COPYRIGHT AND THE UNIVERSITY

by VIVA R. MOFFAT*

Who owns the copyright in this Article? It turns out that this is a surprisingly difficult question to answer. I am the author – I wrote the words, I did the research, I collected and analyzed the data – but it is not clear that I am the "author" for copyright purposes and therefore the initial copyright owner. Under the common law, the "teacher exception" held that professors owned the fruits of their intellectual labor, notwithstanding the general rule that employers own the copyright in works created by their employees. Whether this exception survived the enactment of the 1976 Copyright Act, however, remains an unresolved question. Few courts have addressed the issue and Congress has not clarified matters.

This Article instead looks for answers in current university practice. It presents the first empirical study of university copyright policies in over twenty years, which reveals two different – and contradictory – things. First, all of the copyright policies in the survey treat the faculty member as the owner of the copyright. In other words, the policies reflect the academic tradition of vesting copyright ownership with faculty members. But the study also shows that many universities seek to reserve for themselves copyright "authorship" and therefore the ultimate right to control ownership. This is contrary both to the Copyright Act and to the academic tradition that gives faculty members the rights in their work. University control over copyright in faculty works would threaten academic freedom and the utilitarian and expressive values that copyright protects.

Informed by the study, the Article argues that answering the initial question – who owns the copyright in this article? – is not so difficult after all, at least as a practical matter. Given that nearly all universities treat faculty members as the owners of their creative works, and given that faculty members consistently act accordingly, the teacher exception persists. But as a legal matter, faculty control over their work will remain uncertain unless courts clarify and universities acknowledge that faculty are the copyright "authors" of their work.

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INTRODUCTION

You might be surprised to learn that it is not at all clear whether I am the "author," at least from a copyright perspective, of this article.[1] These are, of course, my words, but a long-standing ambiguity in copyright law leaves open whether copyright authorship, and thus initial ownership, belongs to me or to my employer.[2] The status of the doctrine, often referred to as the "teacher exception," is not settled, and Congress has not resolved the issue.[3]

The copyright authorship question is central to many of the everyday aspects of faculty work, and the fact that it does not have a clear answer creates substantial

[1] "Authorship" is a term of art in the copyright context. The "author" is the owner of the initial copyright entitlement, but, sometimes, the creator of the work is not the "author" of the work for the purposes of the Copyright Act. 17 U.S.C. § 201. *See infra* Part I.B.

[2] *See infra* Part I.A (discussing the origins and current status of the "teacher exception" to copyright's work made for hire doctrine).

[3] The "teacher exception" applies to teachers across all kinds of institutions, from K-12 schools to research universities. *See* Hays v. Sony Corp., 847 F.2d, 412, 413 (7th Cir. 1988) (discussing the "teacher exception" with respect to high school teachers who created a word processing manual). I discuss the exception in the context of higher education here, and I use "teacher exception" as that is the term of art employed by courts and commentators. There have been few reported cases discussing the copyright authorship issue in the higher education context. *See infra* Part I.C.

uncertainty for the academic enterprise.[4] Can a political scientist grant a publisher the copyright in her book? And who should get the royalties? Should academic journals (like this one) acquire copyright rights from faculty, or must they seek permission from the college or university where a professor teaches? Can the university copy and use a professor's online course materials without the professor's permission? Can that same professor use those materials to teach a course outside the university? All of these questions depend upon the answer to the still unsettled authorship question.

In the more unusual circumstances, this uncertainty is even more problematic. If a university is the "author" and initial entitlement holder of the copyright in a professor's article, the university could prevent publication of an article if it disagrees with its findings.[5] Or, if a faculty member publishes a book and the book is optioned into a movie, the university could claim the royalties from both.[6] Or, if a faculty member develops an online course, the university could copy the course materials and hire someone else—perhaps a lower-salaried adjunct professor—to teach the course using those materials, or prevent the creator from using those materials elsewhere.[7] These are mostly hypotheticals right now, but

[4] The fact that this question is unresolved has caused much consternation among commentators. *See, e.g.,* Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 591-92 (1987) (discussing the question of ownership of faculty works and expressing concern that "… these new claims for copyright ownership [by the university] could substantially alter the creative environment for a large segment of the university community."); *see also infra* Part I.C.

[5] The copyright owner's rights include the right to control copies, derivative works, and distribution of the work. 17 U.S.C. § 106 (the owner of the copyright has the "exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work …; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies … of the copyrighted work …"). There have been instances of institutions attempting to restrict faculty speech related to their scholarly work. *See, e.g.,* Michael Wines, *Florida Bars State Professors From Testifying in Voting Rights Case,* NEW YORK TIMES, Oct. 29, 2021, available here: https://www.nytimes.com/2021/10/29/us/florida-professors-voting-rights-lawsuit.html.

[6] This may seem far-fetched, but quite a number of academics write books that earn substantial royalties, and a few of them even become movies. Percival Everett is a professor of English at the University of Southern California. His novel JAMES was released to glowing reviews earlier this year, and one of his previous novels, ERASURE, was adapted into the academy award winning movie AMERICAN FICTION. https://dornsife.usc.edu/profile/percival-everett/.

[7] This has been a persistent concern since the advent of online courses. In an early high-profile example, Harvard University sought to prevent Professor Arthur Miller from providing his lectures and other course materials to another institution. *See* Amy Dockser Marcus, *Why Harvard Law School Wants to Rein in a Star-Struck Professor*, WALL STREET JOURNAL, November 22, 1999 (available here: https://www.wsj.com/articles/SB943231953420342442). For a discussion of this dispute, *see* Nancy Kim, *Martha Graham, Professor Miller and the Work for Hire Doctrine:*

the uncertainty of the doctrine leaves open these possibilities, and universities have taken advantage of this ambiguity by drafting copyright policies that (purport to) leave themselves the option of claiming rights in faculty work if they wish to do so.

Copyright confers the ability to control the use and distribution of a work, and it entails not just financial interests, but dignitary, expressive, and reputational elements as well.[8] As the examples above indicate, the potential for university control over faculty works implicates all of these interests, and it is a threat to academic freedom.[9] The ability of faculty members to research and to teach freely and without political or ideological influence is foundational to the values and mission of higher education,[10] and control over copyright is one part of this foundation.[11]

Faculty members at American universities and colleges create a wide array of expressive works in the course of their scholarly, teaching, and creative activities: books, articles, lecture notes, slide presentations, essays, poems, art work, audiovisual works, software, and so on.[12] Under the 1976 Copyright Act, all of these works are protected by copyright law from the moment they are "fixed in a tangible medium of expression."[13] And as a general matter, the creator of a work is the "author" for copyright purposes and owns the initial entitlement.[14] Also straightforward is the general notion that in an employment context, the

Undoing the Judicial Bind Created by the Legislature, 13 J. OF INTELLECTUAL PROP. 337 (2006).

[8] *See* Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1746 (2012) (discussing various theories of intellectual property and arguing that utilitarian and moral rights theories "can be complementary in important ways").

[9] For a discussion of academic freedom and free speech in the higher education context, *see* PEN America, *The Perilous State of Academic Freedom and Free Expression in Education*, Feb. 25, 2024, available here: https://pen.org/the-perilous-state-of-academic-freedom-and-free-expression-in-education/ ("Academic freedom secures the conditions under which university personnel are able to research and teach with fealty to the standards of their disciplines, unhindered by politically or ideologically motivated interference.")

[10] *Id*.

[11] In her seminal work on this question, Professor Dreyfuss put it bluntly, arguing that university ownership of rights in faculty work "could substantially alter the creative environment for a large segment of the university community." Dreyfuss, *supra* note 4, at 591-92.

[12] Indeed, copyright protection is central to the functioning of the modern university. *See, e.g.,* Jacob H. Rooksby, *Copyright in Higher Education: A Review of Modern Scholarship*, 54 DUQ. L.REV. 197, 197 (Winter 2016) ("Of the four intellectual property regimes, copyright is the most central to the day-to-day functioning of higher education.") (Winter 2016) (hereafter, Rooksby, *Copyright in Higher Education*). This article does not address ownership of faculty inventions, which are covered by patent law and the attendant university policies relating to ownership and commercialization of those inventions.

[13] 17 U.S.C. § 102.

[14] 17 U.S.C. § 201(a) ("Copyright in a work protected under this titles vests initially in the author or authors of the work.").

hiring party is the "author" (and initial entitlement owner) of works created within the scope of employment.[15] So, at first blush, it would appear that my University employer is the "author" of this article and therefore owns the copyright.

Not so fast, though. Prior to the enactment of the 1976 Copyright Act, courts articulated the longstanding "teacher exception" to the general rule that employers own works created by employees, such that the authorship question was answered in favor of faculty members.[16] This exception developed over time and came to be seen as a vital part of the academic tradition, based on notions of academic freedom and the understanding that the academic enterprise differed from the commercial sphere in significant ways.[17] This tradition, as applied in the higher education context, treated the faculty member as the copyright "author" and therefore the holder of the initial entitlement.[18]

When Congress overhauled copyright law in the 1976 Copyright Act, it codified the general rule regarding works created by employees in its work made for hire provisions[19] but did not expressly incorporate the teacher exception.[20] Courts, universities, professors, and commentators have struggled to determine whether, as a doctrinal matter, the exception survived the enactment of the 1976 Copyright Act.[21]

Congress is unlikely to act to clarify whether and in what form the teacher exception survives, and courts have been given few opportunities to address the question.[22] In this vacuum, universities have become the de facto policymakers. As such, I turn in this article to a survey of current university copyright policies. This empirical study is the first of its kind in over twenty years, and the only one

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[15] This is the "work made for hire" doctrine. *See infra* Part I.B.

[16] *See infra* Part I.A for a brief history of the exception.

[17] *Id*.

[18] Although the issue was not litigated extensively, the courts and commentators are unanimous in their understanding of its application. *See infra* Part I.A.

[19] 17 USC § 101 (definitions).

[20] Elizabeth Townsend, *Legal and Policy Responses to the Disappearing "Teacher Exception," or Copyright Ownership in the 21st Century University,* 1 MINN. INTELL. PROP. REV. 209, 226 (2003) ("The teacher exception was established under the 1909 act by case law, but because of the 1976 act did not incorporate it, the 'teacher exception' was subsumed by a work-for-hire doctrine that … places teachers' materials under the scope of employment.").

[21] As we will see, the courts have only addressed the issue squarely on a few occasions. *See infra* Part I.C. *See* Molinelli-Freytes v. Univ. of Puerto Rico (D.P.R. Feb. 15, 2012) (discussing the teacher exception and concluding that it is no longer justified); Hays v. Sony Corp., 847 F.2d, 412, 413 (7th Cir. 1988) (stating in dicta that the teacher exception should persist); Weinstein v. Univ. of Illinois, 811 F.2d 1091, 1092 (7th Cir. 1987) (looking to university copyright policy to determine copyright ownership and implicitly acknowledging the teacher exception).

[22] *See infra* Part I.C.

to focus squarely on copyright authorship and ownership and the distinction between the two.[23]

Given the lack of clarity in the formal doctrine, the results of this study are surprising in some ways. Over half of the studied policies reference academic "tradition" or "custom," and every one of them treats faculty members as the owners of the copyright in their work.[24] To this extent, then, the policies are consistent with the teacher exception to the work-made-for-hire doctrine, and consistent with the on-the-ground practices of faculty and publishers.

On the other hand, many of the policies treat copyright authorship as merely a default around which they can bargain,[25] indicating that universities believe that they can take control of faculty copyrights when they wish. It is this result that might surprise, and alarm, many in the academic community.

These results reveal that all of the actors in the academic ecosystem – faculty, departments, universities, publishers – currently act as if faculty own the rights in their work. In other words, the teacher exception persists as a practical matter. The consistent and non-contested nature of this practice provides ample support for the conclusion that the teacher exception is part of the law of copyright, even though it is not explicit in the statute. But the study also shows that many universities seek to reserve for themselves copyright "authorship" and therefore the ultimate right to control ownership. This is contrary to both the 1976 Copyright Act and to the academic tradition that gives faculty members the rights in their work.[26]

This article proceeds as follows: In Part I, I survey and summarize the legal landscape, describing the state of the doctrine, such as it is. I describe the academic tradition that provided for a "teacher exception" before the enactment of the 1976 Copyright Act, and then trace its alleged decline after that. Reports of its death are probably exaggerated, however, and in Part II, I describe the empirical project the results of which indicate that the academic tradition of vesting copyright in faculty, rather than the university, has persisted. Nearly universally, all of the stakeholders – universities, faculty members, publishers – treat faculty members as the owners of the rights in their copyrightable works. But

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[23] *See* Ashley Packard, *Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work*, 7 COMM. L. & POL'Y 275, 277 (2002) (collecting university copyright policies and concluding "that faculty actually have little protection for their work other than university copyright policies that may not alter the traditional work made for hire arrangement set up by the Copyright Act."); 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, 223-24 (1992) ("analyz[ing] and critique[ing] the copyright policies at seventy leading research universities" and "address[ing] the questions of who now owns the copyrightable work of professors, how universities currently attempt to control such ownership issues, and how these issues should be controlled.").

[24] *See infra* Part II.B.

[25] *See infra* Part II.C.

[26] *See infra* Part I.

the policies also reveal that universities consider the teacher exception to be simply a matter of university policy, one that they can alter at will. This conflicts with the Copyright Act, which makes clear that "authorship" is not negotiable. In Part III, I argue that the on-the-ground practice means that academic tradition – that is, the teacher exception – is so long-standing, so clear, and so reasonable that it is a custom that should have the force of law. There is ample evidence for courts to recognize the teacher exception as the rule. And I argue that the only meaningful way for the exception to operate is to vest copyright authorship with faculty members, so they own the initial entitlement.

