that “the letter of the law implies . . . that faculty writings should belong to universities under copyright law’s work-for-hire provision.”⁴⁰ Given her view that colleges and universities could claim ownership of faculty works, Professor Packard set out to replicate Professor Lape’s empirical investigation of university copyright policies from 1990. Like the original study, she found that every university claimed copyright ownership over some forms of scholarly work, typically when university resources are involved.⁴¹ But whereas only sixteen policies disclaimed ownership of traditional scholarly works in Professor Lape’s study,⁴² Professor Packard found that forty-nine institutions disclaimed ownership of such materials ten years later.⁴³ Also on the rise were the number of institutions that cited their respect for academic freedom as justification for not claiming ownership of scholarly work by faculty.⁴⁴

2. *Second Generation Concerns: Copyright Ownership Issues in the Face of New Technology*

By the early 2000s, a cautious consensus seemed to have emerged that faculty ownership of scholarly materials should not be assumed, but rather is subject to the provisions of individual copyright policies existing at universities.⁴⁵ The increasing commercialization of higher education and the commodification of faculty work

38. *Id.*

39. See, e.g., CORYNNE MCSHERRY, WHO OWNS ACADEMIC WORK? BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY (2001) (noting the lack of clarity and ongoing debate regarding the extent to which the work-made-for-hire provision of the Copyright Act applies to faculty works).

40. Ashley Packard, *Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work*, 7 COMM. L. & POL’Y 275, 277 (2002). See also *id.* at 280 (“[U]niversities would be entitled to claim the copyright to professors’ intellectual work, unless professors could prove their creative work fell outside the scope of their employment.”).

41. *Id.* at 294–98.

42. Lape, *supra* note 24, at 262.

43. Packard, *supra* note 40, at 298.

44. *Id.* at 299.

45. See, e.g., Gregory Kent Laughlin, *Who Owns the Copyright to Faculty-Created Web Sites?: The Work-For-Hire Doctrine’s Applicability to Internet Resources Created for Distance Learning and Traditional Classroom Courses*, 41 B.C. L. REV. 549, 581 (2000) (stating “it would be risky to both educators and institutions to rely on [the teacher’s exception to work made for hire]”); Kenneth D. Crews, *Instructional Materials and “Works Made for Hire” at Universities: Policies and Strategic Management of Copyright Ownership*, in THE CENTER

in this era caused the conversation to shift to more immediate concerns about the ownership question as applied.⁴⁶ In particular, the profit potential inherent in some new forms of software, as well as Internet-enabled distance-learning opportunities, animated much of the scholarly attention to the copyright ownership question during this time period.⁴⁷ As Professor Elizabeth Townsend wrote in 2003, “[u]niversities decide what they want to own and what they give back to the scholar/teacher-creator. The motives behind the policies are often the potential commercial profits of distance learning and other Internet-related opportunities.”⁴⁸ Even with this reality in mind, Professor Townsend argued against the prevailing assumption that the teacher exception to the work-made-for-hire doctrine disappeared after passage of the 1976 Copyright Act.⁴⁹ She reviewed intellectual property policies at several universities, exploring fault lines in whether faculty were treated as knowledge owners or knowledge workers.⁵⁰ Ultimately she concluded that the landscape continued to lack clarity, offering “no definitive answers,

FOR INTELLECTUAL PROPERTY HANDBOOK 15, 19 (2006) (stating that the teacher’s exception “is simply too elusive for educators and universities to rely upon”). Whether this reality is good for faculty or good for higher education is a different matter.

46. See Laughlin, *supra* note 45, at 556 (“In response to changing technology, many schools suddenly are rewriting their policies on how professors may use course material. Why this sudden interest? The answer is simple: money.”); see also Robert Ware III, *Copyrights, Professors and Public Universities*, 16 EDUC. & L.J. 251, 252 (2007) (asserting that “the drive for control of copyrights at public universities is indistinguishable from the quest for profitability at these institutions”).

47. See, e.g., Jeff Todd, *Student Rights in Online Course Materials: Rethinking the Faculty/University Dynamic*, 17 ALB. L.J. SCI. & TECH. 311, 315 (2007) (“Scholarly attention on faculty copyright ownership . . . has exploded. . . . The cause of this interest is clear: the Internet and online courses.”); Roberta Rosenthal Kwall, *Copyright Issues in Online Courses: Ownership, Authorship and Conflict*, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 1–2 (2001) (“As the twenty-first century dawns, . . . interest in copyright ownership of works created by academics is intensifying, largely as a result of the potential financial windfalls associated with distance education.”); Michele J. Le Moal-Gray, *Distance Education and Intellectual Property: The Realities of Copyright Law and the Culture of Higher Education*, 16 TOURO L. REV. 981 (2000) (considering the copyright ownership question in view of distance learning initiatives in higher education); John F. Welsh, *Course Ownership in a New Technological Context: The Dynamics of Problem Definition*, 71 J. HIGHER EDUC. 668 (2000) (examining how the Kansas Board of Regents initiated and pursued a restructuring of intellectual property policies on constituent campuses to accommodate ownership policies for technology-based course materials).

48. Elizabeth Townsend, *Legal and Policy Responses to the Disappearing “Teacher Exception,” or Copyright Ownership in the 21st Century University*, 4 MINN. INTELL. PROP. REV. 209, 210 (2003).

