

2016

# Who Owns This Article? Applying Copyright's Work-Made-for-Hire Doctrine to Librarians' Scholarship

Paul Hellyer

*William & Mary Law School*, [phellyer@wm.edu](mailto:phellyer@wm.edu)

---

## Repository Citation

Hellyer, Paul, "Who Owns This Article? Applying Copyright's Work-Made-for-Hire Doctrine to Librarians' Scholarship" (2016).

*Library Staff Publications*. 120.

<https://scholarship.law.wm.edu/libpubs/120>

Copyright c 2016 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/libpubs>

# Who Owns This Article? Applying Copyright’s Work-Made-for-Hire Doctrine to Librarians’ Scholarship\*

Paul Hellyer\*\*

*The Copyright Act of 1976 provides that works—including scholarship—written within the scope of employment belong to employers. But copyright law and actual practices widely diverge. The academic community generally allows librarians to claim ownership of their writing, even when that ignores copyright law. Mr. Hellyer supports copyright ownership by librarians, and calls for the law and common practices to be harmonized.*

Introduction ..... 33

Part I: The Work-Made-for-Hire Doctrine. .... 34

    Are Librarians Employees Under the Work-Made-for-Hire Doctrine?. .... 34

    Does “Scope of Employment” Include Scholarship? Consider Professors’ Scholarship ..... 35

    Does “Scope of Employment” Include Librarians’ Scholarship? ..... 39

    Applying the Doctrine ..... 43

        The Public Reference Librarian ..... 43

        The University Cataloger. .... 43

        The Tenure-Track University Reference Librarian ..... 44

        Who Owns This Article? ..... 44

Part II: Recognizing Ownership: The Practices and Policies of Libraries and Librarians ..... 45

    Intellectual Property Policies at ARL Universities. .... 45

    Copyright Notices in Librarians’ Articles. .... 50

    Submission Guidelines in Library Journals ..... 52

Part III: Librarians’ Scholarship Should Belong to Librarians ..... 53

## Introduction

¶1 Many librarians publish scholarship under the assumption that they own the copyright to their own work, but the ownership question is far from clear under copyright’s work-made-for-hire doctrine. Generally, employers own the copyright to any works written by their employees acting within the scope of their employment.<sup>1</sup> Commentators have closely examined the question of who owns

\* © Paul Hellyer, 2016. I am grateful to James S. Heller and Benjamin J. Keele for their helpful feedback.

\*\* Reference Librarian, William & Mary Law School, Williamsburg, Virginia.

1. See 17 U.S.C. §§ 101, 201(b) (2012).

scholarship written by professors, but the ownership of librarians' scholarship has been largely unaddressed. This omission is significant because librarians and professors are situated differently in the work-made-for-hire analysis.

¶2 In this article, I consider the copyright ownership of librarians' scholarship, such as books, articles, bibliographies, blogs, or other writings that are published for an audience beyond the librarians' home institutions.<sup>2</sup> I assume without discussion that materials written by librarians specifically for their libraries, such as content on a library's website, a collection development plan, or teaching materials, are works made for hire belonging to their employers.<sup>3</sup>

¶3 In the first part of this article, I present a legal analysis of the work-made-for-hire doctrine as applied to scholarship written by librarian employees. In part II, I review actual practices with respect to copyright ownership of librarians' scholarship and find that librarians' ownership is almost always recognized. In part III, I conclude that, as a matter of policy, librarians should own their scholarship in keeping with long-standing traditions.

### Part I: The Work-Made-for-Hire Doctrine

¶4 Two broadly worded sections of the Copyright Act outline the work-made-for-hire doctrine, supplemented by a large body of case law and secondary sources that interpret and apply the sections. Section 101 defines an employee's work made for hire as "a work prepared by an employee within the scope of his or her employment."<sup>4</sup> Section 201(b) provides that "in the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."<sup>5</sup>

¶5 Section 101 also recognizes that, for certain types of work, independent contractors may create works for hire, provided that the parties expressly agree to this in writing. Although librarians might create works as independent contractors, there should be no question as to who owns the resulting works because of the requirement for an express written agreement. Accordingly, this article focuses on the work-made-for-hire doctrine as applied to librarian employees.

#### Are Librarians Employees Under the Work-Made-for-Hire Doctrine?

¶6 In *Community for Creative Non-Violence v. Reid*, the U.S. Supreme Court established that the usual law of agency determines whether someone is an employee for purposes of the work-made-for-hire doctrine.<sup>6</sup> *Reid* establishes that,

---

2. I use the term "scholarship" in a broad sense. My use of the term does not necessarily denote quality (as quality would be irrelevant to the work-made-for-hire doctrine), but rather it refers to any copyrightable contribution to an academic field.

3. I also assume without discussion that librarians' fiction, poetry, or other writings unrelated to their professional field and written at home are not works made for hire.

4. 17 U.S.C. § 101.

5. *Id.* § 201(b).

6. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989).

for purposes of copyright law, most librarians are employees, and their libraries or parent institutions are their employers.