I. THE DOCTRINE, OR LACK THEREOF

One basic premise of copyright law is that the creator of an expressive work is the author and owner of the copyright in that work.[27] This seems obvious and is uncontroversial.[28] Perhaps less obvious, copyright has long provided that employers are the "authors" and therefore the initial owners of the copyright in works created by employees within the scope of their employment.[29] The contours of this "work made for hire" doctrine have developed over time. The 1909 Copyright Act included a work made for hire provision, stating the basic rule, but did not define "employee" or "work made for hire."[30] As as the courts interpreted and applied this doctrine, they also developed a "teacher exception" to the general work made for hire rule.[31] This exception derived from the academic tradition in which faculty members, rather than their employers, owned the rights in their

[27] Congress passed the first copyright act in 1790 with significant revisions in 1909 and 1976. For an overview, *see* U.S. Copyright Office, *A Brief History of Copyright in the United States,* https://www.copyright.gov/timeline/. Although the scope and focus of copyright law has changed substantially over time, the notion that the creator of a protectable work is the copyright "author" and owner has remained stable. *See* Copyright Act of 1790 (providing 14 years of protection to the authors of books, charts, and maps); Burrow-Giles v. Sarony, 111 U.S. 53 (1884) (holding that a photographer is the "author" of a photograph at least in some circumstances); 1909 Copyright Act (not altering the basic notion of authorship); 1976 Copyright Act (overhauling copyright law but leaving in place the case law regarding copyright authorship); Comm'ty for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) (" …the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression …").

[28] There is a robust literature about the nature of "authorship" in the copyright context, *see, e.g.,* Christopher Buccafusco, *A Theory of Copyright Authorship,* Va. L. Rev. 1229, 1230 (2016) (noting that copyright jurisprudence does "not have a theory of authorship"), but the basic notion that the creator of a work should have the rights in the work has been stable over time.

[29] Ryan Vacca, *Work Made For Hire – Analyzing the Multi-Factor Balancing Test,* 42 Fla. St. U. L. Rev. 197, 198 (2017) (describing the work made for hire doctrine as a "glaring exception" to the general rule).

[30] *Id*. at 205.

[31] *See infra* Part I.A.

scholarly and teaching materials.[32] When Congress enacted the 1976 Copyright Act, it codified and clarified the work made for hire doctrine but said nothing about the teacher exception, and its status has been uncertain ever since.[33]

To make clear what is at stake, if the teacher exception is the rule, it is incontrovertible that I am the "author," for copyright purposes, of this article and thus the initial entitlement holder.[34] On the other hand, if the exception was abolished with passage of the 1976 Copyright Act, "authorship" is less clear. I am an employee of my university, but a court would have to determine whether writing this article is within the "scope of my employment."[35] If the answer to this question is yes, then my employer would be deemed the "author" of the article, and it would the copyright as an initial matter.[36] In addition to the expressive and dignitary interests I might have in my work, this is a distinction with a difference in other ways. For example, if I am the "author" and owner, I can license the rights in the article.[37] If not, I must seek permission from the university to do so or the publisher must negotiate with my employer rather than with me.[38] So, it is crucial to know whether the teacher exception is the rule, and in this section I trace the exception's life and reported death.

A. The Academic Tradition and the Life of the "Teacher Exception"

Under the 1909 Copyright Act, the general rule was that employers were the authors and initial entitlement holders in copyrightable works created by their employees.[39] The statute set forth this so-called work made for hire doctrine, but it did not define "employer" or "work made for hire."[40] Accordingly, "the task of

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[32] Id.

[33] Its status remains uncertain, but in 2019 Congress did give a hint about the teacher exception, amending the Copyright Act to provide that the copyright in scholarly works created by faculty at military colleges and academies belongs to the faculty authors, implicitly acknowledging the exception. 17 U.S.C. § 105(b) & (c). *See infra* Part 1.D.

[34] *Id*.

[35] 17 U.S.C. § 101 (a work created by an employee within the scope of employment is a "work made for hire").

[36] 17 U.S.C. § 201(b) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.").

[37] 17 U.S.C. § 106 (the owner of the copyright has the right to reproduce and distribute copies of the work, or to authorize others to do so).

[38] The fact that no faculty member seeks permission from their university employer, and the fact that university employers do not seek to control copyright is strong evidence that all of the stakeholders acknowledge the teacher exception. *See infra* Part I.

[39] *See* Vacca, *supra* note 29, at 204 ("After an uncertain history, Congress finally recognized the work made for hire doctrine in the Copyright Act of 1909. The 1909 Act provided that 'the word 'author' shall include an employer in the case of works made for hire.'").

[40] M. Nimmer & D. Nimmer, 1 NIMMER ON COPYRIGHT § 503(1)(a)(i).

shaping these terms fell to the courts,"[41] and they developed tests over time to resolve disputes about authorship and ownership.[42]

Along with those tests, the "teacher exception" to the work made for hire doctrine developed, providing that faculty members, rather than their university employers, owned the copyright in the creative work produced in the course of their employment.[43] This was a common law, judge-made rule, developed along with other aspects of the law not spelled out in the 1909 Act. The issue did not arise often, but commentators are in agreement that the teacher exception was well established.[44] The Nimmer treatise, for example, concludes that "the tradition developed that professors, rather than their universities, held the copyrights to the professor's compositions."[45] With little discussion, Professor Rochelle Dreyfuss reached the same conclusion: "Under the Copyright Act of 1909, courts and commentators regarded the work for hire doctrine, which deems an employer the owner of work prepared within the scope of employment, as largely inapplicable to teachers."[46] In other words, for faculty members the basic approach to authorship governed: the creator of the work was the copyright "author" and initial entitlement holder.

The most prominent justification for the academic tradition as embodied in the teacher exception revolves around the notion of the university as an exceptional space, as quite different from commercial endeavors.[47] This is expressed in connection with academic freedom and with the very different

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[41] Community for Creative Non-Violence v. Reid, 490 U.S. 730, 744 (1989).
[42] Nimmer, *supra* note 40 at § 5.03(1)(a)(i).
[43] *Id*. at § 5.03(b)(1).
[44] *See, e.g*., Townsend, *supra* note 20, at 230-31 (arguing "that the 'teacher exception' was so well established that no one thought it was in danger under the 1976 Copyright Act.").
[45] Nimmer, *supra* note 40, at § 5.03(b)(1).
[46] Dreyfuss, *supra* note 4, at 591 (noting that "there are no American cases on point"). *See also* Townsend, *supra* note 44, at 210 ("Before 1987, most believed that scholars owned their creative works, even though they were made for the classroom or during working hours. By owning one's creations under the 'teacher exception,' a teacher had freedom to use the works at other universities, make alterations and new creations from the initial works, and occasionally reap profit from publishing textbooks or, in rare cases, monographs."). *See also id*. at 230-31 (providing background on the development of the teacher exception and its treatment by the courts and concluding that "the 'teacher exception' appeared to be decided case law…" by the late 1960s, at least.).
[47] *See, e.g.*, Dreyfuss, *supra* note 4, at 592 ("The academic community is presumptively dedicated mainly to the pursuit of knowledge."). Professor Jacob Rooksby makes the case for academic exceptionalism, justifying differential treatment of faculty work. Rooksby, *A Fresh Look at Copyright on Campus*, 81 Mo. L. Rev. 769, 806-07 (2016) ("… faculty creativity and the impulse to innovate must not be dampened by copyright concerns brought on by a kaleidoscope of policy considerations and legal uncertainties, all of which bear on the ultimate question of copyright ownership. For higher education to realize its promise of serving as a cultural and knowledge commons of lasting importance, the prospect of any institutional claim of ownership in faculty works must soon become a historical problem instead of an ongoing concern.") (hereafter, Rooksby, *Fresh Look*).

incentive structures for faculty engaged in research and teaching.[48] The American Association of University Professors, in its "Statement on Copyright," explicitly ties faculty ownership of their work to academic freedom, noting that "[i]n the case of traditional academic works, …the faculty member rather than the institution determines the subject matter, the intellectual approach and direction, and the conclusions. This is the very essence of academic freedom."[49] This differs from the typical employment situation in which employees are hired to do particular tasks and produce particular outputs.[50]

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[48] *See, e.g.,* Dreyfuss, *supra* note 4, at 594-95 ("Copyright law has long contained mechanisms to assign the incidents of authorship to a party other than the natural creator. That this should be so is not surprising: it is, in fact, a logical corollary of the hypothesis that production of intellectual property will increase if the law converts creative output from a public good (in the sense that anyone can use an intellectual creation without interfering with anyone else's right of enjoyment) into a private one. That is, if it is agreed that the right to exclude free riders will in fact encourage creativity, then the benefits should be made to accrue to the party who put the creative process into motion. And if intellectual products are considered private goods, then one should be able to purchase these goods before they are created, much as one can contract to buy a custom-made home. In many circumstances, employers neatly fit this characterization, and, accordingly, the common law treated employers as the authors of works created within the scope of employment.").

[49] AAUP Statement on Copyright, available here: https://www.aaup.org/report/statement-copyright#:~:text=The%20objective%20of%20copyright%20is,disseminate%20them%20to%20the%20public%2C, (including "class notes and syllabi, books and articles; works of fiction and nonfiction; poems and dramatic works; musical and choreographic works; pictorial, graphic, and sculptural work; and educational software" as "traditional" academic works). *See* Robert C. Denicola, *Copyright and Open Access: Reconsidering University Ownership of Faculty Research*, 85 NEB. L. REV. 351, 376 (2006) ("There are good reasons why some courts and commentators have made heroic efforts to preserve copyright for faculty, and why universities have not asserted general claims of ownership. Foremost is the desire to safeguard academic freedom."); *see also* Packard, *supra* note 23, at 287 ("Of all the arguments postulated against the notion of university ownership of faculty work, none is more persuasive than the notion of academic freedom. Academic freedom is the three-pronged belief that 'teachers are entitled to full freedom in research and in the publication of their results, ... to freedom in the classroom in discussing their subject,' and to 'be free from institutional censorship or discipline' for speaking or writing as citizens.'").

[50] Leonard DuBoff, *An Academic's Copyright: Publish and Perish,* 32 J. COPYRIGHT SOC'Y 17, 24 (1984) ("The 1976 Copyright Act thus reflects the traditional rationales for granting the right to an employer: First, the work is produced on behalf of the employer and under his direction; second, the employee is paid by the employer for the production of the work; and third, it is the employer who incurs all of the costs and bears all of the risks of loss–he, therefore, should be entitled to all of the gains. His investment is protected from competition by the employee under the copyright law. The employee's only reward for his creation is the salary he receives from his employer."); *see also* John M. Garon & Elaine D. Ziff, *The Work Made for Hire Doctrine Revisited: Startup and Technology Employees and the Use of Contracts in a Hiring Relationship,* 12 MINN. J.L. SCI. & TECH. 489 (2011).

The AAUP Statement explains that this is not simply a theoretical concern. Instead, if the university is the copyright owner, "it would have the power, for example, to decide where the work is be published, to edit and otherwise revise it, to prepare derivative works based on it …, and indeed to censor and forbid dissemination of the work altogether."[51] In the most extreme, but not implausible, example, a university that owns and controls the copyright in a scholarly article could refuse to permit its publication.[52] Less extreme, but more plausible, the university could collect the royalties from the publication of a book, or even from the adaptation of the book into a movie.[53] Or, the university could prohibit a faculty member from using the course materials they developed if they move to a new institution; or the university could copy the course materials developed by a faculty member and allow their use by another.[54] All of these possibilities present

[51] AAUP Statement on Copyright, *supra* note 49 (concluding that "[s]uch powers, so deeply inconsistent with fundamental principles of academic freedom, cannot rest with the institution.").

[52] The owner of the copyright controls the copying and distribution of the work, 17 U.S.C. § 106, and may choose not to publish at all. *See* Packard, *supra* note 23, at 289 ("Once a university owned the rights to a professor's article, the university could determine if the professor could send it to a journal or not, or even to other colleagues for review. The university could determine whether a journal could publish it. And the university could determine whether the professor could go back to the work and make revisions or new works based on the original. In all of these cases, the university would have the power to say no. It would have the power to keep the piece out of the scholarly marketplace and to prevent it from being used as the basis for further projects.").

[53] While unlikely for the vast majority of university faculty, it is far from unheard of for books published by faculty to become best sellers. *See, e.g.*, Michelle Alexander, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010). In a few cases, they might even be adapted into movies. *See, e.g.,* Percival Everett, ERASURE (adapted as *American Fiction,* 2023).

[54] Indeed, the concern about the ownership and use of online course materials in particular has triggered both assertions of rights by universities and much uncertainty on the part of faculty. *See, e.g.*, Packard, *supra* note 23, at 275 ("Faculty all over the country are wondering about the impact technology will have on their intellectual property rights now that electronic learning seems to be the wave of the future."); Townsend, *supra* note 44, at 211 ("This notion of 'teacher exception' has been called into question in the last twenty years, in part because of the new Copyright Law of 1976, and in part because of new technologies that increased potential economic interest in course content, scholarly writings, distance learning, commercial note-taking ventures, and multimedia and software projects."); 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, however, university interest in copyright ownership of works created by academics is intensifying, largely as a result of the potential windfalls associated with distance education."); Robert Gorman, *Copyright Conflicts on the University Campus: The First Annual Christopher A. Meyer Memorial Lecture*, 47 J. COPYRIGHT SOC'Y 291, 302 (2000) (in 2000, noting that "until very recently, universities have focused far less on copyright ownership and development than on patent ownership

significant incursions into the ability of faculty to teach and to write freely, and this is surely one of the reasons for the development of the academic tradition of faculty ownership and control of their work.[55]

The university also differs from the typical workplace in that it is not (usually) commercial in nature and the economic rationales for placing copyright ownership in the hands of the employer, rather than the creator of the work, are much diminished or even non-existent.[56] In the typical workplace context, it is sensible for an employer to own the work that it hires its employees to create.[57] If a software company hires a programmer to write code, the employer should own the copyright in that output – that is what the employer gets in exchange for a salary. The academic context differs in that faculty are not hired to produce particular outputs but rather to contribute broadly to the teaching and research missions of the university.[58]

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and development" but that "[t]his picture has been dramatically changed in only a short time …"); Dreyfuss, *supra* note 4, at 591-92 ("At the same time, universities have begun to take a more active interest in the financial dimensions of the faculty's work product, and increasingly they have come to view exploitation of scholarly output as a means of filling the revenue gaps left by shrinking government grants and student tuition payments. This trend is not entirely novel, since universities traditionally have required faculty members in the sciences to assign to their employers the patent rights to their inventions. Yet these new claims for copyright ownership could substantially alter the creative environment for a large segment of the university community.").