49. *Id.* at 227–40.

50. *Id.* at 246–74.

[although] the trend seems to indicate that more intellectual property policies in education dictate ownership, rather than case law or statute carving out a special ‘teacher exception.’”⁵¹

While new technology did not fundamentally alter the ownership question, it did raise the stakes for how that question got answered.⁵² What emerged in practice, if not policy, was a position that the college or university would only claim copyright ownership in technology-based course materials that used significant institutional resources, were commissioned by the institution, or were believed to hold considerable market value. Copyright in all other materials, including traditional scholarly work like books and articles, would lie with the faculty member who authored the work.

In 2006, Professor Robert Denicola published a thoughtful article on the open access movement in higher education.⁵³ Frustrated by the near outright control of scholarly publications wielded by major academic publishers, scholars across the academy began in the late 1990s and early 2000s to explore new modes of disseminating scholarly works. One mode was the so-called open access journal, or a journal that published articles for free or at cost while allowing individual authors to retain copyright in their works.⁵⁴ While the concept of these journals was noble, Professor Denicola concluded that they largely had been ineffectual, as most lacked prestige value, and academics concerned about promotion, career advancement, and competition for research funding were likely to ignore them in favor of publishing in more established journals.⁵⁵

Professor Denicola also considered the rise of self-archiving of scholarly work, either through individual websites or institutional repositories. While he lauded the concept of self-archiving, particularly through institutional repositories, he felt the promise of these initiatives exceeded their reality.⁵⁶ The main problem he

51. *Id.* at 276. She also flagged, but did not fully address, uncertainties related to student work and websites. *Id.* at 279–80. Jeff Todd took up the student angle as it relates to student involvement in the creation of online course materials. *See* Todd, *supra* note 47, at 333–36.

52. *See* Laughlin, *supra* note 45, at 583 (“The advent of the Internet did not create the legal issues surrounding faculty-created works, but only created greater incentives—due to the enhanced value of the work—to litigate over ownership.”). It also raised the stakes for fair use questions related to the use of copyrighted content by faculty in distance education. *See* Stephana I. Colbert & Oren R. Griffin, *The TEACH Act: Recognizing Its Challenges and Overcoming Its Limitations*, 33 J.C. & U.L. 499 (2007).

53. Robert C. Denicola, *Copyright and Open Access: Reconsidering University Ownership of Faculty Research*, 85 NEB. L. REV. 351 (2006).

54. *Id.* at 356–61.

55. *Id.* at 369.

56. *Id.* at 362, 369–70.

identified with these initiatives is that copyright assignment agreements between scholars and publishers often prohibit these competing modes of storage and distribution, and in any event, many faculty are unaware of how to navigate the copyright agreements necessary to take advantage of open access opportunities.⁵⁷

To mitigate the harms of publishers wielding too much control over scholarly output, Professor Denicola made the provocative suggestion that universities should uniformly lay claim to their faculty's scholarship, viewing it as work-made-for-hire.⁵⁸ He noted that most commentators reluctantly agree that such work is work-made-for-hire anyway, and that higher education ought to embrace it as such by effectively reserving in the name of the institution "a narrow ownership interest sufficient to facilitate open access to faculty research."⁵⁹ He argued that the rights retained by the institution should be narrow in scope, disclaiming any potential to profit from the work or make derivatives of it.⁶⁰

Professor Denicola's proposal challenged conventional wisdom in higher education that academic freedom absolutely requires that faculty enjoy copyright in their works. His article implicitly questioned how valuable that freedom is to individual faculty if they nearly uniformly assign their copyright to academic publishers.

Similarly offering a paradigm-shifting view of the copyright ownership question in 2006 was work by noted copyright expert Kenneth Crews. Professor Crews declared that copyright law had failed to account for "the extraordinarily nuanced needs of higher education."⁶¹ He called for a reexamination of university copyright policies and clear and creative policymaking, in light of evolving understandings of copyright law.⁶² Perhaps the most critical concern he identified was that most policies generally purport to cede copyright ownership of traditional scholarly works to faculty, out of recognition that the law largely has refused to recognize the teacher's exception.⁶³ However, blanket policy statements of that sort are not likely valid if the works in question are truly works-made-for-hire. In such cases, copyright automatically vests with the faculty mem-

57. *Id.* at 369–70 (“[R]elying on academic authors to drive hard bargains with journal publishers over copyright ownership seems unrealistic.”).

58. *Id.* at 371.

59. *Id.* at 375–76, 380.

60. Denicola, *supra* note 53, at 380.

61. Crews, *supra* note 45, at 15.

62. Unfortunately, no such structured reexamination of college and university copyright policies has occurred to date.

63. Crews, *supra* note 45, at 26.

ber's institutional employer, and any transfer of it back to the faculty member would require a signed writing by the university, which generally never occurs.⁶⁴ In short, his point was that, although noble, institutions' intentions that faculty own their work do not make it so.

