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## A Fresh Look at Copyright on Campus

Jacob H. Rooksby

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## A Fresh Look at Copyright on Campus

Jacob H. Rooksby\*

### ABSTRACT

*The role of copyright on the modern college and university campus is overdue for fresh examination. Copyright ownership issues and related contests over rights risk impeding higher education's ability to serve as a cultural and knowledge commons, a specially constructed space where human and artifactual resources interact in ways that benefit society at large. At present, copyright concerns raised by trends involving student entrepreneurship, the digital humanities, and the digitization of special collections material housed in campus libraries threaten higher education's potential to benefit society to the fullest.*

*This Article reviews developments in these three areas of higher education through the lens of copyright, examining, in particular, the copyright ownership – as opposed to use – questions they present. In these emerging contexts, institutional claims to copyright often work to the detriment of students, faculty, and the public. Also harmful are campus copyright policies that are ambiguously worded or inappropriately purport to vest ownership interests in colleges and universities.*

*Resolving these copyright concerns developing in higher education will require amending copyright law and corresponding campus copyright policies. This Article proposes three solutions, each of which would better align applicable laws with our moral expectations for higher education: (1) creating a legal presumption that students own all of the works that they create while students, (2) creating a legal presumption that faculty own nearly all of the works that they create as faculty, and (3) creating two legal prohibitions: one that prevents campus libraries from accepting gifts in which the donor claims copyright or seeks to impose analogous access and use restrictions, and another that prevents institutions from claiming copyright in the donated materials or any derivative works created with them.*

*Together, these proposals help further a vision of higher education as a cultural and knowledge commons – a sector that exists in the public sphere to advance social welfare and responsible economic development to the greatest extent possible.*

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## I. INTRODUCTION

Copyright is one of the most dynamic areas of the law, yet scholarly understanding of its role in higher education is not keeping pace with the times. This Article argues that fresh focus should be turned to copyright ownership on campus, to widen space for the flourishing of a cultural and knowledge commons in higher education.

Law professors Brett Frischmann, Michael Madison, and Katherine Strandburg conceptualize knowledge commons as “shorthand for the institutionalized community governance of the sharing and, in some cases, creation, of information, science, knowledge, data, and other types of intellectual and cultural resources.”<sup>1</sup> Colleges and universities enjoy a unique capacity to serve as vibrant cultural and knowledge commons due to the creative capacity of their human resources (students and faculty), abundant artifactual resources (articles, books, works of art, and other objects of intellectual value, often housed in campus libraries), and historical norms of openness, sharing, and the disinterested pursuit of knowledge.<sup>2</sup> Together, these qualities create a special environment in which cultural and knowledge outputs become (1) close to non-excludable, meaning generally available to all of society, or impossible to prevent others from using, and (2) non-rivalrous, meaning others may continually share and enjoy them at low to no marginal cost. These environmental attributes form the core of higher education as a public good, serving as a sector that brings social and economic benefits to society. They also help explain why higher education enjoys enduring placement in the public sphere.<sup>3</sup>

While the aforementioned scholars’ work devotes particular attention to the governance of knowledge commons, this Article deals more directly with how we might alter the legal and policy landscapes in higher education – specifically as they relate to copyright ownership – to create a more robust cultural and knowledge commons in which faculty, students, and society can share. The need for this alteration becomes apparent in reviewing three important trends occurring in higher education: (1) student entrepreneurship; (2)

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1. Brett M. Frischmann, Michael J. Madison & Katherine J. Strandburg, *Governing Knowledge Commons*, in GOVERNING KNOWLEDGE COMMONS 1, 3 (Brett M. Frischmann, Michael J. Madison & Katherine J. Strandburg eds., 2014).

2. *Id.* at 11. See also CORYNNE MCSHERRY, WHO OWNS ACADEMIC WORK? BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY 6 (2001) (“Put simply, intellectual property law polices the knowledge that can be owned, the realm of artifact, while the university polices the knowledge that cannot be owned, the realm of fact and universal truth.”).

3. See Brian Pusser, *Power and Authority in the Creation of a Public Sphere Through Higher Education*, in UNIVERSITIES AND THE PUBLIC SPHERE: KNOWLEDGE CREATION AND STATE BUILDING IN THE ERA OF GLOBALIZATION 27, 29 (Brian Pusser, Ken Kempner, Simon Marginson & Imanol Ordorika eds., 2012) (describing the “basic normative and functionalist assumption that [higher education] institutions exist to generate public and private goods in the public interest”).

faculty, staff, and student involvement in the digital humanities; and (3) digitization efforts and trends in library special collections.<sup>4</sup> Despite the relatively developed scholarly literature concerning questions of copyright ownership and use in higher education, the existing body of scholarly work has not kept pace with these developments.<sup>5</sup>

These deficiencies in the literature mean that the time is ripe for a fresh look at copyright on campus. This Article begins in Part II by describing in detail the copyright ownership concerns that arise in the contexts of student entrepreneurship, digital humanities projects, and digitization efforts involving library special collections. Part III proposes changes to copyright law and policy in higher education, with a view toward enhancing the sector's potential to serve as a robust cultural and knowledge commons. The proposals are based on two moral premises: (1) higher education exists in the public sphere to further the public interest, and (2) colleges and universities best serve the public by protecting the freedom of intellectual inputs (talented individuals and valuable tangible resources) that lead to innovation and new forms of knowledge. For higher education to truly flourish as a cultural and knowledge commons, individual institutions must temper their impulses to restrict or claim the intellectual fruits of their faculty, students, donors, and other constituents – impulses all too often encouraged by existing copyright laws and policies.

Higher education can fulfill its promise as a constructed cultural and knowledge commons, but doing so will require applying different copyright rules on campus. This Article therefore advocates for higher education exceptionalism in the copyright space – not simply as a matter of permitting students and scholars ample room to make fair use of copyrighted works (which the law should allow), but also removing and prohibiting certain copyright ownership barriers that threaten the long-term existence and vibrancy of higher education as a cultural and knowledge commons. The public should expect more of colleges and universities regarding copyright, but “more” does not entail an increase in ownership claims by institutions – in fact, just the opposite. This Article outlines how and why institutions' ownership claims to creative works generated by students and faculty should be circumscribed. It also proposes limiting institutions' abilities to accept, as gifts to their special collections, tangible works subject to copyright claims by

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4. To be sure, these trends also implicate patents. Higher education administrators are increasingly looking to faculty and student work as a breeding ground for patent-eligible inventions with commercialization potential. While certain developments – for example, in the realm of software – may give rise to both copyright and patent protections, the majority of faculty and student work more directly concerns copyright law and policy issues, which are the focus of this Article. The intersections and parallels between patent and copyright matters in higher education are not discussed in this Article.

5. See generally Jacob H. Rooksby, *Copyright in Higher Education: A Review of Modern Scholarship*, 54 DUQ. L. REV. 197 (2016) (reviewing history of scholarship concerning copyright in higher education).

donors, as well as preventing donee institutions from claiming copyright in donations or any derivative works they create using donations. The net effect of these proposals is to envision the construction of a more sustainable, robust cultural and knowledge commons in higher education and broadly outline the changes to copyright law and campus policies necessary to enable that transformation.

## II. COPYRIGHT AND CREATIVITY ON THE MODERN CAMPUS: TRENDS AND CONCERNS

Scholarly attention to copyright on campus has largely focused on two issues: (1) the copyright ownership question (i.e., who owns copyright in scholarly work, as between faculty and institutions), and (2) the copyright use question (i.e., the kinds of uses of copyrighted material in higher education that are fair uses, the kinds of uses that should be fair uses, and why fair use is important in higher education).<sup>6</sup>

Articles on copyright ownership evidence a slow trend toward a begrudging acceptance that work-made-for-hire principles apply in higher education – that is, institutions technically own copyright, automatically as a matter of law, to scholarship produced by faculty while employed by the institution.<sup>7</sup> This literature has also come to recognize the existence of many institutional policies that seem to suggest just the opposite: whether by custom, tradition, or recognition of scholarly norms, institutions cede ownership in traditional scholarly works and course materials to the faculty who create them.<sup>8</sup> While these policies may be rhetorically satisfying, there is little doubt that they do not amount to successful transfers of copyright ownership back to the faculty who create the works – only signed writings can accomplish such transfers.<sup>9</sup> Some policies contain carve-outs for software, distance learning materials, and other works that require “substantial” or “significant” campus resources for their creation, whether by faculty or even students.<sup>10</sup> Unfortunately, despite a few early empirical studies, little is known about the

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6. *See id.* at 199–215.

7. *See, e.g.,* Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 599 (1987) (recognizing that “scholarly works should now belong to universities rather than to faculty members”); *see also* Alissa Centivany, *Paper Tigers: Rethinking the Relationship Between Copyright and Scholarly Publishing*, 17 MICH. TELECOMM. & TECH L. REV. 385, 395–99 (2011).

8. *See* Rooksby, *supra* note 5, at 199–200.

9. *See* Kenneth D. Crews, *Instructional Materials and “Works Made for Hire” at Universities: Policies and Strategic Management of Copyright Ownership*, in THE CENTER FOR INTELLECTUAL PROPERTY HANDBOOK 15, 20 (Kimberly M. Bonner et al. eds., 2006); *see also* Copyright Act of 1976, 17 U.S.C. § 204(a) (2012) (“A transfer of copyright ownership . . . 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.”).

10. *See* Rooksby, *supra* note 5, at 202, 205.

array of institutional policies regarding copyright and the application of those policies to some members of the academic community (e.g., students) and some scholarship-related initiatives (e.g., the open-access movement).<sup>11</sup> Precise statements about what these policies say and how they purport to operate are therefore difficult to make on a national level. What we do know is that key provisions concerning copyright and lines of ownership vary by institutional policy and factual context.<sup>12</sup>

Meanwhile, the articles on the copyright use question contain more normative proposals than the articles concerning the copyright ownership question.<sup>13</sup> Setting aside the feasibility of these proposals, each reflects the heightened degree of importance that commentators attach to the issue of fair use in higher education. All commentators seem to agree that fair use should take its fullest form in higher education, but defining the metes and bounds of fair use in that context continues to evade easy definition, as it does in other contexts.<sup>14</sup>

The existing body of work largely overlooks the arguably most important trends involving creativity in higher education today: (1) student entrepreneurship, including activities enabled by new campus resources like 3D printers; (2) faculty, staff, and student involvement in the field of digital humanities; and (3) digitization efforts and trends in library special collections. These developments hold great promise for advancing activities in higher education that will help the sector serve as a cultural and knowledge commons of lasting importance, if only copyright law does not stand in the way.

This Part addresses these developments and the copyright ownership issues they present. Each subsection below begins with a brief hypothetical narrative that helps illustrate the issues arising in these contexts and how

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

12. See Anthony J. Luppino, *Fixing a Hole: Eliminating Ownership Uncertainties to Facilitate University-Generated Innovation*, 78 UMKC L. REV. 367, 378–79 (2009).

13. See, e.g., Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149, 224–26 (1998) (proposing amendments to the Copyright Act to exempt educational photocopying, establish a compulsory license for scholarly uses of copyrighted materials, and disavow or replace the Classroom Guidelines); David A. Simon, *Teaching Without Infringement: A New Model for Educational Fair Use*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 453, 527 (2010) (proposing creation of a federal governmental agency to administer fair use in higher education); David R. Hansen, *A State Law Approach to Preserving Fair Use in Academic Libraries*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 29 (2011) (proposing that states enact laws applicable to public colleges and universities that would render void any license terms imposed by content providers that purport to eliminate or modify the scope of fair use available to licensed users).

14. See, e.g., Peter Jaszi, *Fair Use and Education: The Way Forward*, 25 L. & LITERATURE 33, 45 (2013) (arguing that it is incumbent on educators at all levels “to recount how instructional uses of copyrighted materials add value to, repurpose, and indeed *transform* such materials”).

copyright ownership questions in higher education encumber the sector's capacity to fully serve the public as a commons site of culture and knowledge.