¶7 For the small number of librarians who are unsure whether they are employees or independent contractors, we turn to the factors set forth in *Reid*. In that case, a nonprofit organization that served the homeless hired a sculptor to create a sculpture, and the parties later disputed the copyright ownership of the resulting work. In deciding that the sculptor was not an employee, the Supreme Court identified the following factors, none of which is determinative on its own:

[W]e consider the hiring party's right to control the manner and means by which the product is accomplished . . . [;] the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.<sup>7</sup>

Because the Court found that the sculptor was not an employee, it did not reach the scope-of-employment question.

### Does "Scope of Employment" Include Scholarship? Consider Professors' Scholarship

¶8 For most librarians, the key question is not whether they are employees but whether their scholarship fits within the scope of their employment. In deciding whether a work falls within the scope of employment, the main factors are derived from the Restatement of Agency.<sup>8</sup> They are (1) whether it is the kind of work the employee is employed to perform; (2) whether the work is done substantially within authorized work hours and space; (3) whether the work is actuated, at least in part, by a purpose to serve the employer; and (4) whether the employee is acting while subject to the employer's control or right to control.<sup>9</sup>

¶9 I found no cases or secondary sources that closely examine the application of these factors to librarians' scholarship.<sup>10</sup> But a large body of work discusses whether professors' (sometimes referred to under the broader term "academics") scholarship are works made for hire, and these analyses are a useful starting point.

---

7. *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958)).

8. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.03[B][1][b][i] (2015) (citing RESTATEMENT (SECOND) OF AGENCY § 228 (1958)).

9. RESTATEMENT (SECOND) OF AGENCY § 228. The first three factors are in the main text of the section, while the fourth factor is referred to in comment b, which states: "As stated in Section 220 [of the Restatement (Second) of Agency], one is a servant only if, as to his physical conduct in the performance of the service, he is subject to the control or to the right to control of the master." The control factor is frequently cited in cases and secondary sources that discuss the work-made-for-hire doctrine, so I consider it as important as the other factors.

10. Laura Gasaway briefly considered this question in a 2003 article, but more from a policy perspective than a legal one. She wrote that librarians should own their scholarship the same way that teaching faculty do, pursuant to their employers' policies. Laura N. Gasaway, *Copyright Ownership and the Impact on Academic Libraries*, 13 DEPAUL-LCA J. ART & ENT. L. 277, 284-87 (2003).

¶10 Before applying the usual work-made-for-hire rules, we should consider the so-called academic exception or teacher exception. This putative legal rule predates the 1976 Copyright Act and holds that an academic's writings are not works made for hire, even if they are written within the scope of employment.<sup>11</sup> In other words, this rule purports to override the work-made-for-hire doctrine altogether with respect to academics. Little legal authority supports this academic exception,<sup>12</sup> and scholars differ on whether it survived the Copyright Act of 1976, which does not recognize it.<sup>13</sup> Other than dicta, no appellate court has recognized the academic exception since the 1976 Act,<sup>14</sup> and a district court that closely considered the matter in 2010 held that it did not survive.<sup>15</sup>

¶11 My view is that the academic exception did not survive the 1976 Act.<sup>16</sup> It cannot be reconciled with the plain text of the Act, which establishes one work-made-for-hire framework for all employees, not separate frameworks for teachers and nonteachers.<sup>17</sup> In any case, the academic exception would be of little help to librarians because the scant authority for the exception does not address librarians, leaving us to guess whether librarians might or might not fit within the exception. The best course is to put the academic exception aside and focus on the usual work-made-for-hire rules.

¶12 Some observers may argue that these rules apply easily to academic scholarship: they note that universities almost never claim copyright in this scholarship, so surely scholarly works are not works made for hire. But we should not conflate legal analysis with actual practices, which are considered separately in part II of this article. The parties' intentions do not determine whether an employee's work is made for hire.<sup>18</sup> Instead, we look to the conditions of employment, while remembering that copyright law does not always track popular opinion.

¶13 Courts have not provided clear guidance on how to apply the work-made-for-hire analysis to scholarship,<sup>19</sup> and the Supreme Court has not addressed the

11. 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 4.3.2.1.c (3d ed. 2005).

12. Todd F. Simon, *Faculty Writings: Are They "Works Made for Hire" Under the 1976 Copyright Act?*, 9 J.C. & U.L. 485, 485–86 (1983).

13. See 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 5:71 (2013) (stating that the teacher exception did not survive the 1976 Act); GOLDSTEIN, *supra* note 11, § 4.3.2.1.c (arguing that it did survive); 1 HOWARD B. ABRAMS, LAW OF COPYRIGHT § 4:21 (2003) (noting that the "issue is still at large" with respect to scholarly works).

14. 1 NIMMER & NIMMER, *supra* note 8, § 5.03[B][1][b][i].

15. *Molinelli-Freytes v. Univ. of P.R.*, 792 F. Supp. 2d 164 (D.P.R. 2010).

16. Some argue that the teacher exception is still widely recognized within the academic community. While it may be recognized as a nonlegal custom, I disagree that it is widely recognized as a legal rule. If universities believed it was a legal rule, they would not need written intellectual property policies to bypass the work-made-for-hire doctrine, and yet these policies are commonplace (see *infra* part II).