Aside from parties engaging in individual assignment agreements over specific copyrights (which would be unwieldy to pursue), Professor Crews suggested—similar to Professor Denicola's proposal—that institutions could adopt a policy of automatically conferring a non-exclusive license in scholarly works to the faculty who created them.⁶⁵ The conferral of a license would not require a signed writing, making the licensing strategy easier to adopt and implement compared to completing assignment agreements between individual faculty and their institutional employer.⁶⁶

B. *Faculty, Universities, and the Fair Use Question*

The literature concerning fair use of copyrighted materials in higher education began in earnest in the 1980s.⁶⁷ Writing in 1986, Professor Dale Olson reviewed the Supreme Court's decision in *Harper & Row Publishers v. Nation Enterprises*,⁶⁸ the famous 1983 case involving the unlicensed inclusion of portions of President Gerald Ford's not-yet-released biography, *A Time to Heal*, in *The Nation* magazine.⁶⁹ Professor Olson claimed that the opinion was important for college and university attorneys in advising "educators and scholars whose research materials include unpublished materials, such as photographs, letters and journals."⁷⁰ He concluded that fair use has limited application to unpublished materials, and that the implications for scholars who wish to make use of such materials in scholarly publications are "unclear but encourage caution."⁷¹

64. *Id.* at 26.

65. *Id.*

66. *Id.*

67. The first such article, published in 1984, provided the most basic of information about copyright for members of the higher education community. See Mortimer D. Schwartz & John C. Hogan, *Copyright Law and the Academic Community: Issues Affecting Teachers, Researchers, Students, and Libraries*, 17 U.C. DAVIS L. REV. 1147 (1984) (reviewing copyright law, copyright litigation involving higher education, and problems of interpretation and application of the 1976 Copyright Act).

68. 471 U.S. 539 (1985).

69. Dale P. Olson, *Copyright and Fair Use: Implications of Nation Enterprises for Higher Education*, 12 J.C. & U.L. 489 (1986).

70. *Id.* at 506.

71. *Id.* at 508. Time would prove that much of the caution urged in this article was overstated, as the unpublished nature of works does not automatically render scholarly uses of them infringing.

The year 1993 witnessed the best and most comprehensive attention to fair use issues in higher education, with the publication of *Copyright, Fair Use, and the Challenge for Universities* by Professor Crews.⁷² This empirical work stemmed from data Crews collected in the mid-1980s when he was completing his doctoral dissertation.⁷³ The book details how the Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions “Classroom Guidelines”⁷⁴ came to be promulgated as a Congressional report accompanying passage of the 1976 Copyright Act, and how these guidelines went from setting a minimum standard for fair use in education to becoming the maximum permitted by law.⁷⁵ Crews traced this evolution to the 1983 settlement of the copyright infringement lawsuit brought by the textbook publishing industry against New York University (“NYU”). In the settlement, instead of paying money damages, NYU accepted the Classroom Guidelines as establishing the extent of photocopying permitted for teaching and research at the university.⁷⁶ Fearing litigation if they did not follow suit, other universities soon created copyright policies that hewed closely to the rather restrictive parameters established in the Classroom Guidelines.⁷⁷

Not all institutions moved in this direction, however. Crews tells how copyright savvy professors at the University of Wisconsin assisted in drafting a policy at that institution that was much more open to educational fair uses of copyrighted materials.⁷⁸ That policy later formed the basis for a model policy adopted by the American Library Association (“ALA”).⁷⁹ The ALA policy was much more permissive of unlicensed uses of copyrighted materials in higher education, recommending that “selective and sparing” uses of copyrighted materials be deemed fair.⁸⁰

The signature contribution of Crews’s careful work was his survey of the landscape of copyright policies in higher education.

72. KENNETH D. CREWS, *COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES: PROMOTING THE PROGRESS OF HIGHER EDUCATION* (1993).

73. *Id.* at x–xiii.

74. H.R. REP. NO. 94–1476, at 68, *reprinted in* 1976 U.S.C.C.A.N. at 5681.

75. The Classroom Guidelines set meticulous guidelines for when copyrighted materials can be used for teaching and research, and to what degree. *See generally, id.* Brevity, spontaneity, and cumulative effect are key considerations under the guidelines. *See Crews, supra* note 72, at 34–36.

76. *Id.* at 3, 45–47.

77. *Id.* at 47.

78. *Id.* at 47–49.

79. *Id.* at 47–51.

80. *Id.* at 49 (internal citations omitted).

Crews created a sample of 98 universities, based on their membership in the American Association of Universities and/or the Association of Research Libraries in the academic year 1984–85.⁸¹ Crews sought to understand the nature of the copyright policies existing on those campuses.⁸²

Crews found that “[t]he Classroom Guidelines are the single most significant influence on the content of university copyright policies,” forming the foundation of approximately 80% of university policies that addressed either classroom or research copying.⁸³ Crews noted a lack of originality in the policies collected in that only two models—the Classroom Guidelines and the ALA model policy—accounted for all the policies, which “implies that policymakers seek only to create a policy; they do not necessarily pursue the best policy,”⁸⁴ instead seeking “quick answers and some promise of a ‘safe harbor’ from liability.”⁸⁵

Crews concluded that the fear of litigation motivated the creation of most university copyright policies, with service of academic mission standing as a secondary concern.⁸⁶ Of the two model policies that influenced nearly all universities, Crews wrote that “[they] may be helpful minimal measures, but standing alone they are narrow and misleading, and they do stand alone in most university policy statements. Those policies are therefore more a surrender of opportunities than a statement of rights.”⁸⁷

Crews’s book—which also discussed at length a successful case brought by publishers against a Kinko’s copy shop that assembled course packs for students at a nearby university without paying licensing fees—received favorable reviews from commentators.⁸⁸ Noted for its impartial and measured tone, Crews’s book was the first scholarly call for a more robust understanding of fair use in

81. *Id.* at 57–59.