### A. Student Entrepreneurship

#### *Thinking on the Job: Abby in the Library*

*Abby is a law student who works at her campus's law library. She is paid slightly more than minimum wage to shelve books and help answer questions at the circulation desk. She often passes the time by daydreaming. One thing she has considered lately is the outmoded way her campus's electronic catalogue software works. Its functionality and design have serious limitations.*

*Abby recently spent some time familiarizing herself with the back-end aspects of the catalogue software by talking with the library's IT director. He viewed the exchanges with her as educational in nature. Through these discussions, Abby began to see how the software could be improved and adapted for better use as an app on mobile devices. She looked around online and realized that similar problems existed at other institutions.*

*Abby is business savvy, having started and successfully sold her first company while in college. She is also a coder. She soon created a prototype of a new software app that libraries at campuses like hers could use to enhance user experiences in the mobile age. May Abby commercialize the software app without fear of any copyright claim by her university?<sup>15</sup>*

While imaginary, Abby's story is neither unthinkable nor unusual.<sup>16</sup> Students on the modern campus are increasingly entrepreneurial.<sup>17</sup> The rea-

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15. What motivates this Section and the related proposal in Part III.A are situations such as the opening vignette involving Abby: general instances involving student labor that may lead to institutional exploitation. The potential for exploitation of students is much less when institutional employers are clear and upfront with students about institutional expectations for their work – for example, if Abby's boss at the law library had employed her with the explicit direction that she create a new software app for the law library. Unfortunately, institutional expectations about work duties are not always clear or defined in higher education – contracts with students often state nothing more than working hours, pay rates, and the name of one's supervisor. Loose contractual relationships with students open the door for institutions to take the position that works of value created by students were created within the course and scope of employment, once their value becomes known to the institutions.

16. See, e.g., TYANNA K. HERRINGTON, INTELLECTUAL PROPERTY ON CAMPUS: STUDENTS' RIGHTS AND RESPONSIBILITIES 41 (2010) ("Difficulty arises with student employment because the lines between students' roles as students, employees, and individual workers become blurred in academic settings, where students are sometimes 'customers' who pay universities for learning opportunities and sometimes employees who provide services. And when learning and working processes conflate,



sons are diverse: low barriers to market entry, cheap Internet access, wide availability of data storage and publishing software, awareness of high-profile student-turned-entrepreneur success stories, and a growing societal focus on entrepreneurship as an important skill worth cultivating.<sup>18</sup>

Many colleges and universities have responded to these developments by actively encouraging student entrepreneurship. The encouragement takes various forms: entrepreneurship classes and requirements within many schools and majors, business plan and business pitch competitions that provide funding to winners, business incubators for student businesses, “hackathons” (marathon sessions where students try to develop ideas and prototypes of new innovations), and generally a heightened focus on the value and potential of student-generated intellectual property.<sup>19</sup> The fruits of nearly all of these activities – to the extent they are original and fixed in a tangible medium of expression – are subject to copyright protection.

But anecdotal evidence suggests that university intellectual property policies have not always kept pace with these developments. Empirical evidence shows that some university administrators are looking at student entrepreneurship and sensing opportunity for their institution.<sup>20</sup> While the content of university intellectual property policies varies widely, some claim copyright ownership of works that students create with the “substantial use of

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it can be difficult to determine which aspect of the students’ work was created as part of the learning process and which was created to fulfill job requirements.”).

17. Bryce C. Pilz, *Student Intellectual Property Issues on the Entrepreneurial Campus*, 2 MICH. J. PRIVATE EQUITY & VENTURE CAP. L. 1, 5 (2012); see also Natasha Singer, *Universities Race to Nurture Start-Up Founders of the Future*, N.Y. TIMES (Dec. 28, 2015), <http://www.nytimes.com/2015/12/29/technology/universities-race-to-nurture-start-up-founders-of-the-future.html> (describing entrepreneurship focus and trends in higher education).

18. Pilz, *supra* note 17, at 5–8.

19. See, e.g., Luppino, *supra* note 12, at 369; see also Jeffrey R. Young, *The Story of a Digital Teddy Bear Shows How College Learning Is Changing*, CHRON. HIGHER EDUC. (Jan. 12, 2016), <http://chronicle.com/article/The-Story-of-a-Digital-Teddy/234881?> (describing student entrepreneurship trends in higher education); Scott J. Grunewald, *Old Dominion University Student Looking for 3D Printing Startup Success*, 3DPRINT.COM (Jan. 4, 2016), <http://3dprint.com/113523/old-dominion-u-startup/> (noting that “[m]any schools have actively shifted much of their curriculum to support these budding entrepreneurs[, and] . . . even prestigious research universities are putting more effort into helping their students careers take off right out of the gate”).

20. See Nathalie Duval-Couetil, Jessamine Pilcher, Elizabeth Hart-Wells, Phil Weilerstein & Chad Gotch, *Undergraduate Involvement in Intellectual Property Protection at Universities: Views from Technology Transfer Professionals*, 30 J. ENGINEERING EDUC. 60, 68 (2014) (in a survey of fifty directors of technology transfer offices at universities having a strong emphasis in STEM disciplines and/or entrepreneurship, reporting that 26% of respondents disagreed or strongly disagreed with the statement: “Undergraduate students are primarily generating IP that is not within the scope of the university IP policy,” and that 78% of respondents reported being “somewhat involved” or “actively involved” in student intellectual property).

university resources,” although that phrase is often left ambiguously defined or undefined in the policy.<sup>21</sup> It is not uncommon for these policies to dictate that the institution owns any copyrightable work that it “sponsors” or “commissions” – again, without offering total clarity as to what those terms mean as applied to students, who often create works to enter in institution-sponsored competitions or receive small grant funding to develop a research or business idea.<sup>22</sup> Many of these policies also lay claim to student copyright if the student is an “employee” of the institution and creates the work “within the course and scope of employment” – although, again, without defining such terms.<sup>23</sup> Other policies go so far as to state, by default, the institution retains all rights to students’ works, or that as a condition of enrollment, students grant their institution a royalty-free license to use their works for non-commercial purposes.<sup>24</sup> Each of these scenarios presents the possibility that a college or university might own a work that a student creates while enrolled or, at least, has a license to use such work long after the student has graduated.

The effects of such policies have proven to be confusing, if not surprising, to some students. On the one hand, colleges and universities actively encourage students to be entrepreneurial. On the other hand, ambiguities in institutional intellectual property policies leave students uncertain as to who owns rights in their copyrightable works and patent-eligible inventions, even ones emanating from the classroom.<sup>25</sup> Questions often exist as to whether such policies even apply to students, whether as a matter of drafting (i.e., the policies are silent or ambiguous on their application to students, student-employees, or what is meant by a “student”), or as a matter of contract law (i.e., a failure of consideration or mutual assent), although case law generally supports the enforceability of these policies.<sup>26</sup> For students like Abby seeking to secure outside funding for companies they may wish to form around their intellectual property, such uncertainties may trouble prospective investors, leading to delays and roadblocks that deter the very entrepreneurial spirit the institution wishes to cultivate in students.

These concerns are not hypothetical. In 2009, students at the University of Missouri at Columbia won a business plan competition sponsored by the

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21. Luppino, *supra* note 12, at 383.

22. *Id.*

23. *Id.*

24. *Id.*; see also HERRINGTON, *supra* note 16, at 47.

25. See Beth McMurtrie, *Universities Set Up Legal Clinics to Help Student Innovators*, CHRON. HIGHER EDUC. (Nov. 8, 2015), <http://chronicle.com/article/Universities-Set-Up-Legal/234094> (“Some digital activists are asking whether universities are prepared to help students navigate these legal complexities even as they promote entrepreneurship through coursework, clubs, and campus incubators.”).

26. Luppino, *supra* note 12, at 388–89.

university's school of journalism.<sup>27</sup> The winning student team developed an app called NearBuy, designed to match students looking for housing with those in the area willing to provide it.<sup>28</sup> The app was immediately successful and generated over 250,000 downloads on Apple's App Store.<sup>29</sup> The university's attorneys initially claimed the students owed the university a 25% ownership stake in the company and two-thirds of any profits, pursuant to the institution's intellectual property policies.<sup>30</sup> As the student entrepreneur behind the app told a reporter at the time: "We were incredibly surprised, and intimidated at the same time. You're facing an institution hundreds of years older than you, and with thousands more people. It was almost like there were no other options than to give in."<sup>31</sup>

The university eventually relented and revised its intellectual property policy because of this situation.<sup>32</sup> The policy now specifies that students own rights to any intellectual property they generate from a school-sponsored contest, extracurricular activity, or individual initiative, but the university can assert an ownership right in intellectual property that a student develops under a professor's supervision, using substantial institutional resources, or grant money.<sup>33</sup>

Student entrepreneurial activity of this sort occurs around the country. The relative ease with which students can create new software applications is one contributing factor. For example, in 2012, Bloomberg Business published an article about a software startup company, 52apps, that had partnered with students at the University of South Carolina at Columbia to create apps within five days, start to finish.<sup>34</sup> The article noted that "[c]olleges and universities, with their legions of smartphone-toting students, offer particularly fertile ground" for app development.<sup>35</sup>

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27. Tushar Rae, *iPhone App Raises Questions About Who Owns Student Inventions*, CHRON. HIGHER EDUC.: WIRED CAMPUS (Jan. 31, 2011), <http://chronicle.com/blogs/wiredcampus/iphone-app-raises-questions-about-who-owns-student-inventions/29265>.

28. *Id.*

29. Alan Scher Zagier, *Young Inventors Prompt Colleges to Revamp Rules*, BOS. GLOBE (Jan. 24, 2011), [http://archive.boston.com/news/education/k\\_12/articles/2011/01/24/young\\_inventors\\_prompt\\_colleges\\_to\\_revamp\\_rules/](http://archive.boston.com/news/education/k_12/articles/2011/01/24/young_inventors_prompt_colleges_to_revamp_rules/).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Kathleen Chaykowski, *College Kids Aim to Make 52 Apps a Year in South Carolina*, BLOOMBERG BUS. (July 9, 2012), <http://www.bloomberg.com/news/articles/2012-07-09/college-kids-aim-to-make-52-apps-a-year-in-south-carolina>.

35. *Id.*

In 2015, the *New York Times* published a story about undergraduate students at Harvard University enrolled in an engineering course.<sup>36</sup> They were tasked with “creating a technologically sophisticated barbecue smoker that could outperform the best product on the market and be sold for less than \$1,500.”<sup>37</sup> Guest visitors to the course included high-level executives from Williams-Sonoma, who expressed interest in carrying the product in the company’s stores if the students were successful.<sup>38</sup> The course’s professor and teaching fellow conceptualized the new product, then tasked the students with creating it.<sup>39</sup> The students created a prototype of the product, as well as a smartphone app that monitors and controls the product’s temperature.<sup>40</sup> Harvard sought to protect the product and app using patents and copyrights, and two of the students involved in the course formed plans to start their own company to sell the product.<sup>41</sup>

Despite entrepreneurial developments like these, students at some of the most revered campuses in the country have serious concerns about whether they fully own the works and inventions that they develop as students. For example, as recently as the spring of 2014, students at the University of Texas at Austin expressed apprehension about whether the university owns their intellectual property.<sup>42</sup> The intellectual property policy at the University of Texas system (“UT”) was unclear, they said, regarding its application to non-employee students.<sup>43</sup> Fortunately, administrators took notice of the issue, and a task force was convened to look into it.<sup>44</sup>

But nearer to the students’ point of concern, disagreement over the policy’s meaning seemed to exist at the highest levels of the UT administration. A 2014 news article quoted UT’s Vice President for Research as saying that nowhere did the policy indicate that student intellectual property belongs to the university.<sup>45</sup> But as he observed, “[W]hat it also doesn’t say is intellectual property developed by non-employee students does not belong to the

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36. Claire Martin, *Learning to Engineer a Better Brisket*, N.Y. TIMES (July 18, 2015), <http://www.nytimes.com/2015/07/19/business/learning-to-engineer-a-better-brisket.html>.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Bobby Blanchard, *UT Encourages Entrepreneurship While Addressing Hazy Intellectual Property Policy*, DAILY TEXAN (Mar. 3, 2014), <http://www.dailytexanonline.com/news/2014/03/03/ut-encourages-entrepreneurship-while-addressing-hazy-intellectual-property-policy> (“[M]any student business owners echoed concerns about whether the University owns a student’s intellectual property, which would grant the University access to a share of the student’s profits. Students say the System’s policy is not clear on the question of ownership.”).

43. *Id.*

44. *Id.*

45. *Id.*

board. That's what we need."<sup>46</sup> And yet the university's provost took a different position in an interview with the same member of the media, stating that the policy was "that the University can claim ownership of intellectual property that is developed by students."<sup>47</sup> When high-level administrators at the same prominent institution cannot say with certainty whether the intellectual property policy applies to students, student passion for pursuing entrepreneurial endeavors may diminish.<sup>48</sup>

A group of students in Virginia concerned about this very issue formed an organization, Students for Intellectual Property Rights, to help lobby lawmakers to take action.<sup>49</sup> The group's founder, Caleb Carr, recently expressed his motivations for starting the movement as follows:

By being a student, you inherently agree to [institutions' intellectual property policies]. Basically, you're not able to do anything using the resources of campus, but what resources? We're talking about students who create in their dorm rooms, in the library, in labs. Do they have the freedom to talk to professors? Can they take what they're working on in senior design classes and run with it? I had all these questions, but I wasn't getting any clear answers on what I can and can't do.<sup>50</sup>

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46. *Id.*

47. *Id.*

48. Fortunately, the task force came to recognize that "[t]he Board of Regents' *Rules and Regulations* concerning IP created by students are confusing as to whether students actually own the IP they create." See UNIV. OF TEX. SYS., TASK FORCE ON INTELLECTUAL PROPERTY: DISPOSITION, PRACTICES, AND MECHANISMS OF IMPLEMENTATION 10 (2014). The Task Force recommended that new policy language state that students "own the IP they create in courses and extracurricular activities. This clear statement would address circumstances where the students are using resources and facilities of U.T. System institutions commonly provided for the student's use for which they have paid tuition and fees." *Id.* at 10–11. The Board of Regents implemented the Task Force's recommendation concerning student intellectual property in August of 2015. See UNIV. OF TEX. SYS., *Rule 90101: Intellectual Property: Preamble, Scope, Authority*, REGENT RULES & REGS., <http://www.utsystem.edu/board-of-regents/rules/90101-intellectual-property-preamble-scope-authority> (last updated Aug. 20, 2015).