[55] AAUP Statement on Copyright, *supra* note 49 ("Within that tradition, it has been the prevailing academic practice to treat the faculty member as the copyright owner of works that are created independently and at the faculty member's own initiative for traditional academic purposes."). *See also* Rooksby, *Fresh Look*, *supra* note 47, at 800 (arguing that in many circumstances "copyright ownership issues that must be resolved in favor of students and faculty if higher education is to advance the public's interest in the sector serving as a cultural and knowledge commons. Freedom of inquiry and innovation suffer when institutions use copyright as a means of overly controlling and restricting their human and artifactual resources.").

[56] The rise of for-profit universities presents an obvious challenge to the traditional view of higher education. I leave discussion of the copyright policies of these institutions for another time.

[57] *See* DuBoff, *supra* note 50, at 24.

[58] The basic incentive rationale for copyright may nonetheless apply to faculty. That is, they might be more inclined to create if they know they will reap the reputational and financial benefits from their work. This, though, is an argument in favor of faculty rather than university, ownership of copyright. *See, e.g.,* Rooksby, *Copyright in Higher Education, supra* note 12, at 200 ("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."); Dreyfuss, *supra* note 4, at 593 ("…demonstrat[ing] that the composition of output will change if faculty members lose the copyright to their work, and conclud[ing] that vesting

The non-commercial focus[59] of the academic enterprise and the notion of academic freedom are connected: the scholarly and pedagogical goals of the modern university cannot be accomplished without academic freedom, and academic freedom requires a substantial degree of autonomy and control on the part of faculty members.[60] Thus the academic tradition of faculty ownership and control of their scholarly and teaching materials.

Although there is widespread agreement as to the existence of the teacher exception, there is surprisingly little authority for this proposition. In a 1988 opinion that will be relevant below,[61] Judge Posner indicated that the "authority for [the exception] was in fact scanty . . . but it was scanty not because the merit of the exception was doubted, but because, on the contrary, virtually no one questioned that the academic author was entitled to copyright his writings."[62] It may also be the case that, historically, the amounts at stake were not worth the university inviting the trouble that might arise if it sought to claim ownership. As one court stated, "No reason has been suggested why a university would want to

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the creative with copyright ownership produces nonpecuniary benefits both to the creative and to the public. An economic approach focusing only on creators' monetary rewards would strip the creative of their ability to act as a surrogate for the public, and, in the end, hamper public access to their creativity.").

[59] This is not to discount the economic pressures on universities and colleges, nor is it to say that there are not aspects of the modern university that are, in fact, straightforwardly commercial in nature. Many institutions have significant activity in their offices of technology transfer, and they engage in the commercial world much like any other business. The patent policies, and the policies regarding ownership and control of patents, differ significantly from copyright policies and reflect both different legal structures as well as the distinct nature of patentable inventions. For an overview of university patent policies and ownership issues, *see, e.g.,* Patricia E. Campbell, *University Inventions Reconsidered: Debunking the Myth of University Ownership*, 11 WM. & MARY BUS. L. REV. 77, 81 (2019) ("Most universities today assert ownership rights over all patentable inventions (and many other types of intellectual property) created by members of the university community."); Brian J. Love, *Do University Patents Pay Off? Evidence From a Survey of University Inventors in Computer Science and Electrical Engineering*, 16 YALE J. LAW & TECH. 285 (2013).

[60] *See, e.g.,* Jon M. Garon, *Ownership of University Intellectual Property*, 36 CARDOZO ARTS & ENT. L.J. 635, 643–44 (2018) ("The reasons for providing a teacher exception to the work-for-hire doctrine flow primarily from the desire to provide faculty sufficient academic autonomy from their employers, and a realization that the relationship between scholarship and incentives at most institutions is a very poor fit, particularly for faculty who have achieved tenure and are no longer directly measured by their scholarly output.")

[61] *See infra* Part I.C.

[62] Hays v. Sony Corp. of America, 847 F.2d 412, 416 (7th Cir. 1988). Professor Townsend makes the case that the exception was so well engrained that it was not considered an issue when Congress revised the Copyright Act. Townsend, *supra* note 20, at 226 ("This article argues, on the contrary, that the 'teacher exception' was so well established that no one thought it was in danger under the 1976 Copyright Act.").

retain the ownership in a professor's expression."[63] (As will be shown below, the current crop of copyright policies give rise to the inference that universities would very much like the *option* of ownership if such a reason – financial, perhaps – should arise.[64]) In any event, this is where things stood as the new Copyright Act was debated and ultimately enacted in 1976: the academic tradition vesting copyright in faculty was alive and well.

B. The 1976 Copyright Act and the Codification of the Work Made for Hire Doctrine (but not the "Teacher Exception")

The 1976 Copyright Act substantially overhauled the law of copyright and codified a variety of judge-made doctrines, including "works made for hire" – the ownership of works created by employees and other hired parties. To the extent there was a teacher exception in the pre-1976 Act caselaw, it did not appear in the Act and was, apparently, not even mentioned in the legislative history.[65] That might seem to be enough to conclude that the exception did not survive into the 1976 Act era. And, indeed, the courts that have considered the issue have mostly so concluded. Before discussing that sparse caselaw, this section describes the 1976 Act's approach to works made for hire.

Under the Act's ownership provisions, the creator of the work is the "author" and has the initial entitlement to the copyright.[66] Copyright authorship is significant under the Act and is distinct from ownership of a copyright. The "author" may choose to retain the copyright and license the work (or not) or transfer the rights by assignment.[67] Returning to the example above, if I am the "author" of this article, then I am in the position to license it to a law review for publication. If, on the other hand, my employer is the "author," then the law

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[63] Williams v. Weisser, 273 Cal. App. 2d 726, 734 (1979).

[64] *See* Garon, *supra* note 60, at 642. *See also* Jon M. Garon, *Ownership of University Intellectual Property*, 36 CARDOZO ARTS & ENT. L.J. 635, 642 (2018) ("The dearth of cases however, may reflect the general acceptance of this approach and the unwillingness of universities to assert these rights in court.").

[65] For a discussion of the legislative history surrounding this topic, *see* Townsend, *supra* note 20, at 226 ("One of the main arguments for the disappearance of the 'teacher exception' was its non-incorporation into the 1976 Copyright Act, suggesting that Congress had not intended the 'teacher exception' to survive. This article argues, on the contrary, that the 'teacher exception' was so well established that no one thought it was in danger under the 1976 Copyright Act.").

[66] 17 USC § 201(a) ("Copyright in a work protected under this title vests initially in the author or authors of the work."). The Act's joint authorship provisions address situations with multiple authors. A "joint work" is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101.

[67] 17 USC 201(d)(1) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law.").

review would have to seek permission from the university (unless ownership had been transferred to me[68]).

Similarly, other aspects of copyright rely on the initial authorship determination. If I am the "author," the copyright term is different than if my employer is the "author."[69] If I am the "author" and I transfer the rights to someone else, I can terminate that transfer under certain conditions, meaning that the rights would revert to me.[70] This is not the case if the university is the "author."[71] So, determining "authorship" in the employment context is enormously important.

The 1976 Act sets forth a clear structure regarding copyright authorship and ownership, making obvious that while ownership of copyright may be transferred by license or assignment, "authorship" is not a default around which the parties may bargain. First, § 201 provides that copyright vests in the author or authors of the work,[72] but then states that in the case of "works made for hire," the hiring party is the "author" and initial owner of any works made for hire.[73] The statute defines "works made for hire," and that determination controls the authorship question.

That definition indicates that a work made for hire can arise in only two ways. First, a work created by an "employee" "within the scope of employment" is a work made for hire.[74] Neither "employee" nor "scope of employment" is defined in the statute. In *Community for Creative Non-Violence v. Reid*, a dispute about a commissioned sculpture, the Supreme Court held that common law agency definitions should be applied, and the courts have developed a body of case law fleshing out these definitions across a variety of disputes.[75] In that case, the Court

[68] As we will see below, some universities purport to do this, but it is not clear that these blanket transfers are effective. *See infra* Part II.C.

[69] Copyright "endures for a term consisting of the life of the author and 70 years after the author's death." 17 U.S.C. § 302(a). The copyright term for a work made for hire is "95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first." 17 U.S.C. § 302(c).

[70] *See* 17 U.S.C. § 203 (providing for the termination of transfers and licenses granted by the author).

[71] 17 U.S.C. § 203(a) ("*In the case of any work other than a work made for hire*, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions …") (emphasis added).

[72] 17 U.S.C. § 201(a).

[73] 17 U.S.C. § 201(b) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.").

[74] 17 U.S.C. § 201 (the employer or hiring party "is considered the author" of works made for hire); 17 U.S.C. § 101 (defining works made for hire to include works created by an employee within the scope of employment).

[75] In *CCNV v. Reid*, the Supreme Court addressed the 1976 Act's work made for hire provisions and concluded that the terms "employee" and "scope of employment" are

set forth a multi-factor test to determine when someone is considered an "employee,"[76] and the lower courts have done the same with respect to "scope of employment."[77] These are fact-specific inquiries, resolved by looking at the totality of circumstances. Employment contracts and the parties' understanding are relevant but not dispositive of the question. That is, an employment contract (or a university policy) cannot dictate whether a work is a "work made for hire."[78]

Many faculty are plainly employees of their academic institutions, but whether their scholarly and teaching works are created "within the scope of employment" is a closer call. This question has not been much litigated, although some courts have assumed as much.[79] Commentators have been split on the issue, with some contending that these works are within the scope of employment because they fall within the general requirements of the job.[80] Others have concluded that because the substance of faculty work is independent and because universities do not direct faculty to create particular works, they fall outside the scope of employment.[81] In any event, the statute makes clear that "employee" and "scope of employment" are determined by judicial application of the multi-factor tests, and cannot be altered by the parties' agreement.

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determined by reference to their common law agency definitions. Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

[76] *Id*. *See* Vacca, *supra* note 29, at 199 (noting that the *CCNV* test, "which uses approximately a dozen factors, clarified what the proper test was but spawned questions about how those factors are balanced and which factors, if any, are the most important in the analysis.").

[77] *See, e.g.,* Aymes v. Bomelli, 980 F.2d 857 (2d Cir. 1992). *See* Vacca, *supra* note 29, at 199-200 (noting that the court in *Aymes* "noted that not all factors are equally weighted. The court in *Aymes* went further still and opined that five of the factors would 'be significant in virtually every situation.'").

[78] Lape, *supra* note 23, at 239 ("It should be noted that under neither the 1909 Act nor the 1976 Copyright Act can an agreement between employer and employee determine whether a work is a work made for hire within the terms of the statute.").

[79] *See, e.g., Hays*, 847 F.2d, at 216-17 ("A possible textual handle [for finding that faculty works are not works made for hire] may be found in the words of section 201(b), quoted earlier, which appear to require not only that the work be a work for hire but that it have been prepared *for* the employer—which the Hays–McDonald manual may or may not have been.").

[80] *See, e.g.,* Rooksby, *Fresh Look*, *supra* note 47, at 805 ("And while most would agree that faculty scholarship falls within the work-made-for-hire doctrine, even institutional policies that purpose to bestow faculty with copyright in their scholarly works do not comply with the letter of copyright law, which requires signed copyright transfer agreements."); Kim, *supra* note 7, at 357–362 (2006) (stating that, "[c]urrently, it is uncertain whether a teacher exception would survive a challenge by an institution under the work for hire doctrine")

[81] *See* Robert Gorman, *Copyright Conflicts on the University Campus: The First Annual Christopher A. Meyer Memorial Lecture*, 47 J. COPYRIGHT SOC'Y 291, 302 (2000) (arguing that works created by faculty members are not made "within the scope of employment" and are therefore owned by faculty members and not the university).

Similarly, the second prong of the works made for hire definition strictly cabins the parties' ability to manipulate the "authorship" determination. Under this portion of the definition, only if a work falls within one of nine enumerated categories *and* is subject to a written agreement indicating its status as a work made for hire is, in fact, a work made for hire.[82] This provision creates a set of works that can become works made for hire by agreement of the parties, but the scope of the parties' discretion is limited. If the work does not fall within one of the nine categories, for example, it cannot be a work made for hire, even if the parties so agree in writing.[83]

In the academic context, this could arise if an adjunct or contingent faculty member is hired to teach a course but is not deemed an employee of the university. The adjunct might create a set of course materials for the class; the first question would be whether those course materials fall within one of the nine categories, one of which is an "instructional text."[84] But an "instructional text" is defined as "a work prepared for publication and with the purpose of use in systematic instructional activities,"[85] and in many instances the course materials will likely not be "for publication." If the course materials are not deemed "an instructional text," they will not be a work made for hire even if there is a signed agreement to that effect. And if they are an "instructional text," they will only be a work made for hire – with initial copyright vesting in the university – if there is a signed agreement to that effect.[86]

To summarize, there are two, and only two, ways in which a hiring party will be the copyright "author" of a work created by someone else, and the statute – not an employment contract, not a university policy – controls that determination.

But to be clear, if the teacher exception persists, this debate is moot. As the academic tradition developed, if the creator of the work is a faculty member, she is the "author" for copyright law purposes and owns the initial entitlement.[87] In that case, there is no need to determine whether the work is a work made for hire.