82. Several of his findings regarding the promulgation or existence of these policies are interesting. For example, 16 of the 98 universities Crews contacted indicated that they had no copyright policy at all. *Id.* at 57–60. The other 82 universities responded by supplying “a total of 183 distinct copyright policy documents.” *Id.* at 60. Crews found that librarians (48.6%) and administrators (26.8%) were responsible for developing most of the policies, whereas faculty seldom played any appreciable role. *Id.* at 63. As Crews noted, “[t]he lack of faculty leadership in formulating university copyright policies suggests an institutional view of copyright as a managerial matter, rather than an academic concern.” *Id.* at 63.

83. Crews, *supra* note 72, at 73.

84. *Id.* at 76.

85. *Id.* at 115. He also found that, of the 11 policies that incorporated the ALA model, administrators or legal counsel—not librarians—were responsible for promulgating all but one of them. *Id.* at 76.

86. *Id.* at 78.

87. *Id.* at 119.

88. See Kathryn L. Zelenock, Book Review, 21 J.C. & U.L. 615 (1995); Vince Tortolano, *Fair Use*, 35 SANTA CLARA L. REV. 755 (1995) (book review).

higher education, not a narrow and reflexive adoption of stingy policies based on fear and misunderstanding.⁸⁹

The next fulsome academic treatment of fair use issues in higher education was Professor Ann Bartow's 1998 article on the subject.⁹⁰ She comprehensively reviewed fair use decisions, particularly those involving "copy shops" close to college campuses, and assessed their impact on scholars' ability to engage "in unremarkable acts of duplication and distribution of idea-bearing materials for educational purposes."⁹¹ She persuasively argued that the window for fair use in higher education was being narrowed, at the risk of "rendering meaningless" the concept of fair use embodied in the Copyright Act.⁹² Professor Bartow identified several harms related to the "compression" of fair use in higher education, including heightened involvement of faculty in copyright infringement lawsuits, the increase of licensing fees, faculty self-censorship, loss of academic privacy, and lasting effects on the depth and quality of academic scholarship.⁹³

To combat these harms, Professor Bartow proposed and considered an array of legislative actions that Congress could undertake, including amending the Copyright Act to exempt educational photocopying, establishing a compulsory license for scholarly uses of copyrighted materials, and disavowing or replacing the Classroom Guidelines.⁹⁴ Failing these possibilities, she outlined how courts should resuscitate the fair use doctrine to be more welcoming of unlicensed uses of copyrighted materials in the educational context.⁹⁵ On the whole, her work emerged as a strong normative defense of fair use in higher education, and outlined reasonable changes to the law—to date, not enacted—that could help amplify the space for fair use in higher education.

While additional authors drew on fair use principles for their work involving copyright in higher education in subsequent years,⁹⁶

89. Professor Crews went on to examine in great detail the nature of various fair use guidelines, not just in higher education, in later work. See Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599 (2001).

90. Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149 (1998). In the same year, two other authors considered fair use in higher education, although their treatment was less exhaustive and more introductory in nature. See Stephana I. Colbert & Oren R. Griffin, *The Impact of "Fair Use" in the Higher Education Community: A Necessary Exception?*, 62 ALB. L. REV. 437 (1998).

91. Bartow, *supra* note 90, at 151.

92. *Id.* at 163.

93. *Id.* at 199–218.

94. *Id.* at 224–26.

95. *Id.* at 227–29.

96. See, e.g., Lorelei Ritchie de Larena, *What Copyright Teaches Patent Law About "Fair Use" and Why Universities Are Ignoring the Lesson*, 84 OR. L. REV. 779 (2005) (discussing fair

the subject did not receive full-on, in-depth treatment until publication in 2010 of a law review article by Professor Deborah Gerhardt and noted attorney and copyright expert Madelyn Wessel.⁹⁷ These authors sought to “clarify legal ambiguities of the law of fair use in order to better align [the fair use] doctrine with critical educational goals.”⁹⁸ Their clarification came in two forms: identifying and rejecting common copyright myths that persist in higher education,⁹⁹ and providing analytical support for defining how unlicensed use of copyrighted material in scholarly publications constitutes fair use.¹⁰⁰ Buttressing the need for rejecting these myths and providing a model defense of fair use in higher education was their recognition of educational fair use as a matter of social justice.¹⁰¹ To substantiate the social justice argument, the authors reviewed the financial resources expended at different university libraries on serial publications and other volumes, finding that “significant disparities” existed.¹⁰² The information they conveyed in their helpful article was intended to serve as a resource for faculty and librarians at institutions without access to limitless funds for licensing content or to sophisticated legal counsel.¹⁰³

use doctrine and advocating for the creation of a similar defense to patent infringement that would benefit universities); JEFFREY C. SUN & BENJAMIN BAEZ, *INTELLECTUAL PROPERTY IN THE INFORMATION AGE: KNOWLEDGE AS COMMODITY AND ITS LEGAL IMPLICATIONS FOR HIGHER EDUCATION* (Kelly Ward & Lisa E. Wolf-Wendel eds., 2009) (discussing fair use principles and their application to course packs and online instruction); Gorman, *supra* note 26, at 17 (noting that, “although there have been only about half a dozen reported decisions in the federal courts on educational photocopying or videotaping, the ruling in every case has been against fair use” and “the legal environment surrounding faculty rights to use copyrighted works is at best murky and at worst downright inhospitable”).