49. See Derek Quizon, *More IP Rights for Students Sought*, DAILY PROGRESS (Aug. 8, 2015), [http://www.dailyprogress.com/news/more-ip-rights-for-students-sought/article\\_2b68d2c0-3e22-11e5-aa55-0b3612b48595.html](http://www.dailyprogress.com/news/more-ip-rights-for-students-sought/article_2b68d2c0-3e22-11e5-aa55-0b3612b48595.html). See also *Intellectual Property*, STUDENTS FOR INTELL. PROP. RTS., <http://studentsforiprights.com/> (last visited July 21, 2016).

50. Alan Prendergast, *Caleb Carr Has a Better Idea for Student Inventors' Intellectual Property Rights*, WESTWORD (Feb. 23, 2016), <http://www.westword.com/news/caleb-carr-has-a-better-idea-for-student-inventors-intellectual-property-rights-7633073>.

Other lobbying efforts are underway at the federal level.<sup>51</sup> These groups believe the lack of clarity in institutional policies concerning student intellectual property inhibits some students from pursuing entrepreneurial ideas.<sup>52</sup> As one student in Virginia remarked, “It’s kind of a stigma for student entrepreneurs to start companies . . . . Why start a company if 40 percent of it is going to be gone?”<sup>53</sup> Even if universities take the position that they are willing to bargain with students and relinquish an institutional ownership claim, the broader question is whether students should even be placed in the position of worrying whether they have less than full rights to the ideas and works they generate through their education.

A recent example from Virginia Tech illustrates this concern. In 2014, Virginia Tech student Mitch Harris – who was majoring in industrial design – used university equipment to create a new type of plastic case for iPhones.<sup>54</sup> Prospective purchasers noticed the product at a social media conference where Harris displayed a prototype and began taking pre-orders for sales.<sup>55</sup> Encouraged by the market potential for the new case design, Harris soon had plans to form a company that would manufacture and sell it.<sup>56</sup>

Then he heard from Virginia Tech Intellectual Properties (“VTIP”), the university-affiliated entity charged with licensing Virginia Tech’s intellectual properties.<sup>57</sup> VTIP raised concerns about Harris’s exclusive ownership of the new iPhone case.<sup>58</sup> VTIP mentioned that Harris had used an industrial design laboratory – including a 3D printer – owned by Virginia Tech in making the prototype for his product.<sup>59</sup> Harris did not dispute using the laboratory and admitted he was not aware of the university’s intellectual property policy, which permitted the university to stake an ownership claim in anything created using its specialized equipment.<sup>60</sup> Before long, Harris gave up on com-

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51. Shawn Drury, *One Student’s Fight to Reclaim IP Revenues for Undergrads’ Startups*, FASTCOMPANY (Jan. 22, 2015), <http://www.fastcompany.com/3038461/one-students-fight-to-reclaim-ip-revenues-for-undergrads-startups> (describing students’ attempts to achieve clarity, through proposed legislation, as to when the use of university equipment leads to institutional claims to resulting intellectual property, and proposing a 75/25 revenue split in favor of students in such situations).

52. *Id.*

53. Quizon, *supra* note 49.

54. Yann Ranaivo, *Virginia Tech Student Entrepreneurialism is Encouraged, but Comes with Some Caveats*, ROANOKE TIMES (May 9, 2015), [http://www.roanoke.com/business/news/blacksburg/virginia-tech-student-entrepreneurism-is-encouraged-but-comes-with-some/article\\_cc7c0750-314f-50fc-8823-55da97e3d42a.html](http://www.roanoke.com/business/news/blacksburg/virginia-tech-student-entrepreneurism-is-encouraged-but-comes-with-some/article_cc7c0750-314f-50fc-8823-55da97e3d42a.html).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

mercializing the product as initially planned.<sup>61</sup> As he put it, “If you get all tangled up in all that stuff, it’s easy to get distracted and then you lose that momentum, and sometimes it can just downright kill your project.”<sup>62</sup> He cited the university’s intellectual property policies as going against the institution’s call for more innovation.<sup>63</sup>

Another incident involving 3D printer technology – this one at Augustana College in 2014 – shows why student fears about institutional intellectual property overreach are not misplaced. The private liberal arts college in South Dakota owns a replica of Michelangelo’s statue of Moses – given to the college in 1971 – that it displays on its campus.<sup>64</sup> A local resident, Jerry Fisher, photographed the statue to hone his 3D capture skills and attempted to recreate the statue using a 3D printer.<sup>65</sup>

This innocuous photographic activity – which may seem like a quintessential example of a college serving an educational purpose, even for non-students – took an unfortunate turn when Fisher began documenting his progress on his Twitter feed and Google+ account.<sup>66</sup> Augustana College contacted him, alleging that it owned copyright in the Moses statue, even though the original was created by Michelangelo in 1515, and any slavish copies of it, like the one Augustana owns, are not subject to copyright.<sup>67</sup> The college demanded that Fisher destroy all CAD files associated with the 3-D object and contact anyone who had downloaded the files, requesting that they delete them.<sup>68</sup> Although Fisher complied with Augustana’s unfounded request, the incident serves as a chilling example of what is possible when institutions

61. *Id.*

62. *Id.*

63. *Id.* Shortly after this incident, Virginia Tech’s new president oversaw a change to the institution’s intellectual property policy. *Id.* The policy now specifies that products built using Virginia Tech equipment belong to students, provided that whatever they create is not created as part of paid work for the university. *Id.* A news report stated that this change came “during a surge in student businesses based from products that have ranged from apps to items such as watch straps, flavor dispensers, greeting cards and a smartphone case invented to improve selfies.” Yann Ranaivo, *Virginia Tech Revamps Policy on Students’ Inventions*, ROANOKE TIMES (June 10, 2015), [http://www.roanoke.com/news/education/higher\\_education/virginia\\_tech/virginia-tech-revamps-policy-on-students-inventions/article\\_8ef5d30e-dec2-5d64-8f34-1603221ff455.html](http://www.roanoke.com/news/education/higher_education/virginia_tech/virginia-tech-revamps-policy-on-students-inventions/article_8ef5d30e-dec2-5d64-8f34-1603221ff455.html).

64. *US College Says 3D Michelangelo Replica Infringes Its Copyright*, WORLD INTELL. PROP. REV. (Jan. 26, 2015), <http://www.worldipreview.com/news/us-college-says-3d-michelangelo-replica-infringes-its-copyright-7666>.

65. *Id.*

66. Michael Weinberg, *3D Scanned Statue Copyright Debacle: How a University Got It Wrong*, MAKE (Jan. 23, 2015), <http://makezine.com/2015/01/23/3d-scanned-statue-copyright-debacle-how-a-university-got-it-wrong/>.

67. *Id.*

68. *Id.*

misunderstand copyright law, their own copyright policies, and the application of law and policy to new technologies.<sup>69</sup>

News sources have noted that institutions are recognizing the ability of 3D printers to “revolutionize[] the educational experience for college students.”<sup>70</sup> Many colleges and universities are creating and investing significant resources in “Makerspaces,” or facilities that contain 3D printers, laser cutters, machine tools, workbenches, and other materials “to enable students to design and build small project prototypes and models that may or may not be part of their formal educational curricula.”<sup>71</sup> Some community colleges are even part of this trend.<sup>72</sup> As these developments and investments occur, more student entrepreneurship projects, like Mitch Harris’s, risk being chilled, or shelved entirely, due to intellectual property policies that lack clarity or inappropriately purport to widely apply to student activities.<sup>73</sup> Despite the growing interest in student entrepreneurship, commentators and policy makers pay little concerted attention to the copyright ownership question in this new climate.

The copyright ownership question is particularly acute for works that students generate as part of class assignments, whether in traditional courses, capstone courses, independent study courses, or service-learning projects. In many instances, the specter of an institutional or third-party claim to student

69. Indeed, a public domain exists, even if some institutions of higher education otherwise seem unconvinced. *Id.* It was argued that Augustana’s action undermined its stated mission to “enrich[] lives by exposure to enduring forms of aesthetic and creative expressions.” *Id.*

70. David Weldon, *Xavier U to Launch 3D Printing As a Service*, CAMPUS TECH. (Aug. 6, 2015), <http://campustechnology.com/articles/2015/08/06/xavier-u-to-launch-3d-printing-as-a-service.aspx>; see also Dian Schaffhauser, *Rochester Institute of Tech to House 3D Printing R&D Center*, CAMPUS TECH. (Sept. 2, 2015), <http://campustechnology.com/articles/2015/09/02/rochester-institute-of-tech-to-house-3d-printing-rd-center.aspx>.

71. See Abigail Barrow et al., *Managing Student Intellectual Property Issues at Institutions of Higher Education: An AUTM Primer*, ASS’N U. TECH. MANAGERS 11 (Aug. 2014), [https://www.autm.net/AUTMMain/media/ThirdEditionPDFs/V2/TTP\\_Manual\\_3rd\\_Edition\\_Volume2\\_StudentIP.pdf](https://www.autm.net/AUTMMain/media/ThirdEditionPDFs/V2/TTP_Manual_3rd_Edition_Volume2_StudentIP.pdf); see also Rhea Kelly, *Penn State Opens Maker Commons*, CAMPUS TECH. (Mar. 24, 2016), <https://campustechnology.com/articles/2016/03/24/penn-state-opens-maker-commons.aspx>.

72. See Michael Hart, *Sierra College Maker Space Fosters Student Innovation*, CAMPUS TECH. (Aug. 27, 2015), <http://campustechnology.com/articles/2015/08/27/sierra-college-maker-space-fosters-student-innovation.aspx>.

73. Cf. HERRINGTON, *supra* note 16, at 4 (“[F]acility with technology often leads [students] to create marketable work products based in new technologies and then to pursue entrepreneurial efforts to promote them. When students’ work has the potential to be valuable, representatives of their educational institutions may claim interest in student products created within the educational setting.”).



ownership of copyrightable work may be inhibiting the free exchange of ideas in the classroom. Professor Bryce Pilz's 2012 article highlighted concerns about the involvement of industry sponsors in capstone classes.<sup>74</sup> He called industry involvement in these courses "prevalent" and pointed to a study suggesting somewhere between 40% and 64% of all course sponsors in engineering require the transfer of at least some student intellectual property.<sup>75</sup> While Pilz's work specifically focused on industry involvement in and sponsorship of capstone courses in schools of engineering, the phenomenon is not limited to engineering schools or capstone courses. In fact, it commonly occurs in undergraduate business programs. Many companies partner with college or university faculty by providing them with actual data students are asked to analyze in the classroom.<sup>76</sup> Sponsors review the students' results, often acting as judges of final team projects and presentations.<sup>77</sup>

While the faculty and sponsors tout these arrangements as bringing invaluable real-world problems inside the campus walls, many sponsors "desire to own the intellectual property resulting from the project and/or to maintain the confidentiality of any proprietary information disclosed to students."<sup>78</sup> Universities often permit these companies to enact their demands through private agreements with participating students.<sup>79</sup> Compromising these students' academic freedom is one obvious concern that these arrangements bring.<sup>80</sup> Compounding that concern is the fact that many times students are required to complete these courses in order to receive their degree – i.e., these courses are not optional elective offerings.<sup>81</sup> In addition to stipulating that students enjoy no copyright in original works they create involving the company's information (original works that would otherwise be owned by the student authors), the onerous agreements such sponsors require students to sign sometimes contain additional draconian provisions. These provisions include warranty, indemnification, and confidentiality clauses, all of which are more suited to business-to-business transactions than they are to the unique learning environment of higher education.<sup>82</sup>

Some institutions, like Penn State, have developed policies to address what they call these "special situations." Consider, for example, what Penn State tells its students:

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74. See Pilz, *supra* note 17, at 38.