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[82] 17 U.S.C. § 101 ("works made for hire" definition)

[83] The categories include items like motion pictures, translations, and tests. The justification for this rule, and for the inclusion of some of the categories, is that employer ownership serves as a coordinating mechanism, particularly in situations where there may be many contributors to a work. *See* Dreyfuss, *supra* note 4, at 597 ("In addition, in many of the work for hire cases, the courts may have thought that the work would not be adequately disseminated if the copyright ownership was not placed with the employer. For example, courts usually held that contributions to a motion picture were for hire, so that a single entity would control all the rights. In that way, business decisions related to exploitation of the film could be made more easily than if every decision had to be approved by every contributor to the film.").

[84] 17 U.S.C. § 101.

[85] *Id*.

[86] 17 U.S.C. § 101 ("works made for hire" definition). *See* Molinelli-Freytes v. Univ. of Puerto Rico (D.P.R. Feb. 15, 2012), report and recommendation adopted, (D.P.R. Sept. 30, 2012).

[87] *See supra* Part I.B.

As we will see below, the teacher exception survives in the vast majority of copyright policies, but in a cramped form.[88] Many of the policies diverge from the academic tradition and from the clear language of the Copyright Act in that they treat "authorship" as a default term and, either explicitly or implicitly, indicate that they could – and might – decide to "claim" copyright authorship if they choose.[89] It is important to note, however, that copyright authorship cannot be allocated at the discretion of the parties.[90] A hiring party can, of course, create the conditions in which they will be deemed the employer, the worker will be deemed an employee, and the employment will involve creating works within the scope of employment. But a hiring party cannot simply call someone an employee and have it be so for purposes of the Copyright Act.[91] Likewise, only certain kinds of works will qualify as works made for hire under the second prong of the definition; and even for those works the hiring party is the author only if there is a written agreement to that effect.

While copyright authorship is not a default around which the parties can bargain, the initial entitlement holder is free to license or assign their rights.[92] In the works made for hire context, however, there are some constraints. Section 201(b) provides that in the case of a work made for hire, the hiring party is the "author" and, "unless the parties have expressly agreed otherwise in a written instrument signed by them,"[93] owns the rights in the work. This makes clear that ownership can be transferred by agreement, but the authorship determination will remain unaffected. That is, even if the hiring party transfers copyright ownership to the employee, the employer will remain the copyright "author."[94] And the transfer of ownership is cabined by a strict statute of frauds provision. The creator of the work will only own the copyright if both parties agree in a signed writing.[95]

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[88] *See infra* Part II.C.

[89] I put the word "claim" in quotes because that is not how copyright authorship or ownership arises. *See supra* Part I.B.

[90] Lape, *supra* note 23, at 246 ("[i]nitial ownership of the copyright in a professor's work is determined by the provisions of the Copyright Act, rather than by the terms of any contract, including an employment contract.").

[91] The parties can, of course, agree to an employment relationship, but one cannot be created post hoc. In CCNV v. Reid, CCNV hired Reid to create a sculpture. When the parties later had a dispute about ownership, the Court rejected CCNV's efforts to characterize the relationship as employee/employer; rather, the facts led to the conclusion that Reid was an independent contractor rather than an employee. CCNV v. Reid, 490 U.S. 730.

[92] 17 U.S.C. § 106 (providing that "the owner of copyright … has the exclusive right to do and to authorize any of the following …" including reproduction and distribution of the work).

[93] 17 U.S.C. § 201(b).

[94] *Id*.

[95] 17 U.S.C. § 201(b) ("In the case of a work made for hire, the employer or other person for whom the work was prepared in considered the author for purposes of this title, and,

In a variety of ways, then, the Copyright Act provides that "authorship" is not a default term and that transfer of ownership of copyright is carefully controlled. Yet, as we will see, virtually all university copyright policies purport to manipulate and allocate authorship of works in ways not contemplated by and contrary to the language and purpose of the Copyright Act.[96]

C. The (Sparse) Post-1976 Copyright Act Caselaw on the "Teacher Exception" and its Apparent Demise

As described above, the import of the 1976 Copyright Act codification of the work made for hire doctrine has been relatively straightforward, and the application of the doctrine has been uncontroversial for the most part. But, notwithstanding the apparent clarity of these authorship and ownership provisions, their application to faculty creative work remains in dispute. To be sure, the 1976 Copyright Act and its legislative history are silent regarding the teacher exception, and courts have considered the question only a few times since its passage. Yet, there are reasons to believe that the exception persists.

The two most influential cases arose in the Seventh Circuit, about a decade after the new Copyright Act. Neither case decided the question regarding the teacher exception squarely, and neither case distinguished copyright authorship and ownership clearly.

The first, *Weinstein v. University of Illinois*, entails perhaps the most quintessential academic dispute: "the order in which the names of an article's authors will be listed."[97] Answering this question involved discussing copyright ownership. The court acknowledged the academic "tradition [that] covers scholarly articles and other intellectual property," stating that "[w]hen Saul Bellow a professor at the University of Chicago, writes a novel, he may keep the royalties."[98] This implies – though the court does not state explicitly – that university faculty are the "authors" and the owners of the copyright in their work. But the court discusses and seemingly defers to the university's policy in reaching its conclusions.[99] And in this case the university "…concede[d] … that a professor of mathematics who proves a new theorem in the course of his employment will own the copyright to his article containing that proof."[100] Ultimately the court

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unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights compromised in the copyright.").

[96] *See* Rooksby, *Fresh Look, supra* note 47, at 805 ("Even at institutions with policies that cede copyright ownership to faculty, these policies do not actually transfer copyright in any given work, and faculty should not be lulled not trusting that institutions will not take special interest in new forms of creative endeavor, or that institutions will not change their positions on the copyright ownership question at a future date.").

[97] Weinstein v. Univ. of Illinois, 811 F.2d 1091, 1092 (7th Cir. 1987).

[98] *Id*. at 1094.

[99] *Id*. (noting that the university "adopt[ed] a policy defining 'work made for hire' for purposes of its employees, including its professors.").

[100] *Id*.

concluded that the faculty member owned the copyright in his work, but it is not clear whether that was because the teacher exception persists – making the faculty member the "author" of the work – or because the university policy so provided.[101] As described above, this is a crucial distinction and not one addressed by the court. Copyright "authorship" cannot be allocated by contract (or university policy).

In the second case, *Hays v. Sony*, the court, in an opinion by Judge Posner, also fails to distinguish between copyright authorship and copyright ownership. The court treats the pre-1976 Act status as settled: "virtually no one questioned that the academic author was entitled to copyright his writings."[102] In discussing the 1976 Act, the court notes that it "is general enough to make every academic article a 'work for hire' and therefore vest exclusive control in universities rather than scholars …"[103] but does not squarely address the question of whether the teacher exception survived the enactment of the new statute. In dicta, Judge Posner said that "if forced to decide the issue," he would "… conclude that the exception had survived the enactment of the 1976 Copyright Act."[104] This was so because of the havoc that would be wreaked on the higher education landscape in the event of a contrary decision.[105]

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[101] The court seems to acknowledge that there is "a rule that faculty members own the copyrights in their academic work," *Weinstein*, 811 F.2d at 1094, and then says that this "academic tradition" is one "the University's policy purports to retain." *Id*. The court holds that the plaintiff faculty member owns the rights in the work he created, but it is not clear about the mechanism by which that ownership arises. The university policy in *Weinstein* is quite similar to many current university policies, and it suffers from the same lack of clarity regarding the mechanism by which "authorship" arises. *See infra* Part II.

[102] Hays v. Sony, 847 F.2d 412, 416 (7th Cir. 1988). Note that the court in *Weinstein* also acknowledged the general understanding of the academic tradition. *Weinstein*, 811 F.2d at 1094 ("We would be surprised if any member of the faculty of the College of Pharmacy treats his academic work as the property of the University.").

[103] *Weinstein,* 811 F.2d at 1094.

[104] H*ays*, 847 F.2d at 416-17 ("The reasons for a presumption against finding academic writings to be work made for hire are as forceful today as they ever were. Nevertheless it is widely believed that the 1976 Copyright Act abolished the teacher exception, though, if so, probably inadvertently, for there is no discussion of the issue in the legislative history, and no political or other reasons come to mind as to why Congress might have wanted to abolish the exception.").

[105] *Id*. ("To a literalist of statutory interpretation, the conclusion that the Act abolished the exception may seem inescapable. The argument would be that academic writing, being within the scope of academic employment, is work made for hire, per se; so, in the absence of an express written and signed waiver of the academic employer's rights, the copyright in such writing must belong to the employer. But considering the havoc that such a conclusion would wreak in the settled practices of academic institutions, the lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production, and the absence of any indication that Congress meant to abolish the teacher exception, we might, if forced to decide the issue, conclude that the exception had survived the enactment of the 1976 Copyright Act.").

Judge Posner may well have thought the teacher exception a good idea, but, while other courts cite *Hays*, the few other courts to consider the question have indicated that the teacher exception likely did not survive the enactment of the 1976 Act.

The sparse case law often refers to "academic tradition" or "custom" – an obvious but implicit reference to the teacher exception – but the cases do not hold that to be the rule.[106] Instead, courts have continued to defer to university policies to determine authorship and ownership.[107] For example, in *Bosch v. Ball-Kell*, the court, while seeming to acknowledge the academic tradition, looked to the university's policy to conclude that teaching materials were included "within the general category of traditional copyrightable works…"[108] The court refers to this as "the legislative intent, so to speak."[109]

The most extensive discussion of the post-1976 Act status of the teacher exception is in *Molinelli-Freytes v. University of Puerto Rico*.[110] There the court "assume[d] the role of legal historian in order to unearth the common law roots of a 'teacher exception,'"[111] ultimately concluding that the exception did not survive the enactment of the 1976 Act.[112] Taking *Weinstein's* lead, the court in *Molinelli-*

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[106] *See, e.g.,* Roop v. Lincoln Coll., 803 F. Supp. 2d 926, 937 (C.D. Ill. 2011) (holding that "…even if *Hays* does establish a "teacher exception" to the "work for hire" doctrine (which it does not do expressly) it is not applicable to the instant facts.").

[107] *See* Townsend, *supra* note 20, at 239-40 (in 2003, arguing that "Easterbrook's decision in *Weinstein* appears to stand as the only voice on this topic, meaning that university policies control whether a "teacher exception" exists. Since the *Weinstein* decision, the focus has been on the employment contract and intellectual property policy at the particular university. It seems that only tradition and custom, remembered by the university, keeps the teacher exception in place.").

[108] Bosch v. Ball-Kell, No. 03-1408, 2006 WL 2548053, at *7 (C.D. Ill. Aug. 31, 2006) ("The logic behind such a conclusion is compelling. In the typical work for hire scenario, the employer assigns and directs the topic, content, and purpose of the work. In the academic setting, an employee may be assigned to teach a particular course, but then is generally left to use his or her discretion to determine the focus of the topic, the way the topic is going to be approached, the direction of the inquiry, and the way that the material will ultimately be presented.").

[109] *Id*. ("Thus, it would appear that the legislative intent, so to speak, in passing the policy was that course materials, such as syllabi, notes, etc., were to be included within the general category of traditional copyrightable works, rather than in the exception for works for hire, and that the category of traditional copyrightable works was not limited to works prepared for scholarly journals or peer review.")

[110] Molinelli-Freytes v. Univ. of Puerto Rico, 792 F.Supp.2d 164 (D. P.R. 2010).

[111] *Id*.

[112] *Id*. at 171-172 ("Thus, only policy and historical custom weigh in favor of a finding that a 'teacher exception' remains. …Accordingly, the only remaining enunciated policy concerns involve the transient nature of university professor and Plaintiffs' speculative concerns that failure to recognize a 'teacher exception' would cause a chilling in academic innovation. The Court will not find that a teacher exception continues to exist based solely

Freytes also deferred to university policy and, indeed, suggested that university policies have substantially addressed the concerns that may exist. "Most academic institutions today have already responded to the uncertainty regarding the "teacher exception" by enacting policies, returning ownership of works traditionally copyrighted by professors to the professors themselves."[113] According to the court, then, there is no real need for a "teacher exception." This is the clearest statement from a court that the exception has been abolished, but it remains the only one in the 45 years since the passage of the new copyright act.[114] Other than this opinion, the federal courts have neither definitely rejected nor conclusively affirmed the teacher exception. To some extent this would appear to answer the question: if no court has held that the teacher exception survived the enactment of the 1976 Copyright Act, it is difficult to conclude that it is the law.

Commentators have been split on the question of the continued existence of the teacher exception. According to some, it is mostly dead, but others have declared it to be somewhat alive.[115]

In her seminal article on this topic, Professor Dreyfuss states that "scholars have indeed concluded that the 1976 Copyright Act abolishes the teacher exception to the work for hire doctrine."[116] But, more than a decade later, Professor Elizabeth Townsend dug into the legislative history and concluded that the 1976 Act did not, in fact, abolish the teacher exception, arguing that it was so well established and so broadly accepted that no one thought it was at issue.[117]

Another decade on, Professor Jacob Rooksby provided a succinct overview of the academic commentary on this subject, concluding that "The articles on copyright ownership manifest a slow trend toward a begrudging acceptance that work-made-for-hire principles apply in higher education, and recognition that

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upon these two potential concerns. Accordingly, the Court rules that no such exception survived the enactment of the 1976 Copyright Act …").

[113] *Id*. at 172.

[114] As the *Molinelli-Freytes* court explains, "case law regarding the potential applicability of the 'teacher exception' in the wake of the 1976 Copyright Act's enactment is scant, and no reported opinion exists holding either that such an exception survived or that it was extinguished by the 1976 Copyright Act." 792 F.Supp.2d at 168-69.

[115] Referencing Miracle Max in THE PRINCESS BRIDE (1987) ("Turns out your friend here is only mostly dead. See, mostly dead is slightly alive.").

[116] Dreyfuss, *supra* note 4, at 598 ("The dispositive issue is whether the production of scholarly material is 'within the scope of employment,' that is, part of the job. Since scholarship is a factor in decisions regarding tenure, promotion, salary increases, sabbatical leaves, and reduced teaching loads, scholarly work should now belong to universities rather than to faculty members.").