17. 17 U.S.C. §§ 101, 201 (2012).

18. 1 GOLDSTEIN, *supra* note 11, § 4.3 ("As a general rule, the question whether a work was made for hire will turn strictly on several objective factors and not on the subjective intention of the putative 'employer' and 'employee' to create a work for hire relationship.")

19. Because universities and libraries generally do not assert copyright ownership of their employees' scholarship, there has not been much litigation on this issue. Nearly all cases about the work product of teachers and professors involve teaching materials rather than scholarship.

issue at all. In dicta, the Seventh Circuit has observed that “copyright law gives an employer the full rights in an employee’s ‘work for hire’ . . . unless a contract provides otherwise. The statute is general enough to make every academic article a ‘work for hire’ and therefore vest exclusive control in universities rather than scholars.”<sup>20</sup> The court did not explain the reasoning behind its dicta. Secondary sources provide more detailed guidance, although they do not always agree. First, let’s consider what the major copyright treatises say on whether professors own their scholarship.

¶14 Nimmer writes that the matter is “highly contested,” noting on the one hand that the “publish or perish” tradition suggests scholarship is within the scope of faculty’s employment, while on the other hand, the employer’s lack of control over the scholarship suggests that it is not.<sup>21</sup> Patry writes that no bright-line rule exists with respect to faculty ownership, but acknowledges that in some situations the employer may own the copyright to works of scholarship, depending on the purpose of the creator’s employment. As a hypothetical example of a work made for hire, he mentions scholarship written by a nonteaching research academic whose job description includes publishing.<sup>22</sup> Abrams views this as a close question but favors the argument that faculty members’ works of scholarship are generally not works made for hire because they are not prepared for the use or benefit of the employer. He notes that faculty do not generally breach their contracts when they fail to produce scholarship. At worst, he argues, their employers may choose not to renew their contracts if they are not yet tenured.<sup>23</sup> Finally, Goldstein argues strongly against scholarship being made for hire. Although most of his argument relies on the academic exception (which he believes is still in force), he also notes that academic employers do not exercise supervision or control over scholarship, and he counts supervision and control as “the two most salient hallmarks of a work for hire.”<sup>24</sup>

¶15 Many law review articles also address the question, and some go into greater detail than the treatises. Three of the most useful articles are by Todd F. Simon, Pamela A. Kilby, and Leonard D. DuBoff, respectively.<sup>25</sup> In 1983, Simon offered one of the first detailed analyses of the work-made-for-hire provisions of the 1976 Act as applied to scholarship. Like Goldstein, Simon considers the control factor to be the most important one, but his analysis of the control factor is unusual. He believes that universities do exercise significant control over scholarship because they require professors to publish within their areas of expertise and require faculty publications to meet standards of quality, quantity, and frequency.<sup>26</sup> In contrast,

---

20. *Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1094–95 (7th Cir. 1987). The relevant holding interprets the university’s intellectual property policy.

21. 1 NIMMER & NIMMER, *supra* note 8, § 5.03[B][1][b][i].

22. 2 PATRY, *supra* note 13, § 5:71.

23. ABRAMS, *supra* note 13, § 4:21.

24. 1 GOLDSTEIN, *supra* note 11, § 4.3.2.1.c.

25. Simon, *supra* note 12; Pamela A. Kilby, *The Discouragement of Learning: Scholarship Made for Hire*, 21 J.C. & U.L. 455 (1995); Leonard D. DuBoff, *An Academic’s Copyright: Publish and Perish*, 32 J. COPYRIGHT SOC’Y 17, 25 (1985).

26. Simon, *supra* note 12, at 502–03.

most other sources maintain that universities do not exercise control over scholarship.<sup>27</sup> Simon also believes that scholarship is a purpose of employment for professors, pointing out the tacit understanding that professors must publish and will receive support to do so, for example through sabbaticals, library resources, office equipment, funds to hire research aides, reimbursement of travel expenses, and other means.<sup>28</sup> He concludes that universities have a strong legal basis for asserting ownership over professors' scholarship.<sup>29</sup>

¶16 In his 1985 article, DuBoff reaches the same conclusion as Simon. DuBoff correctly anticipated *Community for Creative Non-Violence v. Reid* by relying on the usual law of agency to determine who is an employee and what is in the scope of employment, although the specific factors he identifies are somewhat different from those of the Supreme Court.<sup>30</sup> Like Simon, DuBoff notes that professors receive support from their institutions to create scholarship and that they must publish for tenure and promotion.<sup>31</sup> Whereas Abrams asserts that professors' employment contracts generally do not require them to publish, DuBoff claims that many professors do have publishing requirements in their employment contracts.<sup>32</sup> As to the time-and-place factor, DuBoff writes that it sometimes helps to consider *where* faculty perform research and writing, but *when* it is performed is usually not relevant because professors have no regular hours for working on scholarship.<sup>33</sup> He concludes that when professors publish works within their academic fields, they are acting within the scope of employment and the work belongs to their employers.<sup>34</sup>