75. *Id.*

76. See Quizon, *supra* note 49.

77. *Id.* ("Like unpaid internships, these projects typically motivate students with the promise of experience and the prospect of being discovered.")

78. See Pilz, *supra* note 17, at 39.

79. *Id.* at 40. Professor Pilz notes eleven concerns total. *Id.*

80. *Id.*

81. See Quizon, *supra* note 49 ("Your cost of being part of this capstone project – for which you paid tuition – is giving up your intellectual property.") (quoting one adjunct faculty member familiar with these arrangements).

82. *Id.*

Situations may occur in certain courses (e.g., SUBJ 296, 496, 596, 295, 395, 495 and 595) where students are presented with the opportunity to participate in projects or activities in which the ownership of any resulting intellectual property *must be assigned* either to the University or to a sponsoring entity (such as a company) *as a condition of the student's participation*. Students are never obligated to participate in projects or activities that require the assignment of the student's intellectual property to the University or to another entity. In these situations students will always be presented with two options: 1) to participate in projects or activities that do not require the student to assign their intellectual property or 2) to participate in projects or activities that require the student to assign their intellectual property.

The student's grade and/or evaluation of performance in the course will not be affected by the student's decision to participate or not to participate in projects or activities requiring the assignment of the student's intellectual property.

Students should understand that the assignment of intellectual property is a binding legal agreement and that they have the right to seek independent legal advice at their own expense prior to signing this agreement. Students may obtain free legal consultation through the Division of Student Affairs.<sup>83</sup>

A similar scenario unfolds at the University of Washington ("UW"), where, depending on the restrictions imposed by individual sponsors, students may or may not own intellectual property they create in courses.<sup>84</sup> The Vice Provost for Innovation at UW recently touted the choice available to students as a good thing, saying that students can proceed based on their own "comfort level."<sup>85</sup>

If student entrepreneurship is to flourish on the modern campus, students should not face the prospect of their institutions condoning or effectively requiring their assignment of copyright to sponsors of coursework. When this occurs, inquiry for the sake of learning takes a secondary position to inquiry for the sake of pleasing the sponsor. At the margin, students may hold back their best work, knowing that the sponsor will only capture and claim it if the student reduces it to writing. Even policies like Penn State's and practices like UW's, which purport to offer students a choice, are misguided. The higher education classroom should not be constructed as a business unto itself, where every student must be vigilant about entering into agreements

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83. See *Student Intellectual Property*, PENN STATE, [http://www.research.psu.edu/otm/student\\_IP](http://www.research.psu.edu/otm/student_IP) (last visited July 17, 2016) (emphases added).

84. Mariel Frank, *Q&A: How the University of Washington is Aiming to Unleash a New Wave of Innovation*, GEEKWIRE (Aug. 4, 2015), <http://www.geekwire.com/2015/190949/>.

85. *Id.*

with the university or corporate sponsors – agreements that are likely to be negotiated at less than arm’s length.

Can faculty be trusted to impartially grade the work product of students who agree to sign away their intellectual property, particularly if by *not* signing away their intellectual property students create more work (in terms of assignment creation and grading) for the professor? What about the impact of peer pressure? At the undergraduate level, many students are likely to sign away their rights in order to conform to perceived norms and peer expectations without fully understanding the impact of such a decision.

For creativity, innovation, and an entrepreneurial spirit to truly thrive in higher education, students must be free to engage inside the classroom and out without any concerns or doubts about the ownership of their intellectual fruits vis-à-vis their college, university, or anyone the institution has allowed on campus. Similarly, their full participation in the classroom should never hinge on or be compromised by their agreement to assign copyright to a third-party sponsor of the course.<sup>86</sup> Of all places in society, the higher education classroom should be a safe harbor for student innovation. Consulting an intellectual property attorney should not be a burden students are expected to shoulder before enrolling in a course, entering a university-sponsored competition, using campus resources, or accepting a paycheck for campus work.<sup>87</sup>

### *B. Faculty, Staff, and Student Involvement in the Digital Humanities*

#### *Fast at Work: Abraham’s Art Project*

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86. Although Professor Pilz presciently recognizes many of the problems that arise with student-sponsor interactions, I disagree with his suggestion that course sponsors should be offered or are fairly entitled to a full, royalty-free, non-exclusive license to any student work or invention that results from the course sponsorship. *See* Pilz, *supra* note 17, at 41. If course sponsors are interested in the work that students in the course produce, let them negotiate with students independently for rights to the work. Any agreement the parties reach is likely to be cheaper to the sponsor than attempting to internalize the research and development costs without relying on student intellectual labor. *See id.* Additionally, while Professor Pilz seems to suggest that we should leave universities to consider for themselves whether to prohibit outside sponsors from requiring intellectual property assignments from students, *see id.* at 40, I propose in Part III.A that institutions should have no choice in this regard; institutions should be prohibited from providing access to the classroom to any company attempting such an assignment.

87. I disagree with Professor Luppino’s suggestion that individual faculty could enhance student understanding of intellectual property policies on a given campus by “supplementing [them] . . . with written statements in the course syllabus or the assignment instructions about rights and duties in respect to innovations created in course projects.” Luppino, *supra* note 12, at 417. Faculty and students should not face these burdens; instead, the presumption of ownership should rest with the student, as discussed in Part III.A.

*Abraham is a recently hired assistant professor of art history at a state university that encourages its faculty to apply for grant funding from national organizations and research sponsors. Abraham's specialty is modern art, with a particular emphasis on the life and works of a famous American painter. Abraham would like to make the famous painter's work more accessible to the world through creating an interactive website that displays many of the painter's works and artifacts, interspersed with audio files, an interactive timeline, and original narrative by Abraham.*

*Abraham outlined his intentions for the project in an application for a summer research grant in the amount of \$5,000, which his dean awarded him. While working on the project over the summer, Abraham had a discussion with the leader of a regional arts council, Margery, who was very interested in Abraham's project. Margery encouraged him to create an app, accessible on tablets and mobile devices, that she thinks would be of interest to K-12 teachers across the nation. She expressed that the council she runs would be interested in providing additional financial support to enable the project.*

*Abraham's primary interest in the project is using it in his own classroom, but he recognizes the potential to profit from the project if others have interest in it and can access it. May Abraham pursue this project without any potential copyright claim from his university?*

The project Abraham envisions falls within the ambit of digital humanities, a rising trend within higher education that involves using software and digitization technologies to create new Internet-based modalities for teaching and learning about the humanities.<sup>88</sup> Drawing on technology centers, visualization labs, and computational tools, these efforts often bring science and “big data” to the humanities – for example, performing computational and statistical analyses of text – thereby unlocking new avenues of research and inquiry for students and teachers alike.<sup>89</sup> Data mining, text and network

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88. See Michael Roy, *Either/Or? Both/And?: Difficult Distinctions within the Digital Humanities*, EDUCAUSE REV. 16 (May 19, 2014), <http://er.educause.edu/articles/2014/5/eitheror-bothand-difficult-distinctions-within-the-digital-humanities>. Digital humanities projects may also go by the terms “digital scholarship” and “digital liberal arts.” *Id.* One author identifies the defining feature of digital humanities as “the application of digital resources and methods to humanistic inquiry.” Donald J. Waters, *An Overview of the Digital Humanities*, 284 RESEARCH LIBRARY ISSUES: A QUARTERLY REPORT FROM ARL, CNI, AND SPARC 3, 3 (2013).

89. Brief of Digital Humanities and Law Scholars as Amici Curiae in Support of Defendant-Appellees at 4–5, *Author's Guild v. Google, Inc.*, 804 F.3d 202 (2015) (No. 13-4829-cv). For example, as opposed to “close and often anecdotal study of select works,” the mass digitization of books has allowed scholars to glean insights from the “study of several million [works] in the larger archive of literary history.” *Id.* at 5–6. One such insight that large-scale analysis of texts provides is the year in which written uses of the singular in reference to the United States (“the United States

analysis, and data visualization are common methodologies deployed in digital humanities projects.<sup>90</sup>

Many once regarded the digital humanities as a fad or the narrow province of specialists, IT developers, and librarians.<sup>91</sup> However, the digital humanities are here to stay. As a recent article discussing the phenomenon put it: “Today . . . historians, philosophers, and poets not only are learning how to use tools to conduct analysis for their work; they also are building collections, developing their own tools, and constructing platforms.”<sup>92</sup> Most creators of digital humanities projects intend for the public at large – not just students and scholars – to use and benefit from these projects.<sup>93</sup> If institutions do not already have a digital scholarship center to promote these activities, they may soon. As these centers are established, common concerns include everything from the practical (who will provide the content? Who will fund it?), the legal (how will rights to the content be cleared and handled?), to the technical (how will these projects be preserved and their integrity maintained for future generations?).<sup>94</sup>

Examples of digital humanities projects abound. At Washington & Lee University in Virginia, a research team has created a website that allows users to search for, locate, and study the graffiti of the early Roman empire, from the cities of Pompeii to Herculaneum.<sup>95</sup> Students actively participate with professors in creating the project, traveling to Italy in the summers to locate graffiti, photograph it, and enter related data into a software program created for the project.<sup>96</sup>

Students were similarly involved in the creation of “Valley of the Shadow,” one of the first digital humanities projects in the world, started at the

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is”) first outnumbered plural uses (“the United States are”). *Id.* at 8–9. That year was 1879. *Id.* at 9.

90. See *Mellon Foundation Grants Washington and Lee Funds for Digital Humanities, Study of History*, AUGUSTA FREE PRESS (July 13, 2015), <http://augustafreepress.com/mellon-foundation-grants-washington-and-lee-funds-for-digital-humanities-study-of-histor/>.

91. Nancy L. Maron, *The Digital Humanities Are Alive and Well and Blooming: Now What?*, EDUCAUSE REV. 28 (Aug. 17, 2015), <http://er.educause.edu/articles/2015/8/the-digital-humanities-are-alive-and-well-and-blooming-now-what>.

92. *Id.*

93. *Id.* at 30.

94. *Id.* at 32.

95. See *The Ancient Graffiti Project*, WASH. & LEE U., <http://ancientgraffiti.wlu.edu/> (last visited July 17, 2016).

96. See Eunice Brumskine, *Classics Students Present Research on Summer Visit to Italy*, COLLEGIAN (Nov. 16, 2014), <http://www.thecollegianur.com/article/2014/11/students-present-summer-rome-research>.

University of Virginia.<sup>97</sup> The project entailed digitizing primary source documents from two nineteenth-century American towns – one in Augusta County, Virginia, the other in Franklin County, Pennsylvania – to give online visitors realistic portrayals of life in those places during the Civil War and its aftermath.<sup>98</sup> Resources used in the project included newspaper articles, letters, diaries, church records, tax records, maps, images, and statistics, all of which allow users to see and understand the evidence that fueled the scholarly analysis.<sup>99</sup>

Other digital humanities projects focus on humanistic topics, such as the spread of American slavery into the borderlands between the United States and Mexico between 1820 and 1850,<sup>100</sup> the life and work of Albert Einstein<sup>101</sup> and Walt Whitman,<sup>102</sup> and the history of women at the “Seven Sisters” colleges.<sup>103</sup> Some digital humanities projects are faculty initiatives that accompany their books,<sup>104</sup> while others are born as digital projects.

The copyright use question raises complicated issues in digital humanities projects and initiatives, as these efforts frequently entail using copyrighted works, or works whose copyright status is unknown, in new contexts.<sup>105</sup> While one would hope that the transformative nature of these uses renders

97. Jennifer Howard, *Born Digital, Projects Need Attention to Survive*, CHRON. HIGHER EDUC. (Jan. 6, 2014), <http://chronicle.com/article/Born-Digital-Projects-Need/143799/>.

98. *Id.*

99. *Id.* See also Edward L. Ayers, *The Valley of the Shadow: Two Communities in the American Civil War*, U. VA., <http://valley.lib.virginia.edu/> (last visited July 17, 2016).

100. See *The Texas Slavery Project*, U. VA., <http://www.texasslaveryproject.org/> (last visited July 17, 2016).

101. See *The Collected Papers of Albert Einstein*, PRINCETON U., <http://einsteinpapers.press.princeton.edu/> (last visited July 17, 2016).

102. See CTR. FOR DIG. RESEARCH IN THE HUMANITIES, *News and Updates*, WALT WHITMAN ARCHIVE, <http://www.whitmanarchive.org/> (last visited July 17, 2016).

103. See SEVEN SISTER COLLS., *Documenting the History of Women in Higher Education*, C. WOMEN, <http://www.collegewomen.org/> (last visited July 17, 2016).

104. See Colin Gordan, *Mapping Decline: St. Louis and the American City*, U. IOWA LIBRS., <http://mappingdecline.lib.uiowa.edu/> (last visited July 17, 2016) (mapping the demographic trends in St. Louis over more than fifty years).