[117] Townsend, *supra* note 20, at 226. *See also* Lape, *supra* note 23, at 238 ("There is nothing in the 1976 Copyright Act or its legislative history to suggest that the common law exception for professors from the common law definition of work made for hire was eradicated by the act."); Lape concludes regarding this question that "the 1976 Copyright Act did not disturb the professors' exception from the work-made-for-hire doctrine; to the extent that such an exception ever existed, it continues to exist." *Id*. at 246.

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."[118] None other than the inimitable Nimmer on Copyright has declared the teacher exception at least "highly contested"[119] and appears to conclude that the issue has been subsumed within the general work for hire analysis under *CCNV v. Reid* and its progeny.[120]

D. Congress Finally Speaks, Implicitly Acknowledging the "Teacher Exception"

It turns out that Congress has not been entirely silent about the teacher exception. Buried in the National Defense Authorization Act of 2020, Congress included a little noticed amendment to the Copyright Act, providing that civilian faculty members at the nation's military colleges and academies own the copyright in their scholarly works.[121] This is an acknowledgement, if only an implicit one, of the teacher exception.

Prior to this amendment, faculty at these institutions did not own the copyright in any works they created. This is because of the longstanding "government works" doctrine in Section 105(a) of the Act, which provides broadly that "[c]opyright protection under this title is not available for any work of the United States Government."[122] A "work of the United States Government" is defined as "a work prepared by an officer or employee of the United States Government as part of that person's official duties."[123] As a general matter, then, U.S. government works – including those created by faculty members at government educational institutions – are in the public domain. It is this provision that makes the opinions of judges and memos by agency staffers and policy papers by White House aides available to the public.

Then in 2019 Congress changed this rule with respect to one group of federal employees: civilian faculty members at military colleges. If the teacher exception

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[118] Rooksby, Copyright in Higher Education, supra note 12, at 216.

[119] Nimmer, *supra* note 40, at § 5.03[B] ("Based on the rule noted above that an employee owns his work product not produced as part of his employee duties, the question arises whether university professors own the copyright to their articles and other scholarly productions. On the one hand, "publish or perish" connotes that the composition of scholarly contributions forms part and parcel of those employees' duties, leading to the conclusion that they constitute works for hire. On the other hand, the lack of control and supervision exerted by the university over the content, form, or even the subject matter about which the scholar chooses to write separate these works from just about every other work for hire. For these reasons, the matter is highly contested.")

[120] *Id*. at § 5.03[B](b)(1) (citing cases applying the *CCNV v. Reid* multi-factor test in the university setting).

[121] 17 U.S.C. § 105(b) (providing that civilian faculty members own the copyright in their "literary work produced … in the course of employment at a covered institution for publication by a scholarly press or journal.").

[122] *Id.* at §105(a) ("Copyright protection under this title is not available for any work of the United States Government…").

[123] 17 U.S.C. § 101 (definitions).

is the rule, providing those faculty members who are government employees with copyright ownership in their work has the effect of putting them on the same footing with faculty members who are not federal government employees. In other words, if the teacher exception were not the rule – that is, if university employers owned the copyright in faculty work – this 2019 amendment would be quite anomalous, putting military faculty in a position unlike that of any other faculty member in the country. The former is a much more plausible explanation.

Although the legislative history is sparse, it appears that the motivation for the amendment was to "improve[] the recruitment and retention of civilian faculty members." Providing that these faculty members control their copyrights, just as they would if they taught at a non-military college, would make employment at a military college more appealing, presumably. The reasons given for the amendment are similar to the justifications for the teacher exception itself. The House report mentioned "the degraded state of Professional Military Education" and hoped that faculty ownership of copyright would be a "small step" toward "reform."[124] The Report requested that the Department of Defense submit a report by January 2022 (which was seemingly not completed) indicating (1) how many such copyrights vested, (2) how many faculty members "published a literary work in a scholarly press or journal" and (3) "[r]eal world examples of the ways in which this provision has improved the recruitment and retention of civilian faculty members at each covered institution." With this statement, Congress indicates that vesting copyright in faculty is related to incentivizing the creation and publication of scholarly works. The perceived need for an incentive to create and disseminate expressive work is foundational to U.S. copyright law[125] and animates the teacher exception.[126] Moreover, the reference to improving the recruitment and retention of faculty members at the military institutions implies that at non-government institutions faculty members enjoy copyright ownership of their work as a default matter. This is not a straightforward statement that the teacher exception persists, but it implies that Congress considers the teacher exception to be the rule.

* * *

In sum, there is little formal doctrine on the teacher exception. Congress has spoken only glancingly – though quite tellingly – on the matter, but many courts and commentators have concluded or conceded or suggested that the teacher exception has disappeared. The problem with this argument is that universities and colleges and the faculty therein continue to act as if the exception persists. As the review of university copyright policies demonstrates, the teacher exception is alive and well on the ground.[127]

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[124] *See* National Defense Authorization Act for Fiscal Year 2020, Conference Report to accompany S. 1790, H.R. 116-333 (2019), at 1233.
[125] U.S. CONSTITUTION, Article I, sec. 8, cl. 8.
[126] *See supra* Part I.A.
[127] *See infra* Part II.

II. THE PERSISTENCE OF THE ACADEMIC TRADITION AND THE "TEACHER EXCEPTION"

Part I of this Article explained two things about copyright law. First, it is far from clear that the teacher exception survived the enactment of the 1976 Copyright Act; as a formal doctrinal matter it is difficult to argue that it is the rule. And, second, copyright "authorship" is distinct from ownership and is not a default around which the parties can bargain. In this Part, the results of an empirical study of university copyright policies reveal that the practice on the ground would lead you to the opposite conclusion on both counts. First, the policies nearly uniformly reflect the persistence of the teacher exception – they all treat faculty as the owners of their work, and nearly all of them implicitly deem faculty to be the "authors" of their work. Second, many of the policies appear to treat authorship and ownership as policy choices to be made at the institution's discretion.

This is the first comprehensive study of university copyright policies in more than 20 years[128] and the first to focus squarely on universities' treatment of copyright authorship and ownership as distinct issues. As Professor Jacob Rooksby described, "… despite a few early empirical studies, knowledge about the array of institutional policies regarding copyright is still embryonic, making careful and systematic investigation into this matter long overdue."[129] Almost half a century after the enactment of the 1976 Copyright Act, we have little understanding of how copyright law operates at universities and colleges in the United States. I seek to rectify that here.

In this Part, I explain my methodology, provide a big picture summary of the results, and then describe the data in a qualitative way, demonstrating how the top-line results – which are quite consistent – mask a great deal of variety and, ultimately, instability. Although university copyright policies are almost

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[128] *See* Lape, *supra* note 23, at 223-24 ("analyz[ing] and critique[ing] the copyright policies at seventy leading research universities" and "address[ing] the questions of who now owns the copyrightable work of professors, how universities currently attempt to control such ownership issues, and how these issues should be controlled."); Packard, *supra* note 23, at 277 (collecting university copyright policies and concluding "that faculty actually have little protection for their work other than university copyright policies that may not alter the traditional work made for hire arrangement set up by the Copyright Act."). Packard updated Lape's study and found that more universities had adopted copyright policies and that more institutions disclaimed ownership of traditional faculty works. Id. at 298-99. This trend appears to have continued.

[129] Rooksby's very useful summary of the case law and the scholarship concludes right about where this article begins: the state of the law is in flux and is unstable, and we don't know much about what is actually happening on the ground. Rooksby, *Copyright in Higher Education*, *supra* note 12, at 216 ("What we do know is that key provision concerning the definition of intellectual property and lines of ownership vary by institutional policy and factual context.").

uniformly drafted in a way that is consistent with the teacher exception, many of them also make clear, implicitly or explicitly, that the institution does not regard the teacher exception as the rule but rather as a policy choice at their discretion. It is these dynamics that lead to instability for the academic enterprise. It is crucial to know where the initial copyright entitlement vests, and that remains unclear, both doctrinally and as a matter of practice. I describe the quantitative and qualitative aspects of the survey in this Part and in the next Part suggest what might be done about it.

A. Methodology

With the help of a research assistant, I collected the publicly available copyright policies of the top 25 universities according to the 2024 U.S. News and World Report ranking.[130] I also collected the copyright policies of the top 25 public universities.[131] There is some overlap between these two categories, of course, and for some of the state schools, one policy covers multiple institutions. The University of California system, for example, has six schools in the top ranks but only a single copyright policy for the entire system. Ultimately, I collected and reviewed 41 copyright policies.[132]

For each policy, I recorded the following data: (1) whether the school is a public or private institution; (2) whether the policy indicates that the faculty member or the institution owns the copyright; (3) if the faculty member owns the copyright according to the policy, does the policy indicate whether that is (a) by transfer from the institution to the faculty member; or (b) by virtue of having created the work;[133] (4) whether there is a carve-out for "substantial support" by university; (5) whether teaching/instructional materials are treated differently than scholarly works; (6) whether software is treated differently than other

[130] *See* U.S. News & World Report rankings for 2024 Top "National Universities" — https://www.usnews.com/best-colleges/rankings/national-universities.

[131] U.S. News & World Report, 2024 Top "Public Colleges and Universities" — https://www.usnews.com/best-colleges/rankings/national-universities/top-public. I selected this set of schools based on my (anecdotal) experience that institutions tend to look to higher-ranked or "elite" schools for policies. In addition, I make the assumption that the higher-ranked schools will tend to have more resources to put into the development of university policies of all kinds, so they will be more heavily researched and lawyered. Finally, I understand that the National Association of College and University Attorneys (NACUA) has a form "copyright policy," but I have been unable to access or review that form policy. *See* https://www.nacua.org/ (site requires login to access resources pages). The existence of this form copyright policy makes consistency across institutions more likely.

[132] There are 42 institutions represented in these lists. I have been unable to locate Dartmouth's policy. The policies and spreadsheet are on file with the author.

[133] This is intended to determine whether the institution treats faculty work as works made for hire and then transfers rights (or not) to the faculty creators or, on the other hand, if the institution treats faculty as having the initial copyright entitlement. As described below, the policies are often not clear in this regard, and they certainly could be interpreted in different ways.

copyrightable works; (7) whether the policy references academic "custom" or "tradition;"(8) whether the policy references academic freedom.

My primary goal was to determine what the policies indicate about whether the institution or the faculty member owns the copyright and the mechanism by which ownership arises – that is, what it indicates about who has the initial entitlement. The questions about the contours of the policy – differential treatment of instructional materials, software, and instances of substantial support for particular works – help flesh out the scope of the policies.

I had a few preliminary hypotheses. The first was that the policies would reflect the decline or disappearance of the teacher exception. The second was that there would be some substantial variation among policies.[134] I was sort of wrong about both of these suppositions. I also wondered whether public institutions would treat the issues differently than private institutions, and it turns out that some of the variation in the data comes from public schools.[135]

The broad quantitative results are consistent in one significant way: they show that the academic tradition vesting copyright ownership with faculty persists. But this top-line result smooths over what are in fact often confusing, unclear, or contradictory policies. There is, in fact, a great deal of variation in the details. Most importantly, many of the policies hedge in terms of where the initial copyright entitlement lies, appearing to treat that question as a default giving the school the option of claiming copyright authorship when they choose. Put another way, many of the policies appear to reserve for the institution the ability to grant or deny "authorship" to faculty, something that makes no sense given the Copyright Act's work made for hire provisions.

B. The Top-Line Results: Uniformity Regarding Copyright Ownership

I reviewed a total of 41 copyright policies, covering 21 private institutions and 20 public systems.[136] Of the 41 policies, every one of them indicates that

[134] In retrospect, this likely reflects some naivete on my part. The fact that NACUA maintains a database of form policies makes consistency much more likely.

[135] There are obvious differences between public and private institutions. One is that public institutions have immunity from suit as a general matter, and the Supreme Court has recently rebuffed Congress' efforts to limit that immunity with respect to copyright claims. *See* Allen v. Cooper, 589 U.S. 248 (2020) (striking down portion of the Copyright Remedy Clarification Act attempting to abrogate state sovereign immunity in copyright infringement cases). Another potential distinction revolves around whether the university/faculty relationship is governed by a collective bargaining agreement. In some instances – for example, the University of Florida – the copyright policy is contained within the collective bargaining agreement. *See* Data on file with the author. The collective bargaining process may provide an opportunity for the parties to negotiate the terms of university policies on intellectual property. *See* Michael Klein & Joy Blanchard, *Are Intellectual Property Policies Subject to Collective Bargaining? A Case Study of New Jersey and Kansas*, 20 Tex. Intell. Prop. L.J. 389, 393 (2012) (discussing whether intellectual property issues are "within the scope of bargaining").

[136] *See* Data on file with the author.

faculty members own the copyright in at least the traditional scholarly and instructional works they create. Some university policies are broader than others, and some are more detailed than others, but in so far as concerns the bulk of the copyrightable work that faculty create, the policies are remarkably consistent in providing that faculty, rather than the university, own the rights in those works.[137]

Much less clear is the mechanism by which the policies purport to allocate ownership.[138] Of the 41 policies providing that the faculty member owns the rights in their creative output, all but three of them appear to indicate that the faculty member is the "author" – i.e., that the faculty member has the initial copyright entitlement.[139] This is stated in various ways, some policies simply stating that faculty members own the rights to their expressive works; others providing that the institution "cedes" or "does not claim" the rights in copyrightable works; others indicating that they "acknowledge" or "recognize" academic tradition or custom.[140] Notably, though, none of these 38 policies describes faculty works as works made for hire, and I have therefore coded these results as ones indicating that faculty are the "authors" and initial entitlement holders. To be clear, not one of the policies states this explicitly. Recall, however, that the creator of a work is the "author" and initial entitlement holder unless the work is a work made for hire, in which case the hiring party is the "author."[141] In that latter situation, if faculty works are "works made for hire," faculty can own the copyright only if it is transferred to them by the institution. None of the policies in this category purport to do that. Thus, ownership in this circumstance could only arise by virtue of creation.