¶17 Kilby, on the other hand, argues forcefully against scholarship as made for hire. She wrote in 1995, after the *Community for Creative Non-Violence* decision, so she follows the same general law of agency that the Supreme Court applied. Unlike Simon, Kilby believes that universities do not control their employees' scholarship.<sup>35</sup> Unlike DuBoff, Kilby concludes that a failure to produce scholarship is not a breach of present employment obligations, but merely affects future employment. She also argues that professors publish to promote their own interests, not the interests of the university.<sup>36</sup> She concludes that professors' scholarship is not made for hire within the meaning of the Copyright Act.<sup>37</sup> She goes on to argue that it would be unconstitutional to treat scholarship as made for hire. First, she points to the Constitution's copyright clause,<sup>38</sup> which allows Congress to confer copyright

---

27. E.g., 1 GOLDSTEIN, *supra* note 11, § 4.3.2.1.c; 1 NIMMER & NIMMER, *supra* note 8, § 5.03[B][1][b][i]; Kilby, *supra* note 25, at 466–67.

28. Simon, *supra* note 12, at 503–05.

29. *Id.* at 505.

30. Compare DuBoff, *supra* note 25, at 26–29, with *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989).

31. DuBoff, *supra* note 25, at 30.

32. *Id.* at 25.

33. *Id.* at 31–32.

34. *Id.* at 34.

35. Kilby, *supra* note 25, at 466–67.

36. *Id.* at 468.

37. *Id.*

38. *Id.* at 469 (citing U.S. CONST. art. I, § 8, cl. 8).

ownership on “authors,” which in her view cannot be construed to refer to universities in this context.<sup>39</sup> Second, she argues that professors have a First Amendment right to control the copyrights in their scholarship.<sup>40</sup> Although I do not apply here a constitutional analysis to the ownership of librarians’ scholarship, Kilby’s constitutional arguments appear to apply equally well to librarians and professors.

¶18 In sum, the application of the work-made-for-hire doctrine to professors’ scholarship is difficult and uncertain. Part of the difficulty is that the second factor from the Restatement (“authorized work hours and space”) is hard to apply to professors, who are generally free to choose when and where they work on their scholarship.<sup>41</sup> Usually, this factor is neutral or simply inapplicable for professors. As for the control factor, I agree with most commentators that universities do not control professors’ scholarship. Professors have wide latitude to decide what topics to cover, how to conduct their research, and what opinions to express. In my view, the fourth factor (the employer’s control) is the easiest to apply and almost always weighs against scholarship being made for hire—but one factor alone is not decisive. The first and third factors (whether it is the type of work the employee is employed to perform and whether it is actuated in part to serve the employer’s interests) are the most challenging ones in this context. For these factors, there seems to be no consensus among the commentators.

### Does “Scope of Employment” Include Librarians’ Scholarship?

¶19 In considering whether librarians’ scholarship falls within the scope of employment, I rely in part on what commentators have written about professors’ scholarship. This can help us by way of analogy, although there are some key differences between professors and librarians. I also rely on the Restatement (Second) of Agency, which I believe is one of the best sources for this question. In *Community for Creative Non-Violence v. Reid*, the Supreme Court’s opinion closely tracked the Restatement and cited it repeatedly in deciding whether the sculptor was an employee under the work-made-for-hire doctrine.<sup>42</sup> Because the Court found that the sculptor was not an employee, it never reached the scope-of-employment question. But if it had addressed that question, it seems a reasonable assumption that the Court would have continued to closely follow the Restatement. I next consider each of the Restatement factors separately.

¶20 The first Restatement factor is whether scholarship is the kind of work that librarians are employed to perform. Or, to phrase the question another way, is scholarship a purpose of librarians’ employment? The answer is generally not the same as for professors. For tenure-track professors, scholarship is often the most important part of their work, whereas librarians focus on serving patrons. For most librarians, scholarship is the “icing on the cake,” as the late Albert Brecht once told me.<sup>43</sup> In this respect, librarians may be more similar to K–12 teachers than professors. Nimmer

---

39. See Kilby, *supra* note 25, at 468–74.

40. See generally *id.* at 474–85.

41. See, e.g., DuBoff, *supra* note 25, at 31–32; Simon, *supra* note 12, at 505.

42. *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989).

43. Albert O. Brecht (1946–2012) was the law library director at the University of Southern California School of Law, where I worked as an intern.

notes that K–12 teachers are not subject to the same “publish or perish” pressures as professors, and for that reason, he concludes that their scholarly work is less likely to be within the scope of their employment.<sup>44</sup> Of course, this point is a generalization. For library directors who have faculty status or for other librarians who may receive tenure, scholarship may indeed be a key purpose of their employment. The terms of a librarian’s employment contract may shed light on the question.

¶21 In assessing the first factor, we also have to consider the published work itself and how closely it fits with the librarian’s employment. If the subject matter of a work relates to an employee’s job duties, then it’s more likely to be made for hire, although this point by itself is not conclusive.<sup>45</sup> For example, if I wrote an article about providing reference services at an academic law library, that article would fit very closely with my job duties, which makes it more likely to be made for hire. On the other hand, this article about copyright law is not a *close* match with the day-to-day work that I perform, which makes it somewhat less likely to be made for hire. If I wrote a detective novel, that clearly would be outside the purpose of my employment.