105. See, e.g., David T. Coad et al., *BeardStair: A Student-Run Digital Humanities Project History, Fall 2011 to May 16, 2013*, J. INTERACTIVE TECH. & PEDAGOGY (2013), <http://jitp.commons.gc.cuny.edu/beardstair-a-student-run-digital-humanities-project-history-fall-2011-to-may-16-2013/>. Adding to the complicated legal landscape is section 303 of the Copyright Act, which provides that some works that were neither published nor registered for copyright as of January 1, 1978, entered the public domain on January 1, 2003 (or later, depending on when the work’s author died). See Copyright Act of 1976, 17 U.S.C. § 303 (2012). Publication of such works prior to December 31, 2002, extended copyright protection through December 31, 2047, or seventy years after the death of the work’s author, whichever is longer. See *id.*; see also Lolly Gasaway, *When U.S. Works Pass Into the Public Domain*, U.N.C. (Nov. 4, 2003), <http://www.unc.edu/~uncnlg/public-d.htm>.

them fair uses, resolving that question with certainty can be difficult, particularly given that these projects are, by design, widely accessible to anyone with an Internet connection. With uncertainty over the fair use question in mind, many digital humanities projects intentionally use dated materials (e.g., from the Civil War, or antiquity) in which any copyright protection has long since expired. Even if the material used for the project is more recent, often it comes from a special collection at a college or university library (e.g., the Seven Sisters project, referenced above), where rights to use it for digital purposes may be defined in the deed of gift with the donor.<sup>106</sup> Finally, even uniquely for those using works that are in the public domain, new uses of them in digital humanities projects can lead to copyright claims by the creators of the project and/or the institution sponsoring the project.<sup>107</sup>

The copyright ownership question is complicated, too, for digital humanities projects. Collaboration across disciplines, titles, and ranks – as well as interactivity using “the crowd” or general public – is considered a hallmark of digital humanities projects.<sup>108</sup> The collaborative aspect of digital humanities projects helps sustain interest and value in these works, as involved faculty across the world incorporate these projects into their courses and research.<sup>109</sup> Collaborative writing, translating, and editing, as well as the sharing of data and content, are what make these projects so exciting; researchers are able to work together, uninhibited by geographic space, to bring new insights and understandings into areas of scholarly interest.<sup>110</sup> Meaning and value are literally co-constructed in these digital spaces, often with faculty, librarians, and IT personnel working side by side on projects.<sup>111</sup>

Part of the allure of digital humanities projects is that they challenge the traditional notion of scholarship as being “written by experts for experts.”<sup>112</sup>

106. This practice, however, is far from uniform. *See infra* Part II.C.

107. Sponsorship of the project by the institution typically entails devoting staff and physical resources (such as software and hardware) toward maintaining the project.

108. Julianne Nyhan & Oliver Duke-Williams, *Is Digital Humanities a Collaborative Discipline? Joint Authorship Publication Patterns Clash with Defining Narrative*, LONDON SCH. ECON. & POL. SCI.: THE IMPACT BLOG (Sept. 10, 2014), <http://blogs.lse.ac.uk/impactofsocialsciences/2014/09/10/joint-authorship-digital-humanities-collaboration/>.

109. Howard, *supra* note 97 (describing widespread use of Valley of the Shadow).

110. *See, e.g., Examples of Collaborative Digital Humanities Projects*, DIGITAL SCHOLARSHIP HUMAN. (June 1, 2009), <https://digitalscholarship.wordpress.com/2009/06/01/examples-of-collaborative-digital-humanities-projects/>.

111. *See* Maron, *supra* note 91, at 34 (“This is the future of libraries. As the core infrastructure for scholarship, librarians will work side-by-side with faculty and students through all steps of the research process, including the selection and management of resources, the analysis, documentation and design of findings, and the dissemination and preservation of scholarly works.”) (quoting the head librarian at Brown University).

112. Roy, *supra* note 88, at 19.

Indeed, students are frequently involved in these initiatives, whether for class credit or through their outside-of-class work with professors, as are university staff members. Boundaries between official titles like “student,” “faculty,” and “staff” tend to blur in digital humanities projects, allowing students to make contributions to final products that are greater in scale than the contributions they might make in more traditional classroom settings. In fact, digital humanities projects are often characterized “by faculty building collections, librarians doing research, and students wandering free between content consumption, content creation, and content management.”<sup>113</sup> But as one recent investigation noted, “[I]ssues related to the use and abuse of student labor creep into the classroom. Using student labor in the classroom may violate the social contract of higher education.”<sup>114</sup> The use of student labor may also raise copyright ownership issues, particularly if the students make original contributions to these projects – e.g., textually or through photographs – and their work is not subject to a separate agreement with the project’s directors.<sup>115</sup>

One example of a student-driven digital humanities project is Infinite Ulysses, which University of Maryland student, Amanda Visconti, created as part of her English PhD program.<sup>116</sup> The site contains an electronic version of *Ulysses*, the famous work by James Joyce noted for its near impenetrability to uninitiated readers.<sup>117</sup> Visconti’s site allows users to highlight passages and leave interpretations and annotations that can be read and responded to by other viewers.<sup>118</sup> Visconti found her university’s intellectual property policy unclear in her situation.<sup>119</sup> Typically, universities do not claim ownership over student dissertations, but hers was not the typical dissertation.<sup>120</sup> Would the university make a claim to it because it was funded, in part, through a university fellowship, or because she utilized specialized campus equipment to create it? After weeks of emailing administrators trying to find out, she

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113. Elijah Meeks, *How Collaboration Works and How It Can Fail*, DIG. HUMANS. SPECIALIST (May 27, 2013), <https://dhs.stanford.edu/natural-law/how-collaboration-works-and-how-it-can-fail/>.

114. See DIGITAL FRONTIERS, <http://digital-frontiers.org/student-labor-digital-humanities> (last visited Jan. 21, 2016).

115. Cf. Tanyon Boston, *...And Bring Your Playbook: Who Owns the Intellectual Property Created by College Coaches?*, 19 VA. J.L. & TECH. 104, 151, 182 (2014) (noting ambiguities in the application of university intellectual property policies to students and staff members).

116. See INFINITE ULYSSES, <http://www.infiniteulysses.com/> (last visited July 17, 2016).

117. Sue Schopf, *Why You Should Try to Read Ulysses – Again*, HARV. EXTENSION SCH., <http://www.extension.harvard.edu/inside-extension/why-you-should-try-read-ulysses-again> (last visited July 22, 2016).

118. See INFINITE ULYSSES, *supra* note 116.

119. See *IP & Copyright*, INFINITE ULYSSES, <http://www.infiniteulysses.com/content/ip-and-copyright> (last visited July 17, 2016).

120. *Id.*



never received an answer.<sup>121</sup> In the face of similar silence, less committed students might choose to avoid such avenues of scholarly activity altogether.

Whether students participate in these projects alone or in collaboration with faculty, many of the same concerns can arise, as often these projects are funded, in part, by the institution or rely on special laboratory and equipment space for their construction and maintenance. Faculty and staff participation in these projects may raise questions not squarely addressed in existing intellectual property policies. Are digital humanities projects “courses” or “traditional scholarship”? If the answer to either question is “yes,” then many institutions cede their copyright claim to the faculty member as a matter of policy. But the answer to those questions is most often “no” – the project may be used in a course but is not itself a course, nor is it a book or journal article – leading to attendant worries for faculty.

Thus far, digital humanities projects are phenomena of well-funded research universities, although private liberal arts colleges are also becoming involved in creating them.<sup>122</sup> As institutions of all sizes and funding agencies take laudable steps to support digital humanities activities not only financially, but also through the dedication of campus space and equipment to enable work on these projects,<sup>123</sup> they must explicitly indicate ownership and maintenance responsibilities in these contexts. Faculty experimentation with digital humanities should not lead to fears and concerns of provoking a copyright battle with the institution. Nor should students shy away from these initiatives, uncertain if faculty or institutions will lay claim to their contributions. Instead, copyright concerns must be overcome so that the promise of digital humanities can be harnessed.<sup>124</sup>

### *C. Digitization Efforts and Trends in Library Special Collections*

#### *Still at Work: Abraham’s Art Project*

*The famous painter central to Abraham’s project, described in Part II.B above, died in 1940. The painter’s estate donated many of his early works, as well as his personal journal and professional correspondence, to the special collections library at Abraham’s university. At the time of the donation, the painter was not particularly famous, although his fame would grow in time.*

*Abraham would like to digitize these materials for inclusion in his digital humanities project. He envisions displaying them on a website that would*

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121. Amanda Visconti, *Copyleft, IP Rights, and Digital Humanities Dissertations*, LITERATURE GEEK (Dec. 9, 2013), <http://literaturegeek.com/2013/12/09/dhiprights>.

122. See Roy, *supra* note 88, at 20.

123. See, e.g., Brief of Digital Humanities and Law Scholars as Amici Curiae in Support of Defendant-Appellees, *supra* note 89, at 18 (noting and citing large federal grants to universities “for the specific purpose of furthering text-mining and digital humanities research”).

124. Cf. Maron, *supra* note 91, at 38 (noting the capacity of digital humanities “to share the fruits of academic work with a worldwide audience”).

be accessible to anyone at his university who accesses the site from an on-campus Internet connection, or off campus using login credentials. For the general public, including K-12 schools, Abraham envisions making the website into a software app that would be sold for \$1.99 per download. Abraham has enlisted the help of Paulo, an assistant professor in the computer science department, to help him create the app.

The university's librarian objects to the duo's proposed use of the special collections objects, most particularly in the proposed app. She states that several of the objects "may be under copyright," but that even if they are not, the university enjoys copyright in the works, or at least ownership rights in the objects that prevent the duo from doing what they propose. Unfortunately, because of this issue, Margery's arts council declines to provide the additional funding that Abraham and Paulo had requested for completing the project.

Library special collections house material of great artifactual and monetary value. These items often are singular, rare, or exist in special physical format.<sup>125</sup> As Abraham's hypothetical encounter illustrates, special collections in college and university libraries can be sites of rich scholarly activity. Libraries are commonly turning to digitization of special collections material as a means of increasing access while also preserving these valuable objects so future generations may use and enjoy them.<sup>126</sup>

Copyright issues involving special collections can be maddening, as the rights surrounding each collection, and even individual objects within the collection, may be different based upon the terms of their donation and acceptance, as well as the copyright status of the underlying works themselves. Copyright may prevent many uses of collections material online and the creation of derivative works, like the app that Abraham and Paulo want to create. Donor restrictions that exceed the limits of copyright may do the same. Even institutions themselves may inappropriately lay copyright claims to slavish reproductions of special collections material otherwise in the public domain. They may also seek to equate ownership of the object with the right to dictate how and when information gleaned from the object, including digital copies, is used.<sup>127</sup>

Unreasonable copyright and related restrictions, like the one Abraham faces, impede the ability of the higher education community to incorporate special collections objects into digital scholarship and teaching. This rights impasse undermines the unfettered contribution to the cultural and knowledge

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125. Lisa R. Carter, *Special at the Core: Aligning, Integrating, and Mainstreaming Special Collections in the Research Library*, 283 RES. LIBR. ISSUES: A Q. REP. FROM ARL, CNI, & SPARC 1, 1 (2013).

126. See *Special Issue on Special Collections and Archives in the Digital Age*, 279 RES. LIBR. ISSUES: A Q. REP. FROM ARL, CNI, & SPARC 1 (2012) [hereinafter RLI 279].

127. See Laura N. Gasaway, *Copyright Ownership and the Impact on Academic Libraries*, 13 DEPAUL-LCA J. ART & ENT. L. 277, 290-93 (2003).

commons that these objects otherwise stand to make through unrestricted use of them by students, faculty, and the public. Libraries, and in particular campus libraries, have traditionally been viewed as “unchanging sources of communal memory.”<sup>128</sup> Indeed, the notion that libraries are storehouses of information and important edifying artifacts goes to the heart of higher education’s existence in the public sphere as a robust knowledge and cultural commons. These institutions collect and catalogue all kinds of physical objects – books, papers, letters, journals, art, and music – that may be under copyright protection at the time of acquisition. Other objects and works are donated to the institution by alumni, faculty, corporate benefactors, and other friends of the institution. In accepting these items for storage and preservation, librarians make important decisions that implicate the library’s – and by extension, the university’s – existence as a site of public memory and meaning.