Only three of the policies (which cover at least eight institutions) state that the institution considers faculty creative work to be works made for hire, and all three of them purport to transfer the rights to the faculty creators.[142] In this

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[137] This finding is also consistent with other practices. I have collected a set of over 45 law journal publication agreements. They uniformly treat the professor as the author and copyright owner, and that is consistent with my anecdotal experience (and that of every academic I know). In the last twenty years at my institution, I have looked at publication agreements for faculty across campus, and in every case the agreement is between the faculty member who wrote the book or article and the publisher. In no instance have I heard of a publisher asking for the university's permission; nor have I heard of a university asserting rights in the works. (Agreements on file with the author.)

[138] I say "purport" here because, as indicated above, copyright "authorship" is not simply a default around which the parties can negotiate. *See supra* Part I.B.

[139] I say "appear" because many of the policies, as we will see, are confusing, unclear, and inconsistent in their treatment of these issues.

[140] I explain below why I concluded that, notwithstanding the variation in language, it is fair to say that the best way to understand these 38 policies is that they are consistent with the teacher exception.

[141] *See supra* Part I.B.

[142] University of California "Copyright ownership" policy, available here: https://copyright.universityofcalifornia.edu/resources/copyright-ownership.html;

circumstance, the institution is the "author" and has the initial entitlement.[143] It is not clear whether this attempt at a blanket transfer of copyright ownership is effective, but it is noteworthy that even the institutions that assert "authorship" for themselves nevertheless seek to confer ownership on faculty. Notably, all of the institutions that do this are public schools: the University of California system, the University of Michigan, and William & Mary.[144]Although none of the policies references the "teacher exception," 23 of them mention academic "tradition" or "custom" or "traditional" faculty or academic work.

Finally, I looked at three categories of potential "carve-outs" – types of work excluded from the general policy: instructional materials, software, and work created with "substantial" institutional support. Here, almost all schools purport to own the work in the latter category. That is, all but four of the schools indicate that work created with substantial support – meaning over and above the typical institutional support provided to faculty – is owned by the institution. A smaller number of schools carve out software from their general policy that faculty own the fruits of their academic labor, and just a few carve out instructional works.[145]

These top-line results demonstrate how consistent university policies are in some ways. Most significantly, they *all* state that faculty own the rights in their creative work. The vast majority of them are consistent in that they do not assert that faculty works are works made for hire. Instead, 38 of the 41 policies state that faculty own the rights, but they differ and are not clear on the mechanism by which that occurs. The other three policies also provide for faculty ownership, accomplished with a purported transfer of rights.

C. A Qualitative Look at the Policies: Variation and Uncertainty Regarding "Authorship"

A more detailed analysis of the policies illustrates both the consistent top-line result as well as important nuances. In general, the practice on the ground is very consistent with the academic tradition. But a closer look at the details demonstrates the variation and lack of clarity in the policies. Faculty might take heart in the fact that they are deemed to own the rights in their work, but they might be surprised to learn that their institutions believe that could change at the institution's discretion.

All of the policies are the same with respect to copyright ownership – faculty own the rights in their work, according to all of the policies. But the policies differ

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University of Michigan, "Who Holds Copyright at or in Affiliation with the University of Michigan," available here: https://spg.umich.edu/policy/601.28; William & Mary University, "Intellectual Property Policy," available here: https://www.wm.edu/offices/ce/policies/research-activities/intellectual-property.php.

[143] Again, the work made for hire designation is not one that the parties can simply negotiate.

[144] Note that these three policies cover at least eight institutions.

[145] In some instances, schools have separate policies covering software and instructional materials. I have reviewed some of those policies, but they are not included in this data set.

significantly with respect to the mechanism by which that occurs. Recall that copyright "authorship" determines the initial entitlement.[146] And copyright "authorship" is not a default term, but many of the policies treat it as such. In terms of copyright authorship, the policies can be sorted into three groups. One set of policies states that the institution "recognizes" or "affirms" or "acknowledges" faculty ownership; another set states it somewhat differently, though with the same bottom line – these schools "do not claim" or "cede" or "waive" ownership of faculty works; the third, and smallest, group treats faculty works as works made for hire and purports to transfer ownership to faculty.

Mechanism of faculty ownership	
School "acknowledges" or "affirms" faculty ownership; or faculty "retain" copyright	28
School "cedes" or "waives" or "does not claim" copyright	10
School asserts work made for hire status and (purports to) transfer rights to faculty	3

1. Faculty retain rights

In the first group are policies that are the most consistent with the teacher exception, indicating that faculty have the initial copyright entitlement. These policies "acknowledge" or "recognize" faculty ownership of their work. But many of the policies even in this group include language that hedges, indicating that the institution believes that it can allocate copyright "authorship" and ownership at its discretion.

Brown University's "Copyright Ownership and Use Policy" comes very close to explicitly acknowledging the teacher exception.[147] It states first that "Under copyright laws, works prepared by an employee within the scope of the employee's employment is considered a Work Made for Hire and the work is owned by the employer…"[148] – a fair enough statement of the rule[149] – and then says "… unless an exception applies."[150] The Copyright Act does not provide for any exceptions to the work made for hire rules, however, and the next sentence indicates that the policy must be referring to the teacher exception. It says:

> The University recognizes the 'academic tradition.' This tradition holds that faculty members, instructors, and fellows, though employees of the

[146] *See supra* Part I.B.
[147] Brown University Copyright Ownership and Use Policy No. 10.20.02 (effective date October 16, 2020), available here: https://policy.brown.edu/policy/copyright-ownership-and-use-policy.
[148] *Id*. at § 3.0.
[149] *See supra* Part I.B.
[150] Brown University Policy, *supra* note 147, at § 3.0.

> university, retain ownership of all intellectual property rights in their own scholarship and academic writings.[151]

This policy may be the one that comes the closest to explicitly acknowledging and affirming the teacher exception, and it at least implies that faculty are the initial entitlement holders.

But, a bit later in the policy, Brown states that all employee works are "works made for hire" and belong to the university, and then again references "academic tradition," stating that the university "*does not claim* ownership to scholarly works and traditional works of authorship (e.g., books, articles, essays) of Academic Appointees."[152] This is in some tension with the earlier statement in the policy, as it intimates that while Brown does not claim ownership now, perhaps it might choose to do so in the future. (This is not how copyright law works, of course. Either Brown is the "author" of faculty works because of the works made for hire doctrine, or the teacher exception is the rule and faculty are the "authors" of their creative output.[153])

Caltech's policy contains perhaps the most succinct statement of its approach, which encapsulates almost all of the issues discussed here:

> Copyrights to and royalties from textbooks, reference works, submissions to scientific journals, and other copyrightable materials (except for computer software, which is treated below) produced by Faculty members as part of their normal teaching and scholarly activities at the Institute that do not result from projects specifically funded in whole or in part by the Institute or by a sponsor of the Institute, shall belong to the author or authors and may be retained by them.[154]

This one sentence does a lot of work. It indicates that faculty members own the rights in their work as an initial matter – there is no mention of works made for hire or transfer of ownership. It also indicates that there is a carve-out for software and for works created with substantial support of the institution. In other words, this policy is consistent with the teacher exception, and it does not contain much of the hedging language that is present in some policies.

The University of Chicago also seems to acknowledge, if only implicitly, the teacher exception, indicating that it functions as an exception to the work made for hire doctrine:

> Whether or not any particular faculty work would constitute 'work made for hire' under the Copyright Act, the University has long sought to encourage creativity and innovation by recognizing that academic

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[151] *Id*.

[152] *Id*. (emphasis added).

[153] *See supra* Part I.B.

[154] Caltech Copyright and Software Policy, available here: https://innovation.caltech.edu/patents-licensing/policies/caltech-copyright-and-software-policy#:~:text=All%20rights%20to%20computer%20software,of%20the%20source%20of%20funds.

> appointees … enjoy ownership of copyrightable works they create at the University.[155]

Although this language is quite clear, "recognizing" faculty ownership of their work (rather than, for example, "ceding" or "not claiming" ownership), other aspects of the policy indicate that Chicago also is hedging, leaving open the possibility that it might claim ownership in some cases or at some time. Citing a report on "New Information Technologies and Intellectual Property at the University," the policy states some "basic principles." One is that the university owns the IP created by its faculty and another is that "the University should not assert is ownership but allows 'individual faculty [to] enjoy the revenue generated *until it is substantial*."[156] These "basic principles" flatly contradict its policy that faculty "enjoy ownership of copyrightable works they create at the University." And these "basic principles" seem to say the quiet part out loud: universities are content to let faculty own the rights in their work so long as it does not generate substantial income streams.[157]

Other policies in this group are variations on this theme, unequivocally stating that faculty own the rights in their work, but sometimes including inconsistent or contradictory statements, and in a number of instances indicating that the university could change its policy and decide to "claim" the rights for itself.[158]

2. University "does not claim" rights

In the second group, the policies allocate ownership to faculty but hedge a great deal more. Many of these policies imply that the institutions are the "authors" and that they could claim rights but are choosing not to do so.[159]

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[155] University of Chicago Copyright Policy for Faculty and Other Academic Appointees, available here: https://provost.uchicago.edu/handbook/clause/copyright-policy-faculty-and-other-academic-appointees.

[156] *Id*. at Introduction (emphasis added).

[157] *See* University of Chicago "New Information Technologies and Intellectual Properties" Report, available here: https://its.uchicago.edu/new-information-technologies-and-intellectual-property-university/. The report recommends that the "University formally implement the principle that the University owns the intellectual property the faculty create at the University or with substantial aid of its facilities or its financial support." *See id*., section on "Ownership of Intellectual Property." This report indicates that the point at which the university should assert its rights is when the money earned becomes substantial. "Outside a handful of faculty, royalty income from texts, whether print or electronic, does not cross the threshold where it would be appropriate for the University of assert ownership rights, even if it had them." *Id*.

[158] *See* Data on file with author.

[159] I have nonetheless coded the policies in this group as acknowledging the faculty "authorship" of their works because these policies do not mention the work made for hire doctrine and they do not purport to transfer rights from the institution to the creators, but they do indicate that faculty own the rights in their work. This is how the teacher exception operates – faculty are the "authors" and owners of their work.

Georgetown University's Intellectual Property Policy exemplifies the approach in this set of policies.[160] Georgetown references the academic tradition, stating that the policy:

> …is not intended to disturb the customary relationship between the University and the author or creator or works of traditional scholarship, including teaching materials and artistic works.[161]

But it goes on to say that it: "does not claim 'work made for hire' status under Title 17 of the U.S. Code for such works."[162] This differs from the policies in the first category in that rather than acknowledging or affirming that the rights belong as an initial matter to faculty, it implies – but does not state – that Georgetown owns the rights but is choosing not to claim them. (Of course, this is not how copyright law works. If Georgetown is the "author" of faculty works, the initial entitlement vests in Georgetown. If Georgetown wants to transfer the rights, it must do so in a signed agreement to that effect.[163])

The University of Notre Dame takes a similar approach, but portions of its policy seem to contradict each other. The Intellectual Property Policy states first and most broadly that the university "owns all intellectual property arising from University Work." Regarding copyright, the policy goes on to say that the university "owns all copyrightable materials … that are works made for hire … unless otherwise provided in this policy."[164] And in the next sentence, the policy says:

> Consistent with long-standing academic tradition, the University does not normally claim ownership of works such as textbooks, articles, papers, scholarly monographs, or artistic works. Creators therefore retain copyright in such works …"[165]

This is a bit contradictory, but the statement that the creators of the work *retain* the rights in the work is much more consistent with faculty as the initial entitlement holders, and the reference to "long-standing academic tradition"

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[160] Georgetown Intellectual Property Policy, section 8, available here: https://facultyhandbook.georgetown.edu/section4/b/.

[161] *Id*. at § 8.b.

[162] *Id*.

[163] *See supra* Part I.B. To be effective, a copyright assignment must be in a signed agreement. 17 U.S.C. § 201(b) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."); 17 U.S.C. § 204 (A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.").

[164] Notre Dame Intellectual Property Policy, available here: https://policy.nd.edu/assets/203061/intellectualpropertypolicy.pdf. Note the that the first part of this provision is just a statement of the legal rule.

[165] *Id*. at § 2.2.

appears to contemplate the teacher exception.[166] But the phrase "does not normally claim ownership" implies that Notre Dame might under some circumstances do so. (Again, this is not how copyright law works. Notre Dame is either the "author" for copyright purposes or it is not; its policy cannot change that.)

The policies that fall into this group often acknowledge academic tradition; they do not treat faculty works as works made for hire; and they do not purport to transfer rights to the faculty creators.[167] But rather than affirming or recognizing faculty ownership, as do the policies in the first group, they imply that the institution could claim the initial entitlement – and then they decline to do so. Because the policies in this group do not reference works made for hire but they do state that faculty own the rights in their work, they are most consistent with the notion that faculty are the "authors" and initial entitlement holders.[168] In other words, they are consistent with the teacher exception.

3. Works Made for Hire + Transfer of Rights

Three of the 41 policies reviewed here treat faculty works as works made for hire and then (purport to) transfer ownership to faculty. Notably, all of these schools are public institutions.

The University of Michigan is perhaps the most transparent of the institutions in this group. Its policy states at the outset that:

> …[b]ecause the University is committed to academic freedom, it strives – despite the legal default – to place copyright with the creators of scholarly, academic, and artistic works.[169]

To achieve this, the policy states that:

> Under U.S. copyright law, the University holds the copyright (as 'works made for hire') in copyrighted works authored by its employees who are acting within the scope of their employment. … In light of the default, the University, hereby, transfers any copyright it holds in scholarly works to the faculty who authored those works …[170]

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[166] The Notre Dame policy treats teaching materials differently than scholarly or artistic works, though it nonetheless deems "educational materials produced in the normal course of the University's educational mission" to be owned by their Creators rather than the university." It includes a set of exceptions to this, however, for materials created with the "substantial use of university facilities and resources."

[167] *See* Data on file with author.