¶22 The recent proliferation of online institutional repositories for scholarship adds another twist to the first factor.<sup>46</sup> These repositories are evidence that employers care about their employees’ scholarship, and the decision whether to include librarians’ scholarship within a repository may clarify what librarians’ scholarship means for that institution. Upon publication, this article will appear in my law school’s online repository,<sup>47</sup> which may become the first Google result when readers search for the article. This strengthens the tie between my scholarship and my employer somewhat, although not enough, I believe, to tip the first factor in favor of this article being made for hire.

¶23 Looking back to the commentary on professors’ scholarship, there is only a weak argument that professors’ scholarship is made for hire under the first factor. Although professors are certainly expected to publish, publishing appears to serve less as a *purpose* of employment than as a *qualification* for continued employment. For librarians, it’s not clear that publishing is even a qualification for employment, let alone an actual purpose. It seems safe to say that the first factor weighs somewhat against librarians’ scholarship being made for hire, at least for most librarians. Scholarship is a minor purpose of employment for most librarians, if it is a purpose of employment at all.

¶24 The second factor is whether the work is done substantially within authorized work hours and space. Here we see an even sharper contrast between professors and librarians. While professors do not generally have authorized work hours and space when it comes to scholarship,<sup>48</sup> librarians usually have regularly sched-

44. 1 NIMMER & NIMMER, *supra* note 8, § 5.03[B][1][b][i].

45. See *Avtex Sys., Inc. v. Peiffer*, 21 F.3d 568, 571–72 (4th Cir. 1994).

46. Leila Sterman, *Institutional Repositories: An Analysis of Trends and a Proposed Collaborative Future*, 21 C. & UNDERGRADUATE LIBR. 360 (2014) (noting the sharp growth of online repositories in recent years).

47. WILLIAM & MARY LAW SCHOOL SCHOLARSHIP REPOSITORY, <http://scholarship.law.wm.edu/> (last visited Nov. 16, 2015).

48. DuBoff writes that the place where professors work on scholarship is relevant, even if the time factor is inapplicable. DuBoff, *supra* note 25, at 31–32. But in the time since DuBoff published his article in 1985, advances in computing and communications have blurred the line between home and campus for most professors.

uled work hours, which they fulfill at the library. Some libraries permit or even encourage their librarians to work on scholarship during their regular workdays, while other libraries discourage or ban such activity. This makes the second factor very relevant to librarians and adds a great deal of clarity with respect to ownership of librarians' scholarship.

¶25 At first glance, the third factor (whether the work is actuated, at least in part, by a purpose to serve the employer) may be difficult to distinguish from the first factor (purpose of employment). A helpful distinction is that the first factor considers the employer's viewpoint (why did the employer hire the employee?), whereas the third factor considers the employee's viewpoint (why did the employee decide to create the work?). Unlike the first factor, the third factor is very similar with respect to both professors and librarians. Most of the reasons for producing scholarship are the same regardless of who is writing it—to serve a professional or scientific community if not the broader public, to advance knowledge, to further the author's career, to enjoy the pleasure of research and writing, and to benefit the author's institution.<sup>49</sup>

¶26 Let's stop for a moment to consider that last point. How does librarians' scholarship benefit libraries? For academic librarians, the reputations of their parent institutions often rest largely on the scholarship of their employees. It might be countered that librarians' scholarship plays only a small part in a university's reputation (professors' scholarship being much more important), but this doesn't change the analysis under the third factor. Here we are judging the motivation behind the work, not the importance of the work. Even if my article contributes much less to my institution's reputation than the work of a prominent professor, the professor and I may still have the same motivation to enhance our institution's reputation.

¶27 The scholarship of nonacademic librarians also benefits their libraries. Public, corporate, or K-12 libraries may enhance their reputations through their librarians' scholarship, just as university libraries do. Moreover, producing scholarship can serve as a form of continuing education, allowing librarians to expand their knowledge and refresh their research, writing, and analytical skills. This benefits librarians personally, but it also makes them better employees.

¶28 When discussing the first factor, I mentioned that the content of a work is relevant, and it can be relevant for the third factor, too. If a librarian writes an article praising the accomplishments of her library, you might conclude that she wants to serve her employer's interests. But if she writes an article bemoaning the shortcomings of her library, she may have had other reasons for writing. The author's biographical statement may also be relevant. Scholarship almost always identifies the author's place of employment and position; when this information is omitted, we might conclude that the author does not wish to make any connection between his institution and his scholarship.

---

49. For a view on the different reasons why librarians write, see Mary Whisner, *Writing Buddies*, 103 LAW LIBR. J. 677, 677, 2011 LAW LIBR. J. 40, ¶ 3 ("For some, it might be external pressure—your boss or your promotion committee says that you have to publish to keep your job. Some might hope to make some money, although a lot of us write for journals, newsletters, and blogs without any prospect of financial reward. For me (and I suspect for many of us), writing stems from a basic social impulse: we want to connect with others.").