Because of historical problems involving undocumented accessions to collections, many institutions have promulgated gifts policies that address such issues as who within an institution is authorized to accept gifts on behalf of the institution, as well how institutional commitments concerning the storage, display, and use of the donated objects should be addressed.<sup>129</sup> Yet much historical material of great value maintained by libraries was not acquired in such a formal fashion, meaning “[m]any repositories have a backlog of gifts or loans that were accepted with minimal formalities and inadequate documentation.”<sup>130</sup> Disputes involving this class of material may occur when institutions attempt to remove these items from their collection, or digitize them, or otherwise do something with them that the original donor, her heirs, or the general public finds objectionable. The deeds of gift may be nonexistent, or key terms in them may be ambiguous. And yet some institutional staff and faculty may still reasonably believe that educationally sound justifications exist to digitize the collection or deaccession of certain works. The vexing question college and university librarians often face in these circumstances is identified in a *New York Times* article from 2013: “How do you

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128. Sheila O’Hare & Andrew Smith, *Gifts Nobody Wants: The State of the Art in Dealing with Unwanted Donations*, 1 KAN. LIBR. ASS’N. C. & U. LIBRS. SEC. PROC. 66, 67 (2011); cf. Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUSTON L. REV. 549, 561–62 (2015) (discussing instances where the heirs and estates of famous deceased individuals have asserted copyright in cultural artifacts involving the deceased, as a method of curating his or her reputation, even to the point of limiting critical speech).

129. O’Hare & Smith, *supra* note 128, at 68–69; Gasaway, *supra* note 127, at 293. The Association of Research Libraries has even promulgated model deeds of gift for academic libraries to use in accepting donations to their special collections and archives. See RLI 279, *supra* note 126, at 5–9.

130. O’Hare & Smith, *supra* note 128, at 73. In addition to an occasional “lack of good sense,” the behaviors that may have led to the accumulation of material without clear understanding of its provenance include “irregular documentation systems, heavy reliance on volunteer labor, lack of tax law restrictions and general lack of litigiousness, and sometimes-excessive collegiality with donors and board members.” *Id.* at 76.

adhere to a donor's wishes when they seem to interfere with the best interests of the institution?"<sup>131</sup>

A common basis for donor and library staff concerns or objections is rooted in copyright law.<sup>132</sup> The 1976 Copyright Act makes clear that transfer of a physical object containing a copyrighted work does not convey ownership of the copyright, which can only be transferred by a signed writing.<sup>133</sup> The institution may come to own the object through a deed of gift, but acquisition through donation does not mean the institution automatically owns any copyright in the donated object. This distinction provides sufficient room for worry and contention in subsequent years, particularly if the deed of gift makes no reference to intellectual property rights.<sup>134</sup> Does the institution, as owner of the object, enjoy an implied license to display the work online or lend it widely to patrons at other institutions? Doubts over questions like these tend to be resolved in a conservative fashion, with institutions declining to make the object as widely accessible as they would otherwise be permitted if they were certain about the nature of any copyright in the object. As one librarian concluded in 2012, there is a "reluctance to undertake digitization projects because of uncertainty, and a tendency to select only the safest and

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131. Patricia Cohen, *Museums Grapple With the Strings Attached to Gifts*, N.Y. TIMES (Feb. 4, 2013), <http://www.nytimes.com/2013/02/05/arts/design/museums-grapple-with-onerous-restrictions-on-donations.html>. On the one hand, institutions do, or should, want to increase access to these materials; on the other hand, "[d]onors who were willing to allow access to materials in a controlled setting could be taken aback by the trajectory of increased access." Peter B. Hirtle, Anne R. Kenney & Judy Ruttenberg, *Digitization of Special Collections and Archives: Legal and Contractual Issues*, 279 RES. LIBR. ISSUES: A Q. REP. FROM ARL, CNI, & SPARC 2, 2 (2012).

132. Another basis for objection is that the institution's use of the object violates donor-imposed access restrictions, which can be served to limit the public's access to the objects. Common restrictions of this sort include dictating who can access the gift, requiring a vetting process for access, or even embargoing access to the gift by anyone other than library staff for a period of years. Although institutions often defend their agreement to these terms on the basis of wishing to respect donors' wishes and privacy, these practices can work to the advantage of donors – who can receive tax benefits for their donations – at the expense of the public.

133. See Copyright Act of 1976, 17 U.S.C. § 202 (2012) ("Transfer of ownership of any material object . . . does not of itself convey any rights in the copyrighted work embodied in the object . . ."); *id.* § 204(a) ("A transfer of copyright ownership . . . 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."). Were the law otherwise, purchasing a book would make the purchaser owner of the copyright to the work contained in the book.

134. Additional concerns exist for donated objects that predate 1978 that were unpublished and unregistered at the time of donation – two facts that may themselves be difficult to determine. Some of these works entered the public domain on January 1, 2003. See § 303. Others of these works, if they were published on or before December 31, 2002, are protected by copyright until December 31, 2047, or seventy years after the death of the work's author, whichever is greater. *Id.*

most homogenous collections” for digitization.<sup>135</sup> This reluctance leads many to avoid undertaking digitization projects that would benefit the scholarly community, instead opting to pursue safe projects that bring little risk, but arguably less value, to the knowledge commons.<sup>136</sup>

Library staff may also feel compelled to balk at certain uses of an object, or information contained in an object, even if the institution does not own copyright in it. These objections may stem from a misunderstanding of copyright, feeling a need to comply with donor wishes or restrictions, or simply desiring to control uses of an object.<sup>137</sup> For example, in 2014, the special collections library at the University of Arkansas attempted to block a local newspaper from accessing the university’s special collections.<sup>138</sup> This action accompanied a claim by the university’s librarian that the newspaper had violated the university’s intellectual property rights by publishing a story based on audiotapes held in the university’s archives.<sup>139</sup> The audiotapes in question contained interviews of Hillary Clinton, and the newspaper had used the recordings to report information about the politician that her supporters found unflattering.<sup>140</sup> When the newspaper challenged the university’s action, the university admitted that it actually did not hold copyright in the audiotapes, and, in fact, the copyright holder (a veteran Arkansas news reporter) did not object to the audio excerpts being published.<sup>141</sup>

Aside from occasional misunderstandings of copyright law or willful decisions to ignore it, institutions also face mounting obstacles from heirs and estate administrators who seek to enforce draconian copyright provisions of the decedent’s bequest. These same individuals may try to exploit ambiguities in the relevant documentation in order to prevent institutions from providing full and unfettered access to their special collections. Some wealthy institutions like Yale University are willing to expend significant staff time and resources to digitize old works – such as 16mm and 35mm films and audio tracks on magnetic reels – even when the institution does not

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135. Kevin L. Smith, *Copyright Risk Managements: Principles and Strategies for Large-Scale Digitization Projects in Special Collections*, 279 RES. LIBR. ISSUES: A Q. REP. FROM ARL, CNI, & SPARC 17, 17 (2012).

136. *Id.*

137. See Gasaway, *supra* note 127, at 296 (“The donor may place restrictions on use of the work even if the copyright is transferred to the library. For example, in order to acquire the item, often libraries and archives agree to restrictions such as not making the work available for a certain number of years. The same is true for acquiring the copyright in a work. Although normally the owner of the copyright has all of the exclusive rights, the library may agree to refrain from exercising certain rights for an agreed period of time.”).

138. Alana Goodman, *Unconditional Surrender*, WASH. FREE BEACON (Aug. 4, 2014), <http://freebeacon.com/issues/unconditional-surrender/>.

139. *Id.*

140. *Id.* The interview in question involved her first-person account of her role as a defense attorney representing an alleged child rapist in 1975. *Id.*

141. *Id.*

enjoy copyright in those works, and the donor's estate will not permit the institution to make those newly digitized materials available online.<sup>142</sup> Institutions with fewer resources may not be able to take these steps at all, or they may feel that the terms of the donor's gift prevent them from doing so.<sup>143</sup> Despite the existence of technology that could protect special collections material from degradation and enable wide access to these materials online, most collections remain in print format only.<sup>144</sup> Even a Yale librarian confessed recently that much of what Yale owns is in print form, in part because Yale owns a lot of special collection material, and "[i]t's going to take a long time to digitize everything."<sup>145</sup>

Capacity to digitize aside, the copyright ownership question often obstructs institutional efforts to make their special collections holdings widely available. In instances where the quality and longevity of the physical object may be at risk, one would hope that the object could be digitized, preserved, and made readily accessible. But the copyright ownership question can work to place the onus of preservation on institutions without providing immediate and concomitant benefit to the public. Patrons can experience these collections in person, but full access for anyone with an Internet connection may be a long time coming, given the duration of copyright law.<sup>146</sup> Indeed, donor restrictions imposed by contract can even outlast the term of copyright, potentially hamstringing institutions' abilities to provide wide access to works that otherwise should be within the public domain. These challenges may cause institutions only to prioritize digitization of works that are clearly in the public domain.<sup>147</sup>

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142. See Joe Amarante, *Yale Project Preserving Benny Goodman Film and Audio*, NEW HAVEN REG. (July 15, 2015), <http://www.nhregister.com/arts-and-entertainment/20150715/yale-project-preserving-benny-goodman-film-and-audio>.

143. Cf. Associated Press, *University of Texas Settles Olympic Lawsuits*, WASH. TIMES (Sept. 3, 2014), <http://www.washingtontimes.com/news/2014/sep/3/university-of-texas-settles-olympics-lawsuits/> (describing how the University of Texas canceled a plan to borrow, catalog, and digitize a massive archive of Olympic records after it grew concerned about copyright restrictions).

144. *Id.*

145. Amarante, *supra* note 142.

146. For works created by individuals after January 1, 1978, copyright protection lasts for the lifetime of the author plus seventy years. See Copyright Act of 1976, 17 U.S.C. § 302(a) (2012). For published works of corporate authorship, the duration of copyright is ninety-five years from the date of publication, or 120 years from the date of creation, whichever occurs first. *Id.* § 302(c).

147. See, e.g., Joshua Bolken, *UCLA's Clark Library Wins Digitization Grant*, CAMPUS TECH. (Jan. 6, 2016), <https://campustechnology.com/articles/2016/01/06/uclas-clark-library-wins-digitization-grant.aspx> (noting UCLA's receipt of a grant from the Andrew W. Mellon Foundation to digitize English manuscripts from the seventeenth and eighteenth centuries). Indeed, the majority of the digitization projects funded by the Mellon Foundation in 2015 in its "Digitizing Hidden Special Collections and Archives" awards program involved public domain works. See *2015 Funded Projects*,

The existence and continued growth of valuable special collections in academic libraries across America challenges higher education's ability to fully serve the public. Copyright restrictions and institutions' commitments to donors over the public all too often stand in the way. Library special collections hold vast potential to fuel the productive trends discussed in Parts II.A and II.B, if only we shape the law to allow for such activity. Faculty, like Abraham, are the very people who should be turning to special collections, so new generations of students, scholars, and the public may access their holdings in modern formats. Engaging in digital humanities scholarship and projects involving these works is a leading method to ensure such access. Entrepreneurial students themselves could even be enlisted in these efforts.

Colleges and universities should view facilitation of faculty and student access to special collections material as within their educational and research missions. If a goal of higher education is to serve as an open and robust site of culture and knowledge, then scholars, students, and library staff must be permitted – even encouraged – to use digital tools to help bring special collections material out of the bowels of libraries and into the public domain online, for all to access and learn from.

### III. TOWARD REALIZING HIGHER EDUCATION'S POTENTIAL AS A ROBUST CULTURAL AND KNOWLEDGE COMMONS

The modern college and university campus holds great potential to serve as a robust cultural and knowledge commons, where students, faculty, and staff freely interact with each other and information resources in ways that lead to the creation of new forms of scholarship and knowledge for the benefit of social and economic development.<sup>148</sup> Society's trust in higher education hinges on the sector making these contributions and privileging the commons over institutional or private pecuniary gain.

Yet despite higher education's promise as a cultural and knowledge commons, copyright law and related campus policies often frustrate student and faculty innovation, impeding the flow and diminishing the value of cultural and knowledge outputs to society. Instead of finding higher education as a site of unfettered intellectual vibrancy, many students have come to realize that their own college or university views their work product as subject to institutional or third-party ownership. Faculty face similar issues, as lack of policy clarity or institutional overreach undermine what should be regarded as clear rights of ownership over faculty creations, whether curricular or not. Even a site of cultural and knowledge commons as essential as the campus

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COUNCIL ON LIBR. & INFO. RESOURCES,  
<http://www.clir.org/hiddencollections/awards/for-2015> (last visited July 17, 2016).

148. See Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *The University As Constructed Cultural Commons*, 30 WASH. U. J.L. & POL'Y 365, 379 (2009) (describing the university knowledge commons one "of enormous dynamism" for reasons such as these).

library is all too often highly regulated by copyright and related restrictions, preventing students and faculty from making full use of artifacts that should be viewed as common resources.