[168] One colleague suggested that many institutions believe that all faculty works are works made for hire and that the institutions are simply waiving their rights. This may well be true, but it is not what the policies say. Only three of the policies state explicitly that the institution believes faculty works are works made for hire.

[169] "Who Holds Copyright at or in Affiliation with the University of Michigan," available here: https://spg.umich.edu/policy/601.28.

[170] *Id*. at §§ A & B (the policy defines "scholarly work" quite broadly, to include work authored "in connection with [] teaching, research, or scholarship….").

Assuming that this transfer is valid,[171] and assuming that faculty work is "within the scope of employment," this is a relatively straightforward application of the Copyright Act's works-made-for-hire provisions, resulting in faculty ownership – but not "authorship" of their works. In this instance, the University of Michigan remains the copyright author; the faculty become the copyright owners by transfer of rights.

The University of California system takes a similar approach, although its policy is not as clear as Michigan's. The UC policy "establishes a framework for copyright ownership of [original works of authorship] created at the University of California."[172] The policy assumes – but does not state – that the university owns the copyright in faculty works; it does not mention the work made for hire doctrine. Regarding "scholarly and aesthetic works," the policy states that:

> In order to fulfill its teaching, research, and public service mission, and in support of academic freedom, the University of California encourages the creation and dissemination of creative works. With this policy, the University hereby transfers any copyrights it may own in Scholarly & Aesthetic Works to the Academic Authors who prepared those works using Independent Academic Effort.[173]

The UC policy does not anywhere indicate that faculty own the rights in their work as an initial matter; instead, it appears to treat all faculty works as works made for hire.

While the policies in the first two groups are consistent with the academic tradition, that is not the case with the three policies in this group. These policies do not acknowledge or refer to the teacher exception or a "tradition" or "custom." Rather they assume that faculty works are works made for hire, and they achieve the end result of faculty ownership by explicitly transferring the rights.[174] Note, however, that this kind of transfer may not be effective. The Copyright Act provides that "in the case of a work made for hire, the employer … is considered the author …" and owns the rights in the work "*unless* the parties have expressly agreed otherwise in a written instrument signed by them …"[175] This is essentially a super-charged statute of frauds, requiring express agreement in a writing signed

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[171] This is a big if. Recall that § 201(b) provides that a work made for hire is owned by the hiring party "unless the parties have expressly agreed otherwise in a written instrument signing by them…" 17 U.S.C. § 201(b); *see supra* Part I.B.

[172] University of California – Copyright Ownership Policy, available here: https://copyright.universityofcalifornia.edu/resources/copyright-ownership.html.

[173] *Id*.

[174] *See also* William & Mary Intellectual Property Policy, § IV.A, XX ("The University owns all intellectual property resulting from University Work … Despite the foregoing presumption …, the University assigns title to such intellectual property in the form of copyrights in certain cases." These cases include works of "academic scholarship" and "teaching materials … where said teaching materials are developed without Significant Use of University Resources …").

[175] 17 U.S.C. § 201(b).

by both parties. It is not clear that the policies here satisfy these requirements.[176] Nevertheless, all the relevant actors proceed as if faculty own the rights in their work.[177]

* * *

The most significant result from this review of university copyright policies is that all of the stakeholders in the academic ecosystem act as if faculty members own the rights in the scholarly works and teaching materials they create. The details vary as to how the rights are deemed to arise, and in some instances it is not clear. Many of the policies plainly contemplate something like the teacher exception, in which copyright "authorship" and therefore initial ownership lies with the faculty member. In a handful of cases, the policies and practices indicate that the university is the initial "author" by virtue of the work made for hire doctrine and that the rights are transferred to faculty members.

This demonstrates that the academic tradition has survived notwithstanding scant doctrinal support: faculty are deemed to own the rights in their teaching and scholarly works, and all of the stakeholders – universities, faculties, publishers – in the academic ecosystem behave accordingly. But there is an instability lurking beneath this broad consensus. If faculty are not understood to be the "authors" of their work, if universities can simply claim copyright authorship and ownership at their discretion, the long-standing academic tradition, along with all its settled expectations, is illusory.

III. FACULTY AS COPYRIGHT "AUTHORS" AND OWNERS

Part I of this Article explained two things about the law: first, it is uncertain whether the teacher exception survived the enactment of the 1976 Copyright Act as a formal, doctrinal matter; but, second, it is quite clear that copyright authorship is not simply a default around which parties can negotiate. Part II of the paper demonstrated two things about the practice on the ground that are quite the opposite: first, everyone in the academic ecosystem acts in ways consistent with the teacher exception; and, second, university policies treat copyright authorship as a default manipulable at their discretion.

This is a troubling state of affairs. The disconnect between the law and the practice on the ground is substantial. If all university policies simply acknowledged the teacher exception, the fact that courts have not done so would perhaps not be problematic. But the fact that institutions assert their discretion to

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[176] Eric Priest, *Copyright and the Harvard Open Access Mandate*, 10 NW. J. TECH. & INTELL. PROP. 377, 409 (2012) ("Section 201(b) requires, however, that any such agreement between the employer and employee be in writing and signed by both parties--a requirement arguably not satisfied by the existence of a university policy absent a more traditional writing signed by both parties.").

[177] *See supra* Part II.A .

allocate copyright authorship – contrary to the statutory language – gives rise to substantial instability. In other words, if the initial copyright entitlement does not vest in faculty members, the copyright ownership they currently enjoy is illusory.

If universities decided to change their policies to claim control over faculty works, as they indicate they might, that would be a sea change in terms of the relationship between faculty and their institutions, and it would pose a host of practical problems. Would the institution, rather than faculty members, negotiate with publishers? What would happen when faculty make lateral moves? Would they be able to use their teaching materials at the new institution? Would faculty be treated differently within and across institutions? What would be the effect on academic freedom if the university is the rights holder? It is possible that none of this will come to pass, but most university copyright policies indicate that it could. And if it did, it would indeed "wreak havoc" on the higher education landscape.[178]

In the absence of congressional action, which is quite unlikely, the clearest resolution of this uncertainty would be a court holding affirming that the teacher exception is the rule and at the same time clarifying that faculty members are the copyright "authors" and initial entitlement holders of their scholarly and teaching works. The data presented here provide ample support for the conclusion that the teacher exception is a sufficiently established custom such that it should be incorporated into the law of copyright.

In the appropriate case, the question of the existence and persistence of the teacher exception could arise. To use an example from the data set: If a faculty member's work at the University of Chicago turned out to generate substantial income and the university sought to take control of the work,[179] a legal dispute would tee up the issue of copyright authorship and ownership. At the risk of vast oversimplification, the faculty member could argue that the teacher exception means that the faculty member is the "author" for copyright purposes and holds the initial entitlement. This would mean that unless ownership was transferred to the university, the faculty member could control the licensing or assignment of the work and collect all of the royalty streams. Presumably the university would argue that it retained some rights pursuant to its policy or that the work made for hire doctrine means that it is the copyright "author."[180]

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[178] *Hays*, 847 F.2d at 416-17 ("But considering the havoc that such a conclusion would wreak in the settled practices of academic institutions, the lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production, and the absence of any indication that Congress meant to abolish the teacher exception, we might, if forced to decide the issue, conclude that the exception had survived the enactment of the 1976 Copyright Act.").

[179] Recall that the University of Chicago's policy states that faculty own the rights in their work but also indicates that the university might under some circumstances seek to take control of the work. *See supra* Part II.C.

[180] When this issue has arisen in the past, universities have generally argued that the teacher exception is not the rule, and that, applying the works made for hire analysis, faculty members are employees and their scholarly and teaching materials are made in the scope

A court could – and should – hold that the teacher exception persists (or has re-emerged) and should be considered the rule because of the consistent and non-contested nature of the practice on the ground. As demonstrated above, the practice on the ground is very consistent in one way: universities and faculty members act as if professors are the owners of the copyright in faculty works. In many copyright policies, the references to academic "custom" or "tradition" are explicit; in others, it is not explicit, yet the practice is evident. It is also the baseline assumption of faculty members.[181] In other words, it has developed as a custom that should be deemed part of the law of copyright.[182]

As demonstrated in Part II, the practice regarding copyright "authorship" is less clear. However, faculty cannot consistently and reliably claim copyright ownership if they are not also deemed copyright "authors." That is, there is no way to acknowledge the academic tradition and adopt the teacher exception without the initial entitlement vesting in faculty.

With regard to the exception, the consistency of the practice and the near-unanimity of the relevant stakeholders weigh heavily in favor of incorporating the academic tradition custom into the law. And the factors that might give rise to objections do not exist in this context. The customary understanding of faculty rights in their work is longstanding, extending through the enactment of the 1976 Act. Indeed, it has been the subject of very little dispute, as reflected in the paucity of the case law.[183]

The role of custom in the law has been much discussed and long debated.[184] There are, to be sure, many reasons to be skeptical of the incorporation of custom

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of their employment. *See supra* Part II.C. Institutions also point to their policies, and Chicago's policy implies there is some wiggle room for the school to claim copyright in some circumstances.

[181] Lape, *supra* note 23, at 268 ("Since faculty members have traditionally assumed and generally still assume that they own the copyright in their works, the parties' expectations are protected by preserving the exception to the work-made-for-hire provisions of the Copyright Act.").

[182] The teacher exception came about in the first place through the application of the 1909 Copyright Act and the development of a common exception to the general works made for hire rule. And many aspects of the 1976 Copyright Act leave gaps that must be filled by courts. The works made for hire provision includes the terms "employee" and "scope of employment," but it did not define those terms. The Supreme Court borrowed from the common law to define those terms. CCNV v. Reid, 490 U.S. 730 (1989). *See* Jennifer Rothman, *Copyright, Custom, and Lessons from the Common Law*, in Balganesh, ed., Intellectual Property and the Common Law (Cambridge Univ. Press 2013), at 3 (hereafter, "Rothman, *Copyright, Custom*") ("The codification of fair use was intended to incorporate the common law, but still leave open room for the continued development of the doctrine by the courts.").

[183] *See supra* Part I.C.

[184] Going back to Blackstone, at least, commentators have debated the role of custom in common law development. *See generally* Jennifer Rothman, *The Questionable Use of Custom in Intellectual Property,* 93 Va. L. Rev. 1899 (2007) (hereafter, Rothman, *Questionable Use*); Rothman, *Copyright, Custom*, *supra* note 182, at 1-2.

into the law and genuine concerns about doing so.[185] Professor Jennifer Rothman has written extensively about the role of custom in intellectual property law, and with respect to copyright law in particular.[186] She describes and critiques many of the justifications for the use of custom.[187] Focusing on fair use doctrine, Rothman has significant concerns with the deference given to custom by courts.[188] But, says Rothman, adapting a formulation from Blackstone, there are times when it is appropriate to incorporate custom into law: when the custom is certain; when there is consent to the custom; when there are few conflicts concerning the custom; and when the custom is reasonable.[189] Each of these criteria is satisfied with respect to the teacher exception, and I discuss them each in turn below.

The custom is certain. If the commentators are correct, the teacher exception was both the rule and the custom prior to 1978.[190] After 1978, it was unclear whether the rule survived, as a formal matter, but based on the study described above, it persists as a custom or, as referenced in many university copyright policies, a part of the "academic tradition."[191] That is, the teacher exception *was* the rule, perhaps by incorporating custom. To the extent that this is so, it is not a great leap to say that the rule persists based on current practice.[192]

This review of university copyright policies indicates with no exceptions that universities and faculty alike proceed as if faculty own the rights in their scholarly and teaching materials. The vast majority of the policies indicate – either implicitly or explicitly – that the ownership is by virtue of academic custom or tradition. In other words, they are consistent in treating faculty as the holders of the initial entitlement, as the "authors" of their academic works. Although, as

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[185] Rothman, *Questionable Use*, *supra* note 184, at Part III.
[186] *Id*.
[187] *Id*.
[188] *Id*.
[189] Rothman, *Copyright, Custom*, *supra* note 182, at 9-10 ("Despite this critique of the wholesale incorporation of custom, custom continues to provide some pertinent and meaningful information, including for evaluations of fair use. But before considering the value of any particular custom, we need a system to distinguish the practices and norms worthy of consideration from those that should be dismissed. The common law provides some guidance on how to make such assessments.").
[190] *See supra* Part I.A.
[191] *See supra* Part II. The study here does not take a historical approach, and it is possible that university policies have changed over time. Some of the commentary from ten to twenty years ago indicates that the policies may have been more disparate at some points. *See generally* Lape, *supra* note 23; Packard, *supra* note 23. If anything, however, it appears that the policies have converged, at least regarding faculty ownership of traditional scholarly and teaching works.
[192] Rothman, *Copyright, Custom, supra* note 182, at 14 ("Many of these "customary uses" are simply uses that have been established at common law and now exist because they are uncontroversial legal precedents. Over time, these precedents form categories of uses that are likely (and predictably) fair—but this is a very different understanding than that they are fair because they are customary. In other words, one way of thinking about customary uses is simply as precedents.")

described above, many of the policies are less than clear in their formulations, the bottom line, the takeaway, is that the practice on the ground is consistent and clear.[193] At a minimum, the custom of faculty ownership of their work is certain.