¶29 Certainly, many librarians who publish scholarship do so mainly to serve their own interests or the interests of a community outside their home institution, but this alone does not decide the third factor. As long as the scholarship is motivated *in part* to serve the employer's interests, the third factor weighs in favor of scholarship being made for hire. The Restatement provides some useful guidance here. The main text of the Restatement says that "conduct may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person."<sup>50</sup> The comments to this section of the Restatement explain that even if the employee's predominant motive is to benefit someone other than the employer, the work can still be within the scope of employment as long as it serves the employer to "any appreciable extent."<sup>51</sup> To illustrate this point, the Restatement provides examples of acts that are predominantly intended to benefit someone other than the employer, but that are nonetheless within the scope of employment.<sup>52</sup> With this guidance from the Restatement, I conclude that the third factor usually weighs in favor of librarians' scholarship being made for hire, just as it does with respect to professors' scholarship. Most of the time, librarians who publish scholarship are motivated *in part* by a desire to serve their employer.

¶30 The fourth factor (the employer's control or right to control) is also largely the same for librarians and professors. Simon made the unusual argument that universities do control their professors' scholarship,<sup>53</sup> but the other commentators I reviewed come to the opposite conclusion—and I agree with the majority. Like professors, librarians generally choose what topics to write about and decide what they will say about the topics. Their employers exercise little if any control over the content of their scholarship.<sup>54</sup> The fourth factor weighs against librarians' scholarship being made for hire.

¶31 Now let's put the factors together. The application of the first, third, and fourth factors will be similar for most librarians. The first factor (purpose of employment) will usually weigh somewhat against librarians' scholarship as made for hire, the third factor (motivation to serve the employer) will weigh in favor, and the fourth factor (control) will weigh against. Taken together, these factors will usually not provide a clear answer, leaving the second factor (time and place) to tip the scales. Unlike the other factors, the time-and-place factor will vary considerably from one librarian to another. One librarian might produce scholarship entirely within work hours at the library, another might produce scholarship outside regular hours at the library, and a third might produce scholarship outside regular hours at home—with gradations in between. The second factor will be relatively easy to apply, as it involves objective facts. Because the time-and-place factor involves a high degree of variability and easy applicability, I consider it to be the most decisive factor for most librarians, but this is not to say that it will always yield a clear answer.

---

50. RESTATEMENT (SECOND) OF AGENCY § 236 (1958).

51. *Id.* at cmt. b.

52. *Id.* at illus. 1–3.

53. Simon, *supra* note 12, at 502–03.

54. Exceptions might occur when librarians write about their own libraries, especially where sensitive policy issues are concerned. For example, a law librarian would be well advised to get his supervisor's consent before writing an article about his library's policies on the unauthorized practice of law.

¶32 In the end, the application of the work-made-for-hire doctrine to librarians' scholarship will depend on individual circumstances. It is not possible to make any broad conclusions on whether librarians own their scholarship. To get a clearer picture, let's consider several scenarios in which we assume that the employers do not have any written policies on who owns intellectual property created by their employees. We will address these scenarios using only copyright law.

### Applying the Doctrine

#### *The Public Reference Librarian*

¶33 Diane works as a reference librarian at a public library. She has regular work hours, which she performs at the library. Her library encourages its employees to engage in professional activities, including publishing, but does not require them to publish and does not give raises based on publications. Nothing in her employment contract refers to scholarship. Diane writes an article on reference services for *Library Journal* on her own time at home, using her own computer. She does not discuss the article with her supervisors prior to publication. The published article identifies her job title and place of work.

¶34 First, let's consider why this article might be made for hire. The subject matter is reference services, the same subject matter as her job, which carries some weight for the first factor (whether she is employed to write articles such as this). Also, she may have been motivated in part by a desire to serve her employer—her employer encourages her to publish and her employer's name appears in the article. But these points are clearly outweighed by other considerations—she is not employed to produce scholarship; she wrote the article on her own time, outside her place of employment, using her own resources; and her employer exercised no control over the article. I conclude that Diane clearly owns the copyright to her article.

#### *The University Cataloger*

¶35 John works as a cataloger at a university library. He has regular work hours, which he performs at the library. His library has a system of ranks for its librarians, and promotions are based in part on professional activities such as publishing. John writes a regular column in a regional library association newsletter, mostly during his lunch breaks and during evenings after his regular work hours, sometimes using his own laptop, but usually using the desktop computer provided by his employer. He occasionally discusses writing topics with his supervisors, but they do not review any of his columns prior to publication. His columns identify his job title and place of employment. Sometimes, John writes about practices at his own library, but he is just as likely to criticize those practices as he is to praise them.

¶36 John's newsletter columns present a closer question than Diane's article, but the factors still weigh in favor of John's ownership. Although publishing is a factor in promotions for John, it is not a requirement for his employment; the main purpose of John's employment is cataloging, not scholarship. The time-and-place factor is neutral here because John wrote the columns under mixed circumstances—usually during his own time, but not always, and usually using his employer's computer, but not always. His occasional criticism of his own library makes it less likely that he is serving his employer's interests. As for the control factor, his discussions

with his supervisors do not amount to much; his employer does not exercise actual control. The balance of factors points against the columns being made for hire.