Turning back to the hypothetical vignettes that opened each section in Part II helps illuminate higher education's potential as a cultural and knowledge commons and clarifies the risk that the copyright ownership question poses to achieving it. Recall Abby, the law student who created a software app through exposure to people and ideas on the job in the campus library. Her campus should have no claim to owning any part of the software she creates, even though she receives a paycheck from the university and created the software through exposure to people and ideas the job provided her. Chilling students' inventive and entrepreneurial impulses by clouding ownership claims to their intellectual output transforms higher education into a competitive and closed sphere, where exposure to any campus resource becomes laden with potential rights claims by the institution itself. This guarded atmosphere invariably invades the classroom, as Part II.A discussed in relation to corporate sponsorship of courses, sending students the message that all spaces within higher education are subject to rights contests, pitting students against the very entities they are paying, and entrusting, to provide them with an education.

The digital technologies vignettes involving Abraham and Paulo also paint a distressing picture of the constraining space available for creative freedom and exchange in higher education when the copyright ownership question goes unaddressed or invariably resolved in favor of the institution. Receiving a summer research grant, creating a project with utility for teaching and scholarship, or using campus equipment and resources should not provide a college or university a hook on which to hang a copyright ownership claim. Faculty should be free to pursue research interests and digital commercialization opportunities wherever they may lead, without fear of inciting an ownership contest from their institution once a project proves popular or successful. Society benefits when the intellectual talent that is the *raison d'être* of higher education can fully deploy that talent in digital projects accessible to wide audiences, free of institutional ownership claims.

Students and faculty, as core members of the higher education community, enjoy the freedom and the obligation to use artifactual resources for the benefit of humanity, and donors give valuable objects to higher education so society may benefit from them. Library special collections exist as a form of in-house expertise that should be freely available for mining and use by higher education's privileged members, whose job it is to make knowledge come alive for the world. Wherever possible, institutions should be prohibited from erecting or observing discretionary copyright barriers in artifactual resources, so scholars like Abraham and Paulo may bring special collections materials out into the open. The concept of higher education serving as a fount of knowledge, and not just a warehouse of it, requires that students and faculty enjoy near unencumbered ability to deploy institution-owned information for society's benefit.



Each of the three vignettes discussed above raises 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.

Making good on higher education's promise as a cultural and knowledge commons is possible, but it will require implementing new copyright rules and norms that champion openness, individual agency, and creative freedom over institutional rights staking, obfuscation, and restriction. The difficulty of this proposition lies in instilling institutional commitment to commons qualities and practices that run counter to copyright activity outside of higher education, where everything intangible that is ownable tends to be owned.

This Article next addresses the question of what should be owned, and even ownable, in the cultural and knowledge commons of higher education.<sup>149</sup> The ownership question in higher education must evolve to adequately address the student entrepreneurship, digital humanities, and special collections trends discussed above in Part II. This Article argues that these questions must be answered definitively in favor of students, faculty, and ultimately, the public.

As a general matter, this Article advocates that the law should prohibit institutions from: (1) laying claim to the copyrightable works authored by their students, and allowing third parties to extract copyright assignments from students as a condition of their enrollment in or completion of a course; (2) laying claim to the copyrightable scholarly works of their faculty, including courses and course components, unless the faculty member voluntarily signs an assignment agreement with the institution before the work's creation; and (3) receiving owned artifacts from donors unless the donor agrees in writing that: (a) by donating the owned artifact to the university, the donor is relinquishing any copyright claim the donor may have in the work; (b) the donee institution will make no copyright claim in the work or derivatives of it; and (c) both the donor and the donee intend for the work to enter the public domain, to the extent that copyright in it is not owned by a third party.

These proposals are similar in that each envisions higher education as a special commons, deserving of exceptional treatment as a matter of law and policy, to benefit society. The first two proposals recognize the unique capacity of students and faculty to engage in creative undertakings that can benefit society, particularly through the use of new technologies. Potential copyright claims by colleges and universities should not challenge the public's benefit from these activities. The third proposal seeks to remove access barriers that copyright can impose on resources that should be freely available for public benefit and use. None of these three proposals are without contro-

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149. *Cf. id.* at 403 (“The issue is not whether to use law and policy to promote creativity and innovation, but precisely how to do so.”).

versy, but each would ensure that college and university campuses realize their potential as sites of vibrant discourse and largely unencumbered innovation, distinct from other areas of the cultural environment where restrictions and ownership claims abound.<sup>150</sup>

The prohibitions proposed could be effectuated in one of two ways: as a matter of law, by congressional amendment of the Copyright Act and the Higher Education Act, or as a matter of policy, by voluntary collective action. While the former would be more effective in shaping the campus commons – for example, federal funding could be denied to any institution failing to comply with these new laws – mobilizing Congress around these issues is a fickle proposition. In a time when lawmakers and governing boards are pressuring colleges and universities to generate revenue from all possible sources, the nature of this Article’s proposals (i.e., requiring institutions to relinquish ownership claims that might have private value to the institution) may mean that the proposals would have few natural champions in the halls of Congress.

The latter course of action would be easier to implement but, of course, would come with its own limitations. Organizations like the Association of University Technology Managers (“AUTM”), the American Association of University Professors (“AAUP”), or the American Council on Education (“ACE”) could spearhead these changes, but any policies or best practices that come from the effort would only be hortatory.<sup>151</sup> Individual campuses

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150. *Id.* at 372 (“Importantly, commons do not simply happen. Commons are constructed by human actors and institutions, acting intentionally.”).

151. The AAUP is an advocacy group dedicated to championing the professional interests of college and university faculty. *Mission*, AM. ASS’N U. PROFESSORS, <https://www.aaup.org/about/mission-1> (last visited July 22, 2016). ACE is an omnibus higher education advocacy group, and AUTM is the professional organization for individuals involved in academic technology transfer. *About*, AM. COUNCIL ON EDUC., <http://www.acenet.edu/about-ace/Pages/default.aspx> (last visited July 22, 2016); *Vision, Mission, & Values*, ASS’N U. TECH. MANAGERS, <https://www.autm.net/autm-info/about-autm/vision,-mission-values/> (last visited July 22, 2016). All three organizations have experience staking policy positions for their constituents and members, including on issues involving student intellectual property. *Intellectual Property: An Education & Action Toolkit*, AM. ASS’N U. PROFESSORS, <https://www.aaup.org/get-involved/issue-campaigns/intellectual-property-risk> (last visited July 22, 2016). For example, in August of 2014, AUTM issued a white paper on managing student intellectual property issues in higher education. *See generally* Barrow et al., *supra* note 71.

The paper notes a lack of consensus among institutions regarding how to manage student intellectual property and recommends that “university IP policy, when it comes to students, needs to be carefully thought out, clearly worded, widely disseminated, and fair.” *Id.* at 2.

While AUTM’s white paper does a respectable job of raising awareness of key issues and presenting options for universities to consider in revising or promulgating intellectual property policies concerning students, the paper does little to advance the moral position that institutions should never claim ownership over student-generated works or inventions. Indeed, the paper contemplates that some institutions

would enjoy no tangible incentives by agreeing to these measures and may only be motivated by the intangible goodwill they each represent. They would be free to change course after agreeing to them or could never agree to them and effectively face no sanction.

The obstacles to implementation of these proposals are significant and real. But the focus of this Article is not on the how, but rather the why. The college campus needs to serve as a robust cultural and knowledge commons in order to maintain the public's trust, particularly in these times of diminished financial support and dwindling belief in the public purpose of higher education.<sup>152</sup> Fair use, while an important doctrine, does not go far enough – nor can it – in policing the lines between the kinds of intellectual goods that can be owned, and the kinds that should be owned, by institutions in higher education.

*A. Students Should Presumptively Own All of the Works That They Create as Students*

Silence or ambiguity on the applicability of institutional intellectual property policies vis-à-vis students should not be an invitation to claim ownership, or even co-ownership, of their works. Nor should student use of any university resource, participation in any sponsored project or competition, or receipt of any financial support from the institution result in an ownership claim by the institution or third party. Students attend colleges and universities and pay a hefty price for the experience, in part to receive exposure to substantial resources in many forms: expensive and elaborate equipment, specialized software, rare and valuable cultural objects, and leading experts in a number of fields. They may also expect to participate in institution-sponsored contests or events and to apply for and receive funding in recognition of their scholarly and extra-curricular pursuits. Exposure to these types of resources, and participation in these types of opportunities and events, should be seen as part of the experience of higher education, not as interactions that may open the door to ownership claims by institutions themselves.

To eliminate any doubt about these matters, institutions must be committed and bound, whether by law or policy, to allow students to own all of

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will seek to claim ownership of student works and inventions as a means of generating revenue. *Id.* at 2, 4.

By way of comparison, the AAUP's position on such matters is much more pro-student. See *Defending the Freedom to Innovate: Faculty Intellectual Property Rights after Stanford v. Roche*, AM. ASS'N U. PROFESSORS 17 (June 2014), [http://www.aaup.org/sites/default/files/files/aaupBulletin\\_IntellectualPropJune5.pdf](http://www.aaup.org/sites/default/files/files/aaupBulletin_IntellectualPropJune5.pdf) (advocating that institutions adopt handbook language to the effect that “[s]tudents will not be urged or required to surrender their IP rights to the university as a condition of participating in a degree program”).

152. See generally SHEILA SLAUGHTER & GARY RHOADES, *ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION* (2004) (detailing the erosion of public support for, and trust in, higher education).

what they create as students, whether in the classroom, through exposure to university resources (“substantial,” “significant,” or otherwise), or on their own time. Furthermore, any time an institution employs a student, the presumption should be that nothing the student creates while a student is work made for hire, or otherwise subject to claims by the institution, unless the parties have entered into a signed agreement before the employment begins that specifies otherwise. Referencing by incorporation standard policies should not be a method by which to claim work generated by employed students as work made for hire.

Additionally, institutions should stop requesting, requiring, suggesting, or presenting as an option that students waive, assign, or constrain their intellectual property rights as the price of admission to a course, whether mandatory or elective. Students should never feel like they must hold back their ideas, lest their institution or an outside sponsor try to claim them. Institutions should be prohibited by law or policy from permitting companies to extract these types of agreements from students as part of their coursework. If fewer companies are willing to sponsor course problems and capstone courses because of this prohibition, so be it.<sup>153</sup> The public-serving nature of higher education breaks down when institutions willingly permit students in the classroom to become a captive source of free labor for companies.<sup>154</sup>

Having faculty tell students that they can or should consult an attorney, proactively drafting contracts to “agree to their roles,” or requiring that they actively acknowledge or sign their institution’s intellectual property policy each semester have all been suggested as potential ways to clarify the ownership question as applied to students.<sup>155</sup> None of these suggestions are a good

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153. Higher education should be viewed primarily as an academic experience subject to professional judgment, not formalized job training subject to the pressures and desires of financial interests. To the extent that corporate concerns are destined to influence curricular matters, society should first look to vocationally-focused community colleges – not four-year undergraduate programs at colleges and universities – as more suitable environments for corporations to seek to capitalize on student labor. Conceptions of education in service of job readiness, workforce development, and regional economic growth are firmly rooted at such institutions, by design, unlike four-year institutions that emphasize liberal arts education.

154. Potential student complaint – e.g., “We want jobs from the company, so having to sign away our intellectual property rights is better than not having the company in the classroom at all!” – is no reason to discount this proposal. Students often individually seek treatment or dispensations, from faculty or administrators, that are not in the collective long-term interest of all students, let alone the institution or the public. If faculty cowed to every student wish, there would be no exams and no grades in most courses offered in higher education.

155. See, e.g., Barrow et al., *supra* note 71, at 11 (“[W]hen students register for classes, the student IP policy could pop up similar to an end-user licensing agreement, which must be read and clicked on before the student navigates away from the page.”); Luppino, *supra* note 12, at 427 (suggesting language that faculty could add to their syllabi, telling students “it may be in your best interest to obtain . . . legal advice as soon as possible”), 419 (suggesting that more attorneys should be drafted to pro-

idea, as none go far enough to protect what should be viewed as inalienable student rights. Placing on students the burden of understanding or engaging in sharp contract negotiation is not a solution, as either encumbrance entails the continued existence of a mishmash of policies, the application of which may hinge on definitional interpretations, slippery factual variances, and differing interpretations across institutional stakeholders. For higher education to fulfill its valuable purpose as a knowledge commons, we must conceptualize the experience as a site of transformative, unfettered intellectual exchange, not a prelude to a rights contest or a power grab.

Also insufficient is any suggestion that individual faculty can be trusted to keep these onerous agreements out of their classrooms. In several disciplines, faculty come from industry and intend to return to industry, making it unlikely that they will zealously guard the intellectual freedom of their students when a corporate sponsor stands ready to provide data and information in exchange for copyright assignment or licensing agreements. In-house counsel can only do so much to educate faculty about the pitfalls of these arrangements, particularly when faculty can be expected to quickly claim academic freedom in defense of these corporate relationships.