97. Deborah Gerhardt & Madelyn Wessel, *Fair Use and Fairness on Campus*, 11 N.C. J.L. & TECH. 461 (2010).

98. *Id.* at 461.

99. The myths they identified were: (1) “that if a market exists for the work, any use of it cannot be considered fair”; (2) that federal courts have decided that providing multiple copies of copyrighted articles to students constitutes infringement; (3) that fair use is dead; (4) that universities carry the burden of proving the right to use content in education, and that high damages awards are likely if universities do not do so; and (5) that fair use “is not available to those who copy an entire copyrighted work.” *Id.* at 491, 494, 498, 502, 505.

100. *Id.* at 529 (“[W]hen a scholar seeks to use copyrighted content in academic or creative writing, we believe that a balancing of the fair use factors, when viewed in light of copyright purposes, will generally weigh in favor of fair use.”).

101. *Id.* at 464.

102. *Id.* at 482.

103. Gerhardt & Wessel, *supra* note 97, at 529 (“In a world where technology makes so much content available for educational use, the copyright laws that were originally conceived to promote education are instead often routinely applied to inhibit it. Unequal access to counsel and profound disparities in the content available on campus exacerbate the problem.”).

A 2010 law review article written by David Simon expounded upon the problems identified by these earlier authors.¹⁰⁴ Simon reviewed the constraining approach to fair use in higher education since passage of the 1976 Copyright Act, before considering different ways to “fix” educational fair use.¹⁰⁵ Ultimately, Simon proposed the creation of a federal governmental agency—which he dubbed the Copyright Regulatory Administrative Body (“CRAB”)—to administer fair use in higher education, possibly even as a sub-agency of the Copyright Office.¹⁰⁶ Motivated by a belief that higher education’s need for fair use clarity is important and unique, Simon envisioned the role of the CRAB as promulgating and enforcing fair use regulations specific to higher education.¹⁰⁷

Simon freely recognized the limitations of his proposal, most critically that creation of the CRAB might result in regulations that provide increased clarity at the expense of flexibility. Simon’s proposal was that the CRAB should promulgate defined rules, not standards,¹⁰⁸ which raises the specter that the rules would be too restrictive. His rejection of this concern—i.e., that the problem could be ameliorated by requiring only “substantial compliance” with the rules, as opposed to literal compliance with them—is not particularly convincing.¹⁰⁹ Regardless of the unlikelihood that Congress would ever enact Simon’s proposal, it serves as an interesting thought experiment regarding how best to clarify the bounds of fair use in higher education. It also prompts critical thinking on the degree to which intellectual property laws ought to recognize academic exceptionalism, or preferential treatment of colleges and universities under the law.¹¹⁰

A more realistic proposal can be found in Professor David Hansen’s article from 2011.¹¹¹ He recognizes that academic libraries increasingly license, as opposed to purchase, content from publishers. These license agreements are governed by state law, which

104. David A. Simon, *Teaching Without Infringement: A New Model for Educational Fair Use*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 453 (2010).

105. *Id.* at 494.

106. *Id.* at 528, 552.

107. *Id.* at 494–97, 533–50.

108. *Id.* at 555.

109. *Id.*

110. *Cf.* Peter Lee, *Patents and the University*, 63 DUKE L.J. 1 (2013) (discussing the failure of courts to recognize academic exceptionalism in patent law).

111. David R. Hansen, *A State Law Approach to Preserving Fair Use in Academic Libraries*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1 (2011).

permits publishers to insert onerous provisions that restrict licensees' ability to engage in fair uses of material.¹¹² Although non-disclosure clauses in these license agreements prevent the scope of the problem from being fully understood, Professor Hansen argued that the mere fact that such use restrictions exist serves to hinder the ability of students, faculty, staff, and librarians to make full use of copyrighted materials as intended.¹¹³

As a solution aimed at protecting the scope of fair use, he proposed that state legislatures enact laws, applicable only to public institutions, "that would render void any license terms that purport to eliminate or modify the scope of fair use for its users."¹¹⁴ Although state legislatures would be unable to dictate the behavior of private educational institutions in this regard, Professor Hansen argued that such institutions "would feel some spill-over effects because vendors would have to justify why they can concede fair-use protections in state licenses but not in private licenses."¹¹⁵ His shrewd article concludes by offering model text that states could adopt in enacting the proposed legislation.¹¹⁶

In the most recent scholarly attention to fair use in higher education, Professor Brandon Butler traced the rise of the importance of transformativeness in judicial fair use analyses, and articulated how this trend might be harnessed to higher education's advantage.¹¹⁷ Citing the outcome in the *Author's Guild v. HathiTrust* litigation,¹¹⁸ Professor Butler made the case that courts in recent years have placed primary importance on whether allegedly infringing uses of copyrighted works are transformative in nature.¹¹⁹ If transformativeness is found, then courts tend to conclude that the challenged uses are fair.