### *The Tenure-Track University Reference Librarian*

¶37 Nancy works as a reference librarian at a university library and has regular work hours. She is on a tenure track and is required to publish scholarship to secure tenure and retain her position. Her supervisor has stressed that librarians' scholarship is important to the library. Prior to starting her current job, Nancy had never considered writing an article for publication, but now publishing has become an important goal for her.

¶38 Nancy writes an article about collection development for *College and Research Libraries*, working mostly in her office and mostly during regular work hours. She uses a computer provided by her employer, and she has been allowed free use of her library's interlibrary loan services and photocopiers. She is helped by a student research assistant who is paid by the library. Prior to writing, she discusses her topic with her supervisor, and prior to publication, she shares a draft with her supervisor, who suggests specific revisions. Nancy follows the suggestions because her supervisor's opinion of her scholarship is critical to her continued employment.

¶39 For Nancy, the application of the first factor is complicated. It is clear that her employer cares about her scholarship: if her scholarship is inadequate, she will lose her position; moreover, her employer has provided her with substantial resources to write her article, in particular, the provision of a research assistant. But it could be countered that Nancy's scholarship is what qualifies her for continued employment, and that it is not an actual purpose of her present employment—the actual purpose being service to patrons. On the first factor, Nancy is in the same ambiguous position as most professors. At most, the first factor weighs somewhat in favor of her work being made for hire.

¶40 As for the second factor, she has written the article mostly at work during her regular work hours, so that factor weighs in favor of her work being made for hire. On the third factor, Nancy never thought of publishing until she began her tenure-track position, so it seems clear that she is motivated in part (if not mostly) by a desire to serve her employer. Her supervisor even exercised a certain degree of control over the article. On the whole, it appears that Nancy's scholarship is made for hire.

### *Who Owns This Article?*

¶41 Now to answer the question posed in the title: who owns this article? Let's consider the four factors one at a time. First, is it the type of work I am employed to perform? My library encourages its librarians to publish and engage in other professional activities, but it is not a requirement for my position, and we have no tenure track or ranking system for librarians. Although this article will be included in my library's online repository, the first factor weighs mostly against this article being made for hire. Second, did I create it at work during regular work hours? Yes, I worked on this article mostly in my office during slower periods within my regular work hours, so this factor weighs in favor of this article being made for hire.

Third, was I motivated at least in part to serve my employer's interests? Yes. Although I had mixed motives, I wrote it partly because my employer encourages publishing and I want to enhance my employer's reputation, even if I accomplish that goal in only a small way. Fourth, did my employer exercise control over the article? Although my library director reviewed the article prior to publication and offered his comments, I chose the topic and made all the final decisions as to its content. So the fourth factor weighs against this article being made for hire.

¶42 The first, third, and fourth factors put together do not give a clear answer. I believe the second factor (time and place) is decisive here. If I had written the article at home on my own time, I would say I own the article, but as it is, I conclude that my article is probably made for hire, and the College of William and Mary is its legal author. But under my employer's intellectual property policy, any copyrights the College owns in the scholarship of its employees are assigned to the creators.<sup>55</sup> That's why you see the copyright notice in my own name.

## Part II: Recognizing Ownership: The Practices and Policies of Libraries and Librarians

¶43 Although libraries often have a strong legal basis for claiming ownership of their librarians' scholarship, they do not actually make these claims. To assess actual practices and policies, I reviewed written intellectual property policies at universities that are members of the Association for Research Libraries (ARL), copyright notices in articles authored by librarians, and submission guidelines in library journals.

¶44 As expected, I found that libraries and the broader academic community almost always recognize librarians as the owners of their own scholarship, but there were some surprises along the way. I found several policies at ARL universities that discriminate between librarians and faculty when it comes to recognizing copyright ownership, and I discovered that it is not uncommon for U.S. government librarians to treat their scholarship as works of the U.S. government.

### Intellectual Property Policies at ARL Universities

¶45 Almost all major universities have responded to the work-made-for-hire doctrine by developing written intellectual property policies that purport to alter or clarify the default legal rules.<sup>56</sup> Generally, these policies preserve the tradition that authors own the copyrights to their own scholarship, regardless of what the law would otherwise provide. But are these policies legally effective? And does their scope include librarians' scholarship? To get a sense of what these intellectual property policies say, I reviewed all the policies I could find online from U.S. universities that are members of ARL. Before discussing these policies, we should first consider how the policies are supposed to work according to copyright law.

---

55. *Intellectual Property Policy* § 3.2, COLL. OF WILLIAM & MARY (Jan. 6, 2015), <https://www.wm.edu/offices/techtransfer/documents/propertypolicy.pdf> [<http://perma.cc/X32M-D74L>].

56. I base this conclusion on my own review of intellectual property policies. See also Ashley Packard, *Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work*, 7 COMM. L. & POL'Y 275, 294–97 (2002).