All of these issues point to the need for legislation or collective action that would definitively remove any doubt concerning the ownership of works created by non-employee students and most doubts even about those works created by employed students within the scope of their employment. This proposal would help ensure that student entrepreneurship can continue to flourish on campus, as it would remove any seeds of doubt that students and prospective investors in student startup companies otherwise might have concerning the copyright claims of the student's college or university. The legal presumption should be that colleges and universities never own copyright in student work. The rare exception should be when institutions have entered into an explicit, individualized employment contract with a student, clarifying that specific works created while the student is an employee shall be work made for hire. Absent such an agreement, entered into before the student creates any work of interest to the institution, colleges and universities should not be permitted to do anything to unsettle student ownership claims over their own creative works.

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vide *pro bono* legal services to students, potentially under the auspices of law school clinics); HERRINGTON, *supra* note 16, at 41 (suggesting that “[t]o clarify work arrangements between and among students, their professors, and institutions, it is wise for all parties to create and agree to their roles through contracting, so that all participants in endeavors to develop intellectual products clearly understand who controls the rights to intellectual products and to whom product development will be attributed”).

*B. Faculty Should Presumptively Own Nearly All of the Works That They Create as Faculty*

Institutions' intellectual property policies often are confusing. Critical terms like "substantial use," "courses," and "traditional scholarship" evade easy or even comprehensive definitions amidst rapidly developing new technologies. And while most would agree that faculty scholarship falls within the work-made-for-hire doctrine, even institutional policies that purport to bestow faculty with copyright in their scholarly works do not comply with the letter of copyright law, which requires signed copyright transfer agreements.<sup>156</sup> Meanwhile, developments like digital humanities are upending our historical understanding of the kind of scholarly work in which academics engage.

Faculty pursuit of new modes of research, teaching, and scholarship should not be chilled due to antiquated policies that fail to fully consider or adequately address the copyright ownership question in these new contexts. 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 into 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.<sup>157</sup>

At the same time, most institutions are savvy enough and possess enough administrative staff to determine which faculty have the capacity or interest to create special copyrightable works that the institution might feel it should own or co-own, given the investment in institutional resources required to enable creation or preservation of those works. Indeed, institutions have shown sensitivity to profit potential in the context of massive open online courses (so-called "MOOCs"), as well as distance learning more broadly, by seeking and obtaining from faculty copyright assignments in many of those contexts, or at least clearly defined licensing rights that enable the institution to continue to offer the MOOC even if the professor who creates it leaves the institution.<sup>158</sup> Accordingly, if an institution has a particular financial interest in the work or research and teaching agenda of a given faculty member, the burden should be on the institution to obtain an individually

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156. See Copyright Act of 1976, 17 U.S.C. § 204(a) (2012) ("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.").

157. See also Crews, *supra* note 9, at 19 (calling reliance on the teacher's exception to the work-made-for-hire doctrine "simply too elusive for educators and universities to rely upon").

158. Carl Straumsheim, *When MOOC Profs Move*, INSIDE HIGHER ED (Mar. 18, 2014), <https://www.insidehighered.com/news/2014/03/18/if-mooc-instructor-moves-who-keeps-intellectual-property-rights> (describing the copyright ownership question between institutions and faculty in the context of MOOCs).

tailored copyright assignment or licensing agreement from the faculty member in advance of the work's creation.

This proposal would do nothing to disrupt the presumption that institutions own copyright in the works that they assign faculty members to create as part of their job duties – for example, self-study reports, committee notes, and other creative works that faculty commonly create in carrying out their service functions to the institution. However, any other creative work authored by a faculty member would be presumptively owned by the faculty member, unless an institution could produce an individualized and signed copyright transfer agreement between it and the faculty member concerning the work in question. Any attempt to assign a work after its creation would be presumptively null and void.<sup>159</sup>

This proposal would eliminate any need for faculty to seek assurances of their creative rights with the institution. No one would ever toil over determining whether certain uses of campus equipment or resources brought the faculty's work within the institution's ownership claim, which otherwise happens with all too much frequency, particularly as institutions continue to tweak wording in their intellectual property policies to make them ever broader in scope.<sup>160</sup> And it would also diminish the possibility that, when students and faculty work together on projects, the institution and the student could end up as co-owners of any resulting copyright.

The proposal, of course, is a form of academic exceptionalism and not unlike similar suggestions made by academic commentators dating back to the 1980s.<sup>161</sup> But the reasons for implementing such a change are stronger now than they were then. Faculty today have more tools at their disposal for scholarly and curricular innovation. As Part II.B explored, innovations like digital humanities hold great promise for revolutionizing how students, faculty, and the world consume and engage with scholarship. For these efforts to fully bear fruit, faculty creativity and the impulse to innovate must not be dampened by copyright concerns brought on by a kaleidoscope of policy con-

159. Otherwise, once alerted to the commercial potential of a faculty member's creative work, the institution could demand a transfer of the copyright at the expense of the faculty member's job (for untenured faculty), or threaten or carry out other forms of retribution.

160. See, e.g., Colleen Flaherty, *Rights to Scholarly Work*, INSIDE HIGHER ED (Mar. 26, 2015), <https://www.insidehighered.com/news/2015/03/26/ohio-state-faculty-object-draft-intellectual-property-policy> (describing faculty uncertainty and consternation at The Ohio State University resulting from proposed changes to the institution's intellectual property policy specifically related to copyright); Andy Thomason, *Pitt Professors Are Wary of Signing Away Intellectual-Property Rights*, CHRON. HIGHER EDUC.: THE TICKER (Sept. 11, 2014), <http://chronicle.com/blogs/ticker/u-of-pittsburgh-professors-are-wary-of-signing-away-intellectual-property-rights/85905>.

161. See, e.g., Leonard D. DuBoff, *An Academic's Copyright: Publish and Perish*, 32 J. COPYRIGHT SOC'Y 17, 34–37 (1984) (suggesting inserting an exception for academic professionals into the language of the work-made-for-hire statute).

siderations 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.

*C. The Public Should Enjoy Unfettered Use of Special Collections Material, Free from Copyright Claims Made by Donors or Institutions*

Some who donate to special collections wish to have their cake and eat it, too. On the one hand, they hope or plan to benefit from generous tax laws that can provide financial benefits to those who make these kinds of donations.<sup>162</sup> On the other hand, they often seek to tie the hands of recipient institutions, burdening them with custodianship responsibility but limiting who can access the work and how it may be used, for the duration of the copyright or longer. Even if the donor makes no copyright claim in the donated work, the recipient institution might claim copyright. For example, some institutions seek transfer of the copyright from the donor to the institution in the deed of gift, or inappropriately claim copyright in slavish copies of the donated objects that the institution makes for purposes of preservation or archival.<sup>163</sup> Higher education's potential to serve as a vibrant cultural and knowledge commons is threatened when these actions occur. And yet the prospect of profit, and the human inclination to want to control artifacts instead of release them, leads to these actions happening commonly.<sup>164</sup>

Student, faculty, and staff creativity involving special collections material is of institutional value and should be encouraged. To that end, law or policy should prohibit academic libraries from: (1) accepting gifts in which

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162. Tax deductions are subject to extremely complicated rules. If the donated property is considered long-term capital gain property to the donor, the donor may be entitled to a charitable contribution deduction equal to the value of the donated property. However, if the donated property does not qualify as long-term capital gain property, the deduction is limited to the donor's basis, which is typically the donor's cost. *See generally* 26 U.S.C.A. § 170(e)(1) (West 2016). Furthermore, the charitable contribution deduction is completely disallowed if the donor gives less than his entire interest in the property and fails to satisfy certain extremely technical rules. *See id.* § 170(f)(3)(A). For example, if a donor owns both the copyright and the donated property and fails to donate the copyright, the deduction is denied because the donation is treated as a gift constituting less than the donor's entire interest. *Id.* Because colleges and universities have no obligation to report these details to the federal government, the possibility exists that donors take different positions depending on the audience – i.e., claiming full deductions for their donations, yet insisting on imposing restrictions on the donated objects in their interactions with donee institutions and even threatening to withhold future donations as a method of ensuring compliance with their wishes.

163. *See* Gasaway, *supra* note 127, at 295 (describing why libraries may wish to hold copyright in donated works).

164. *Id.*



the donor claims copyright or seeks to impose analogous access and use restrictions and (2) claiming copyright in the donated materials or any derivatives of them, whether prepared by library staff, faculty, or students. While this proposal would not address or prevent colleges and universities from accepting objects whose copyrights are owned by third parties, or prevent them from accepting objects whose copyright status is unknown, at least it would eliminate an irksome and inappropriate barrier to what otherwise could be free and unfettered use of these donated objects.

This proposal is limited by design. It would do nothing to unsettle or transfer copyrights in, for example, books donated to academic libraries by publishers, corporations, alumni, or anyone else. Those copyrights would continue to rest with the books' publishers or authors. The proposal would, however, prevent a famous alumnus, or his estate, from restricting access to and use of his personal papers once donated to his alma mater. The proposal would also prevent the alma mater from asserting similar rights on the basis of its ownership of the papers.

This proposal would be a boon to faculty and students, who could use unrestricted works in campus collections in new ways – for example, by creating apps involving them, incorporating them into online courses, and making them accessible to the world through digital humanities projects. Fair use should not have to be stretched to its limits to create a robust cultural environment on campuses. This proposal would help recalibrate our starting premises of what is available for cultural use in campus libraries and firmly situate higher education as the leading location of the public domain.

One criticism of the proposal is that it risks saddling colleges and universities with maintenance, preservation, and attendant staff costs while opening the possibility that others – namely faculty and students – could enrich themselves by using their institution's special collections. This is a fair criticism, and one that prompts reflection over the degree to which society truly expects higher education to serve as an open site of culture and knowledge. Meriting further investigation is the extent to which new donations affected by this proposal would result in institutions incurring any additional costs, or whether sunk costs could cover these activities. Regardless, this criticism alone is no reason to shelve the proposal. If data show the anticipated costs of special collections maintenance and preservation are likely to increase, the increase could easily be offset by instituting a compulsory royalty payment that would require anyone turning a profit from special collections material to return a set percentage of revenue back to the institution that owns the artifacts. Copyright law already contains provisions outlining how to handle compulsory or negotiated royalty payments in other industries impacted by copyright law, such as the music industry, and no reason exists to think that this same concept could not be deployed with success in the higher education special collections context as well.<sup>165</sup>

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165. See 17 U.S.C. § 115 (describing compulsory license and royalty payment scheme in the context of non-dramatic musical compositions); *id.* § 116 (describing

Another criticism of the proposal is that it could result in fewer donations of valuable objects to academic libraries. Put off by the immediate open access a donation to an academic library would entail, a famous person's estate could decide to withhold the donation. That possibility provides no reason to justify blocking implementation of the proposal. Academic libraries were never designed to be locked warehouses where no patron can venture, lest she unsettle the copyright interests and other onerous claims of donors and even institutions themselves. The public should not have to wait decades to receive the benefit of donations that many donors are benefitting from in the present, in the form of tax incentives. If prospective donors would prefer to hold, store, and preserve their valuable materials privately, in order to fastidiously control access, then let them. The cultural and knowledge commons in higher education suffers less from donations withheld than from donations given that come burdened and restricted by excessive rights staking.

We must keep in mind that higher education stands to offer something invaluable to prospective donors in exchange for gifts to special collections: public access to materials that can bring enduring life, meaning, and memory to the donor or decedent. That is, after all, why college and university libraries enjoy lasting value as sites of commons. Most prospective donors, whatever their valuable collection, would rather be publicly remembered than privately forgotten.

#### IV. CONCLUSION

Copyright in higher education is inextricably tied to the sector's capacity to serve the public by existing as a site of profound cultural and scientific importance. This Article explored the parameters of higher education's function as a cultural and knowledge commons, using as a lens three new trends involving creativity on campus. While policymakers often expect colleges and universities to be more entrepreneurial, the complicated overlay of copyright law and policy in higher education prevents many students and faculty from realizing the full potential of creative entrepreneurship and scholarship. And despite serving as treasure troves of cultural artifacts of long-term importance, libraries on many campuses are unable or unwilling to permit their patrons to take full advantage of their special holdings due to concerns and uncertainties involving copyright.

Higher education faces distinct pressures in the knowledge economy, one of which is to generate revenue from seemingly any source possible. But to fully serve as a cultural and knowledge commons – a site marked by sharing, openness, and resource availability, distinct from the world of commerce – will require that institutions curb their impulses to profit from the creative works of their faculty, students, and donors.

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negotiated license scheme for copyright owners and operators of coin-operated phonorecord players).

The copyright ownership question looms large in the current higher education climate, yet few scholars and institutions appear to be addressing that question with any sense of urgency or public focus. How we approach and answer that question must evolve if the modern campus, historically situated in the public sphere, is to realize its potential of serving as a constructed cultural and knowledge commons of transcendent value to us all.