Recognizing this trend in the case law, Professor Butler chided higher education for being slow and even resistant to style its unlicensed uses of copyrighted materials as transformative. He argued

112. *Id.* at 8 ("[L]icenses can be problematic for academic libraries because licenses restrict the way that libraries and their users interact with copyrighted content.").

113. *Id.* at 20.

114. *Id.* at 32–33.

115. *Id.* at 38.

116. *Id.* at 43–44.

117. Brandon Butler, *Transformative Teaching and Educational Fair Use After Georgia State*, 48 CONN. L. REV. 473 (2015). He in many ways picks up where Professor Peter Jaszi left off in his thoughtful essay from 2013. See Peter Jaszi, *Fair Use and Education: The Way Forward*, 25 LAW & LITERATURE 33, 45 (2013) ("[T]he turn of copyright doctrine toward transformativeness analysis presents [educators] with an extraordinary opportunity.").

118. 755 F.3d 87 (2d Cir. 2014) (holding that fair use protected the long-term digital preservation activities of digital library spin-off of Google Books Library Project).

119. Butler, *supra* note 117, at 480–93.

that institutions and courts are often too quick to view higher education's uses of copyrighted materials in the classroom as non-transformative, when in reality "teachers make a wide variety of clearly transformative uses."¹²⁰ While others may think that higher education's uses of copyrighted materials can never be deemed transformative, Professor Butler disagreed, arguing that "[t]he now-dominant paradigm of transformative use provides many exciting opportunities to unleash teaching from concerns about payment or permission."¹²¹

His article offers a non-exclusive listing of two main varieties of uses of copyrighted material in the classroom—"orthogonal teaching" and "productive teaching"—that he argues should be considered transformative.¹²² Orthogonal uses consist of using works in ways that teach about some subject other than what the original was intended to convey.¹²³ He cited as examples the use of media about current events to illustrate problems, the teaching of history through using primary materials, and teaching skills or methods (e.g., how to write well) through deploying exemplars.¹²⁴ These types of uses differ from productive uses, where the primary purpose of the copyrighted work's use in the classroom is to criticize or comment upon the work itself.¹²⁵ Professor Butler cited as examples of productive uses the inclusion of third-party media in teaching lectures, as well as assembling galleries, playlists, or other large collections of representative works to facilitate student exposure to genres, movements, styles, and other shared characteristics of expressive works.¹²⁶

On the whole, Professor Butler's thoughtful article provides a compelling strategy for higher education to implement as institutions consider which uses of copyrighted materials they should feel compelled to license, and which types of unlicensed uses they should insist are fair.

CONCLUDING THOUGHTS

The literature reviewed above reveals steady scholarly interest and attention to questions of copyright ownership and copyright use in higher education. The articles on copyright ownership manifest

120. *Id.* at 480.

121. *Id.* at 530.

122. *Id.* at 516–24.

123. *Id.* at 516–17.

124. *Id.* at 516–20.

125. Butler, *supra* note 117, at 521–24.

126. *Id.*

a slow trend toward a begrudging acceptance that work-made-for-hire principles apply in higher education, and recognition that many individual institutions have promulgated policies that do little more than provide rhetorical support for the concept that faculty own copyright in most works they create while employed in higher education. Software and distance learning materials are often treated differently under these policies. Unfortunately, despite a few early empirical studies, knowledge about the array of institutional policies regarding copyright is still embryonic, making careful and systemic investigation into this matter long overdue. What we do know is that key provisions concerning the definition of intellectual property and lines of ownership vary by institutional policy and factual context.¹²⁷

Meanwhile, the articles on the copyright use question contain more normative proposals than the articles concerning the copyright ownership question. However feasible any of these proposals actually is, each reflects the heightened degree of importance that commentators attach to the issue of fair use in higher education. All commentators seem to agree that fair use should take its fullest and most robust form in higher education, and yet defining the metes and bounds of fair use in that context continues to evade easy definition, as it does in other contexts as well.

Despite the helpfulness of this literature, some notable gaps exist that prevent mature understanding of the role of copyright in higher education. I conclude by discussing two avenues of scholarly inquiry that hold great promise for amplifying our knowledge in this area. The first involves principles of copyright ownership on the modern campus. The second involves the need for empirical scholarship on copyright in higher education.

A. *Copyright Ownership on the Modern Campus*

The existing body of work on the copyright ownership question has arguably not kept pace with major developments in higher education. We now face a critical juncture in higher education where historic assumptions about copyrightable works—namely, that typical scholarly output lacks economic value, and that only certain privileged members of the higher education community engage in academic work that is capable of generating financial return—

127. See, e.g., Anthony J. Luppino, *Fixing a Hole: Eliminating Ownership Uncertainties to Facilitate University-Generated Innovation*, 78 UMKCL. REV. 367, 378–79 (2009) (describing how university policies can vary in their assertion of institutional ownership of copyrightable materials and patentable inventions).

merit renewed consideration. As but one example, the advent and popularity of smartphone-enabled software applications means that more faculty members than ever before have the potential to experience the financial rewards of copyright, as do students.¹²⁸ Simply put, barriers to entry to creating popular software are much lower than they are to creating a valuable patented invention. Whereas only scientists of certain training and funding are likely to make inventions that garner the attention of technology transfer office personnel, nearly everyone on campus—students, staff, and faculty members alike—is capable of creating valuable software, or envisioning a software application that he or she can hire another to make.