In addition, the tradition or custom that faculty own the rights in their work – and in the teacher exception more specifically – is a narrow and binary rule. Unlike the operation of custom in the context of fair use, the custom of faculty ownership and control of their creative works is straightforward, easy to understand, and easy to implement.[194] It does not require a determination of whether someone is an "employee" or whether a work has been created "within the scope" of employment. That is, it is certain in terms of its operation (it is easy to apply the rule), in addition to being certain in terms of the effect of the rule. Indeed, it is how universities and faculties operate now, and any alternative would be a sea change in the relationships between universities, faculties, and publishers. In Judge Posner's words, it would "wreak havoc" on the academic world.[195] It would upend the settled expectations of all involved.[196]

There is consent to the custom. It makes a great deal of sense that custom be incorporated into the law only if there is consent to that custom. For example, a

[193] An argument could be made that the custom (faculty ownership of their work) is at least in some tension with the statutory language, and that this might create a higher bar for the incorporation of custom into the law. *See* Rothman, *Questionable Use*, *supra* note 184, at 1943 ("As discussed, many universities expressly allow faculty members to retain copyrights over their lectures, course materials, and scholarly works. Even though most of these university policies do not meet the statutory requirements set forth in Section 201, several courts have relied on the customary "faculty exception" to vest copyright ownership in faculty rather than universities. This conclusion treats the longstanding nature of the exception as an indication of its reasonableness. This approach is particularly troubling because these courts are directly contravening explicit statutory language on the basis of custom.") As discussed above, there is some substantial dispute about how the statute and the caselaw interpreting the statute should be applied in the context of faculty works. *See supra* Part I.C. The troubling aspect of the courts' approach, in my view, is the deference to university policies as dispositive of the question of authorship and ownership. Although ownership of copyright can be transferred, "authorship" is not similarly manipulable. *See supra* Part I.B. That is, the policies here are in conflict with the Copyright Act on this point. It is much less clear that the custom of faculty control over their work is inconsistent with the statute.

[194] *See* Rothman, *Copyright*, *Custom*, *supra* note 182, at 12. Fair use is an inherently, perhaps intentionally, fuzzy doctrine, requiring extensive, fact-intensive investigation. The four fair use factors are meant to be analyzed in a flexible, context-specific way. This means that trying to determine what the custom is and whether it should be adopted as the rule in any given case is complex and likely to be contested.

[195] *Hays*, 847 F.2d at 416.

[196] Lape, *supra* note 23, at 268 ("Since faculty members have traditionally assumed and generally still assume that they own the copyright in their works, the parties' expectations are protected by preserving the exception to the work-made-for-hire provisions of the Copyright Act.").

"custom" in which parties with asymmetrical bargaining power regularly impose terms on weaker parties should not be incorporated into the law.[197]

With respect to the teacher exception, faculty are not likely to raise concerns about consent to the custom. It is not presuming too much, I hope, to conclude that faculty would prefer to own the rights in their work. While many faculty may not know the rules and do not know what their university policy says, they generally act as if they are the copyright "authors" and owners of their work.[198]

Presumably, it is universities who might object to the teacher exception being the legal rule. But given that universities have drafted the policies that form a significant part of the basis for the persistence of the custom, they can hardly be heard to complain about consent. Moreover, the academic ecosystem is a relatively closed community. Put another way, there are a limited number of actors, and among those stakeholders, there is widespread understanding and consistent behavior.[199]

There are few conflicts concerning the custom. As described above, there is scant caselaw concerning the teacher exception.[200] This is one measure of the extent of the conflict regarding the custom. It does appear that there have been relatively few disputes about faculty ownership of their work. I have a few suppositions about why this may be the case.[201]

It may be that much faculty creative work is not particularly financially remunerative.[202] There are exceptions to this, of course, but in general, even with the growth of online access to materials and the possibility of asynchronous teaching, there has not (yet) been a demonstrable shift in the commercialization of copyrighted work by faculty members. Over the years, commentators have expressed significant concern about the potential for this to change,[203] but outside of patent law, the dramatic technological developments of the last 25 years have

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[197] Richard A. Epstein, *Some Reflections on Custom in the IP Universe*, 93 VA. L.REV. IN BRIEF 207, 208 (2007) ("Any custom worthy of the name has to result from repeated voluntary interactions among parties from the relevant groups; otherwise, it offers no evidence that a purported custom maximizes the joint welfare of the parties whom it governs. Without doubt, no custom should bind strangers to its formation who lose systematically from its application.").

[198] *See supra* Part II & n.137.

[199] Rothman, *Questionable Use*, *supra* note 187, at 1950 ("Third, to the extent optimal customs have been identified in other areas of law, they have generally arisen in close-knit communities in which community members have ongoing relationships and in which the same types of transactions are repeatedly conducted. While these conditions are sometimes present in IP transactions, they are not nearly as common as in many other industries").

[200] *See supra* Part I.C.

[201] These are suppositions, based on experience, anecdote, and common sense. I'm not sure how one would go about answering this question in an empirical way.

[202] Note the contrast with scientific or technical work by faculty, which is subject to a different set of rules and which universities have acted to control and monetize. *See* Campbell, *supra* note 59, at 80-81 (discussing university patent policies).

[203] *See supra* Part I.C.

not brought about such significant changes in the financial arrangement surrounding faculty creative work.

It may also be the case that many of the stakeholders do not want to rock the boat.[204] If faculty members are currently able to own and exercise the rights in their work, they may not want to push for clarification of the rule, or they may assume they have nothing to worry about.[205] Also, other than people who teach copyright law, most faculty members across campus do not parse the distinctions between copyright ownership and copyright authorship, or between licensing and assigning rights.

There are some conflicts, of course, and I am aware of situations in which there is conflict over the scope and goals of university copyright policies. Overall, however, whether from hesitation or apathy or lack of understanding, there are vanishingly few apparent conflicts about ownership of faculty copyrightable works, and little conflict over copyright "authorship" or the teacher exception.[206]

The custom is reasonable. In many ways, a custom that is certain, the subject of few conflicts, and is consented to would seem by definition to be reasonable. But to distinguish this factor from the others is to make a normative argument in defense of the custom as rule.

There are (at least) two reasons that the teacher exception is a good rule and thus should be considered reasonable in considering it as a custom. The first is that faculty creative work and the university/faculty relationship differ from the traditional employment relationship and the work that arises in that context. This is well-trod territory, and I do not make this argument from scratch.[207] It is indeed the source of the teacher exception in the first place. As Judge Posner stated in the *Hays* opinion, the "reasons for a presumption against finding academic writings to be work made for hire are as forceful today as they ever were."[208] As Professor Dreyfuss noted, deeming the employer the "author" is sensible in most instances, but she argued that the university context is different: "[i]t is hard to think of a setting in which employer authorship is more of a legal fiction."[209]

Similarly, Professor Rooksby sees the academic context as distinct, "…envision[ing] higher education as a special commons, deserving of

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[204] Indeed, in presenting this idea as a work in progress, some colleagues asked whether it might be best to "leave well enough alone."

[205] The court in *Molinelli-Freytes* appears to assume that university policies consistent with the academic tradition, stating that faculty own the rights in their work, is sufficient. *See Molinelli-Freytes*, 792 F.Supp.2d at 172 ("Most academic institutions today have already responded to the uncertainty regarding the "teacher exception" by enacting policies, returning ownership of works traditionally copyrighted by professors to the professors themselves.").

[206] *See supra* Part I.C.

[207] *See supra* Part I.A (discussing the explanations for the academic tradition and the justifications for the exception to the work made for hire rule).

[208] *Hays v. Sony*, 87 F.2d at 416.

[209] Dreyfuss, *supra* note 4, at 603.

exceptional treatment as a matter of law and policy, to benefit society."[210] And for reasons similar to those set forth here, Professor Lape, in her review of university policies concluded that because "faculty members have traditionally assumed and still assume that they own the copyright in their works, the parties' expectations are protected by preserving the exception to the work-made-for-hire provisions of the Copyright Act."[211]

Second, it is crucial to know where the initial entitlement lies, and it is sensible to place it with faculty rather than with their employers. In her 1987 article, Professor Dreyfuss emphasized the importance of determining where the initial entitlement resides, arguing that "[t]he operation of the work for hire doctrine demonstrates that severing the pecuniary and nonpecuniary interests" – that is, giving universities the initial copyright entitlement – "deprives the public of the full enjoyment of the creator's talents."[212] Professor Dreyfuss was prescient here in identifying the concerns driving universities to assert ownership or at least to hedge their bets in that regard, and she lands firmly on the side of faculty "authorship" of their work, arguing that the economics of the academic environment mean that the parties are not equally situated to negotiate rights.[213]

Indeed, imagining the counterexample only serves to emphasize that the teacher exception is a widely-accepted norm. If a court were to hold that faculty works were works made for hire, giving universities the initial entitlement, myriad aspects of university/faculty, faculty/publisher, and publisher/university relationships would have to change. A faculty member seeking to publish a book would have to negotiate with the university for permission to publish the work, or for an assignment or license so they could negotiate themselves. A journal seeking to publish an article would have to determine whether the university owned and controlled the copyright or if, on the other hand, the university had licensed or assigned the rights to the faculty member. If a university wished to continue the academic tradition of faculty ownership of their work, it would have to ensure that it had properly licensed or assigned the rights in every work created by every faculty member. This would be no small task. Recall that ownership of a work made for hire can be transferred only by a written agreement signed by both parties.[214] Blanket assignments of rights in this circumstance are quite likely not

[210] Rooksby, *Fresh* Look, *supra* note 47, at 800; Dreyfuss, *supra* note 4, at 605.
[211] Lape, *supra* note 23, at 268.
[212] Dreyfuss, *supra* note 4, at 626. Dreyfuss describes the issue in cost/benefit terms. The potential profits from university-held copyright are unlikely to "ever outweigh the costs that a new regime would impose on the social fabric of the university. Even with regard to texts and software, it is unclear whether claiming copyright is worthwhile." *Id*. at 642.
[213] *Id*. at 630 ("If the copyright captures the benefits that the work creates, the employee can use his expectations to bargain for transfer of the right from the employer. But if the long-term value of the work is greater than the market's current evaluation (as with controversial material), or if the employee cannot fully internalize the market evaluation (as, for example, during a fallow period), then the employee will lack the ability to buy the right to use the copyright system to maintain control over his works.").
[214] *See supra* Part I.B.

effective.[215] Universities could perhaps draft blanket licenses to faculties, but maintaining the academic tradition would require a change to virtually every copyright policy, and a very regular practice of entering into, maintaining, and updating agreements assigning rights from universities to the faculty creators.

Engaging in this thought experiment demonstrates that the teacher exception has become a deeply-entrenched norm, creating a wide array of settled expectations on the part of all of the actors in the academic ecosystem. And it demonstrates that it is sensible – and preferable – to place the initial entitlement with faculty members rather than their employers.

CONCLUSION

While congressional action is highly unlikely, the prospect of resolution of this issue through the courts is also fairly remote, relying as it does on the appropriate dispute to arise and the appetite of the parties to litigate the question. Because neither the courts nor Congress have acted in the almost fifty years since the passage of the 1976 Copyright Act, universities have stepped into the void, creating copyright policies, and they are likely to continue to do so. Change is thus most likely through this mechanism.

Higher education institutions should amend their policies to explicitly acknowledge the teacher exception, to clarify that the copyright authorship – with its corresponding initial entitlement – cannot be determined by university policy, and to remove language implying or stating that that the institution has discretion in this regard. All of this is consistent with the current practice on the ground – that is, not much would change for universities, for faculty, or for publishers – but the policies as revised would provide a great deal more certainty; they would be consistent with the Copyright Act; and they would harmonize with the mission and values of the academic community.

A few of the policies in the dataset can be used to develop a template for an updated approach. Brown University's policy[216] provides a good starting point: "Under copyright laws, works prepared by an employee within the scope of the employee's employment is considered a Work Made for Hire and the work is owned by the employer … unless an exception applies."[217] It could be revised to start the same way but conclude differently, as follows:

> Under U.S. copyright law, works prepared by an employee within the scope of the employee's employment is considered a Work Made for Hire and the work is owned by the employer, but the "teacher exception" provides that in the case of works created by faculty members, those

[215] Priest, *supra* note 176, at 409.

[216] Brown University Copyright Ownership and Use Policy No. 10.20.02 (effective date October 16, 2020), available here: https://policy.brown.edu/policy/copyright-ownership-and-use-policy.

[217] *Id*., at § 3.0.

works are not works made for hire and the faculty members are the "authors" for copyright purposes and own the rights in the work.

This is concise and states clearly where rights initially vest. There could be variations, of course, but the provisions regarding ownership should be stated in an affirmative sense: faculty are the "authors" and owners; faculty retain rights; the university "acknowledges" or "affirms" faculty authorship and ownership.[218] In addition to including straightforward language like this, universities should delete the hedging language that appears to give them discretion with regard to copyright authorship and ownership. The policies should not say that the school "waives"[219] or "cedes"[220] its rights or "does not normally claim" rights[221] or "permits"[222] faculty to own rights.

In many ways, little would change if a court held that the teacher exception was the rule and if universities changed their policies as I suggest here. One might argue that this is a solution in search of a problem. On the contrary, however, it demonstrates that the teacher exception is so widespread and so well-accepted that it has become the rule, one on which all of the stakeholders rely and around which they have bargained for decades.[223] The counterfactual makes the point: if a court held that the teacher exception was not the rule and that, in general, faculty works are works made for hire, nearly every university copyright policy would have to change significantly; universities would have to assign rights to faculty if they wanted to continue the tradition of faculty ownership; publishers would have to determine in each case whether they needed to negotiate with universities or individual faculty members for the publication of articles and books; faculty would have to negotiate with universities when they made lateral moves. It is not that all of this is impossible; it is just not how anyone behaves. The law should conform to the practice on the ground.

Ultimately, convincing universities to modify their copyright policies will require faculty to understand the implications of copyright authorship and ownership, and to advocate for themselves, both individually and collectively. This project is a call to action for both faculties and universities, but it need not be an adversarial process. The interests of the stakeholders in the academic community are, for the most part, aligned. Adapting university policies to reflect copyright law and academic custom is consistent with the mission of higher

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[218] *See supra* Part II.C.

[219] Emory University Intellectual Property Policy, available here: https://emory.ellucid.com/printDocument/index/17549/19238 .

[220] University of Virginia, Ownership of Rights in Copyrightable Material, available here: available here: https://uvapolicy.virginia.edu/policy/RES-001.

[221] Notre Dame Intellectual Property Policy, available here: https://policy.nd.edu/assets/424679/ip_final_2021_v3.pdfl

[222] Purdue, Intellectual Property, available here: https://www.purdue.edu/policies/academic-research-affairs/ia1.html.

[223] *See generally* Part I.

education and will advance the goals and values of the broader academic community.