Indeed, entire segments of academe—once viewed as only generating journal articles, books, and other written materials of little economic interest to the central administration—are deploying digital tools that are leading to the production of copyrightable works with potentially vast market interest.¹²⁹ A campus's own holdings in library special collections can even serve as sources of material for these projects. The digital humanities—a phrase that some loathe for its seeming faddishness—has come to institutions large and small.¹³⁰ Often as part of digital humanities projects, faculty work with library staff to take students into special collections in campus libraries and have them use digital tools to make old materials come alive and reach new audiences.¹³¹ As traditional modalities of learning become disrupted by financial constraints and

128. "The ease with which copyright can be obtained and the long duration of protection it affords make copyright a popular method of protecting intellectual property rights in computer software." Susan A. Dunn, Note, *Defining the Scope of Copyright Protection for Computer Software*, 38 STANFORD L. REV. 497, 497 (1986).

129. See, e.g., Nancy L. Maron, *The Digital Humanities Are Alive and Well and Blooming: Now What?*, EDUCAUSE REV., Sept.–Oct. 2015, at 28 ("Today . . . historians, philosophers, and poets not only are learning how to use tools to conduct analysis for their work; they also are building collections, developing their own tools, and constructing platforms.").

130. Digital humanities—also called *digital scholarship* or *digital liberal arts*—entails using software and digitization technologies to create new Internet-based modalities for teaching and learning about the humanities. See Michael Roy, *Either/Or? Both/And?: Difficult Distinctions within the Digital Humanities*, EDUCAUSE REV., May–June 2014, at 16.

131. For examples of digital humanities projects, visit THE VALLEY OF THE SHADOW: TWO COMMUNITIES IN THE AMERICAN CIVIL WAR, <http://valley.lib.virginia.edu/> (last visited Jan. 25, 2015); THE ANCIENT GRAFFITI PROJECT: DEVELOPING A SEARCH ENGINE FOR STUDYING THE GRAFFITI OF HERCULANEUM AND POMPEII, <http://ancientgraffiti.wlu.edu/> (last visited Jan. 25, 2015); TEXAS SLAVERY PROJECT, <http://www.texaslaveryproject.org/> (last visited Jan. 25, 2015); THE COLLECTED PAPERS OF ALBERT EINSTEIN, <http://einsteinpapers.press.princeton.edu/> (last visited Jan. 25, 2015); THE WALT WHITMAN ARCHIVE, <http://www.whitmanarchive.org/> (last visited Jan. 25, 2015); COLLEGE WOMEN: DOCUMENTING THE HISTORY OF WOMEN IN HIGHER EDUCATION, <http://www.collegewomen.org/> (last visited Jan. 25, 2015); and MAPPING DECLINE: ST. LOUIS AND THE AMERICAN CITY, <http://mappingdecline.lib.uiowa.edu/> (last visited Jan. 25, 2015).

fierce competition for students, the online course, as well as online course components enabled through large-scale digitization, are new focal points for copyright ownership concerns in higher education.¹³²

Combined with the fact that recent judicial opinions have cast serious doubt on the patent eligibility of most software applications, these trends involving digitization and scholarly work have led to the growing importance of copyright in higher education.¹³³ As a consequence, key practical questions of policy importance have emerged that often have as much to do with copyright ownership as they do with use of copyrighted works. The bases for institutional claims to copyright ownership bear reevaluation in light of student and faculty activity involving entrepreneurship, digital humanities, and the use of library special collections material.

These developments in the application of technology to scholarship and teaching do not mean that the copyright use question in higher education is not of persistent importance. The contours of fair use continue to be explored in these projects and others. For example, many institutions have created repositories of faculty and student scholarship and datasets.¹³⁴ Some of these repositories were established to provide the public with open access to them, while others are only accessible to members of the academic community that maintains them. Either way, copyright assignment agreements between faculty authors and academic publishers may purport or be construed to prevent faculty from archiving their work in these repositories. The nature of fair use in this context, as well as the unlicensed use of copyrighted materials in courseware or so-called “e-reserves,” is an issue of evolving understanding and concern in academe, and yet these activities have not resulted in much dedicated legal scholarship to date.

The copyright ownership and copyright use questions are closely related, perhaps even to the point of being inseparable, in several of these contexts. The applicable campus norms, policies, and legal constraints that impact practices and behaviors in these developing

132. See CLAYTON M. CHRISTENSEN & HENRY J. EYRING, *THE INNOVATIVE UNIVERSITY: CHANGING THE DNA OF HIGHER EDUCATION FROM THE INSIDE OUT* 212–15 (2011); Cahoy, *supra* note 4, at 497 (“[A]s colleges and universities embrace online environments and distance education, the value of instructional materials has increased.”).

133. See *Alice Corp. v. CLS Bank Int’l*, 134 S. Ct. 2347 (2014) (holding that patent claims drawn to a computer-implemented, electronic escrow service for facilitating financial transactions constituted an abstract idea not eligible for patent).

134. For examples, see LIBRA: UNIVERSITY OF VIRGINIA LIBRARY, <http://libra.virginia.edu/> (last visited Nov. 15, 2015) (online scholarship and data repository at the University of Virginia) and HARVARD DATAVERSE, <https://dataverse.harvard.edu/dataverse/harvard> (last visited Nov. 15, 2015) (online data repository at Harvard University).

areas all merit further investigation that could potentially lead to beneficial normative scholarship.

B. The Need for Empirical Scholarship

Existing scholarship on copyright in higher education contains few empirical studies. The scant scholarship that is empirical in nature is dated and focuses entirely on campus copyright policies, particularly as they pertain to fair use. No empirical scholarship exists concerning the ownership and registration of copyrights by colleges and universities, nor do we have comprehensive understanding of fair use determinations in higher education. Decision making in these areas—whether by faculty, in-house counsel, librarians, or other administrators—is also understudied.

This noticeable gap in the literature is unfortunate because it prohibits a full understanding of how decision makers in higher education view the copyright ownership and use questions, despite a growing body of knowledge about rights ownership and use in higher education involving other intellectual property disciplines. Indeed, recent scholarship concerning the acquisition and ownership of patents, trademarks, and Internet domain names by colleges and universities reveals that intellectual property ownership and rights assertion in higher education is more robust than previously presumed or understood. For example, the prevailing understanding of university technology transfer is that institutions use patents for socially beneficial commercialization of inventions that help mankind.¹³⁵ While that understanding certainly holds true in many instances, recent works challenge the universality of that proposition by presenting data that show how some institutions work with patent trolls, or view their institutional missions as including a mandate to litigate patents to extract royalties.¹³⁶

Similarly, historic scholarly understanding of trademarks in higher education held that the only marks that institutions protect—in fact, the only marks worth protecting—are those involving institutional names, logos, and athletic insignia.¹³⁷ Yet empirical

135. See generally, Christopher S. Hayter, *A Social Responsibility View of the "Patent-Centric Linear Model" of University Technology Transfer*, 54 DUQ. L. REV. 7 (2016); Emily E. Morris, *The Many Faces of Bayh-Dole*, 54 DUQ. L. REV. 81 (2016).

136. See Robin Feldman & Thomas Ewing, *The Giants Among Us*, 2012 STAN. TECH. L. REV. 1, 4, 7–8 (noting that patent aggregator Intellectual Ventures owns patents originally assigned to universities); Jacob H. Rooksby, *When Tigers Bare Teeth: A Qualitative Study of University Patent Enforcement*, 46 AKRON L. REV. 169, 191 (2013) (noting how some institutions view litigation as an attractive method of extracting revenue from patents).

137. Jacob H. Rooksby, *University™: Trademark Rights Accretion in Higher Education*, 27 HARV. J.L. & TECH. 349, 352–53 (2014).

research shows that many institutions turn to trademark as a vehicle for claiming rights in words and phrases that some might view as existing within a cultural commons in higher education, instead of belonging to just one institution.¹³⁸

Most recently, my research into college and university use of litigation and arbitration actions to wrestle control of Internet domain names from third parties shows that institutions have moved beyond the .EDU extension to lay claim to domain names in new and often unfamiliar extensions, with their growing arsenal of trademarks fueling the activity.¹³⁹

Each of these developments in related intellectual property fields shows how colleges and universities increasingly are concerned with accumulating and owning intellectual property, to be wielded in new and growing ways as higher education continues into an era of resource challenges, constraints, and evolving dependencies.¹⁴⁰ And yet the recent scholarship on copyright in higher education predominantly concerns itself not with institutional ownership and assertion of copyright claims, including in novel spaces, but rather addresses settled questions of the work-made-for-hire doctrine's application to faculty, as well as the extent and nature of uses to which copyrighted works can or cannot be put in traditional and emerging teaching environments within higher education.

Future empirical work may find that our current assumptions about copyright in higher education are flawed, outdated, or misplaced. We might also find that copyright activity in higher education is more or less robust than anticipated. At the very least, building empirical knowledge in this field will lead to a richer understanding of the landscape.

In conclusion, copyright in higher education has been an area of keen scholarly interest since the passage of the 1976 Copyright Act. This attention is perhaps unsurprising, given the centrality of cop-

138. *Id.* at 419.

139. See Jacob H. Rooksby, *Defining Domain: Higher Education's Battles for Cyberspace*, 80 BROOK. L. REV. 857 (2015).

140. I agree with Stanley Ikenberry that we are better to try to understand these trends than to think that we can stop them. Specifically, Ikenberry states:

Turning back the clock—restoring state support to earlier levels and pushing commercialization and academic capitalism outside the campus gate—is not likely to happen.

If we better understand the world in which the contemporary public research university functions, the implications for individuals and society will become clearer and the policy options and alternatives will become more obvious.

Stanley O. Ikenberry, *Privatizing the Public Research University*, in *PRIVATIZING THE PUBLIC UNIVERSITY: PERSPECTIVES FROM ACROSS THE ACADEMY* 1, 5 (Christopher C. Morpew & Peter D. Eckel eds., 2009).

yright to higher education's privileged teaching and research functions. Copyright law is powerful, serving to mediate how we construct the public domain that is so vital to higher education's role as a site of knowledge and culture.

In view of copyright's formative role in higher education, and the limitations in the literature identified above, the time has come for a fresh look at copyright on campus. Future work should answer the call to provide more modern perspectives on copyright in higher education, to ensure that copyright law and policies further, rather than impede, the sector's noble goals and high aspirations.