¶46 Even if an employee's work is within the scope of his or her employment, it is possible for the employer and employee to alter the usual rules so that the employee will own the copyright. This can be done in one of two ways. The first method is set forth in section 201(b) of the Copyright Act, which provides that an employee's work will not be made for hire if "the parties have expressly agreed otherwise in a written instrument signed by them."<sup>57</sup> The other method is to simply transfer copyright ownership pursuant to section 204 of the Act, which requires that the transfer be "in writing and signed by the owner of the rights conveyed."<sup>58</sup>

¶47 Each method has its pros and cons. If the parties opt for the section 201(b) method, the work will not be made for hire and the employee will be the original author and owner. However, section 201(b) requires stricter formalities than section 204. Whereas section 204 transfers may be signed only by the transferor, section 201(b) agreements must be signed by both parties—the employer and the employee.<sup>59</sup> Also, section 201(b) specifies that agreements must be made "expressly," a term that does not appear in section 204. Nonetheless, it is possible for a university to create an effective intellectual property policy under section 201(b). If the policy is incorporated into an employee's written employment contract that is signed by both parties, it should meet the signature requirements of section 201(b).<sup>60</sup> To ensure that the policy qualifies as an "express agreement," the policy should explicitly state that the employee's works of scholarship are not works made for hire.<sup>61</sup>

¶48 Although the requirements of section 204 are easier to satisfy, the result may not be satisfactory. A section 204 transfer does not change the original authorship of the work; it merely transfers ownership from the original author (in this case, the employer) to someone else (the employee). A work that has been transferred to an employee under section 204 will still be a work made for hire, albeit one that has a new owner. This distinction matters because the Copyright Act treats works made for hire differently from other types of works. The duration of a copyright normally lasts for the life of the author plus seventy years; but if the work is made for hire, the term is disconnected from the author's life and is set at ninety-five years from the date of first publication.<sup>62</sup> More important, if an author trans-

57. 17 U.S.C. § 201(b) (2012).

58. *Id.* § 204(a). Section 201(d) establishes that copyrights may be transferred, and section 204 specifies the method.

59. For a discussion of what constitutes a signature, see 1 NIMMER & NIMMER, *supra* note 8, § 10:03[A]; 2 PATRY, *supra* note 13, § 5:107.

60. Laura G. Lape, *Ownership of Copyrightable Works of University Professors: The Interplay Between the Copyright Act and University Copyright Policies*, 37 VILL. L. REV. 223, 248–50 (1992).

61. Using such explicit language is the safest approach, but it may not be necessary. At least one appellate court offers a relaxed interpretation of section 201(b). In *Weinstein v. University of Illinois*, the Seventh Circuit considered a policy that stated "a professor retains the copyright unless the work falls into one of three categories," including one that excluded "works created as a specific requirement of employment or as an assigned University duty." 811 F.2d 1091, 1094 (7th Cir. 1987). Although this wording is far from clear, the court held it was sufficient to exempt professors' scholarship from the work-made-for-hire rule. *Id.* at 1094–95.

62. Or 120 years after the work is first created, whichever term expires first. 17 U.S.C. § 302 (2012). The copyright duration of works made for hire is not necessarily disadvantageous. The problem lies in the confusion this will create in the future, when the public tries to determine what works of scholarship are in the public domain. If a work made for hire is transferred under section 204, the public will have no way of knowing that it is a work made for hire with a different copyright duration.

fers his rights to someone else (such as a publisher), section 203 of the Copyright Act ordinarily gives him the right to regain ownership of the work after thirty-five years—except that section 203 is not applicable to works made for hire.<sup>63</sup> Thus, a section 204 transfer may meet the parties' immediate needs, but it is a messy solution that leaves some ticking time bombs. Furthermore, a federal district court has held that section 204 cannot be used to transfer copyright from an employer to an employee; although this ruling is almost certainly wrong, it adds some uncertainty to the use of section 204.<sup>64</sup>

¶49 Another legal question that arises under both sections 201(b) and 204 is whether they can be used for works that have not yet been created. Intellectual property policies do not name specific works; rather, they issue a blanket statement about ownership that is usually intended to cover both existing and future works. According to Nimmer, parties may agree to transfer copyright of works that do not yet exist,<sup>65</sup> but at least one case says transfers must name specific works.<sup>66</sup>

¶50 Several law review articles have assessed the effectiveness of universities' intellectual property policies, including a 1992 article by Laura G. Lape and a 2002 article by Ashley Packard.<sup>67</sup> Lape reviewed the policies at seventy universities classified as "Research Universities I" by the Carnegie Foundation for the Advancement of Teaching,<sup>68</sup> and Packard reviewed the same universities' policies ten years later.<sup>69</sup> Both Lape and Packard found that many policies were poorly drafted, with language that was ineffective in transferring copyright.<sup>70</sup> Their articles are a good source for more information on the general effectiveness of these policies.

¶51 Twenty-three years after Lape's original study, I conducted my own study of universities' intellectual property policies. Using Google searches and menu navigation of university websites, I was able to access eighty-one policies at ARL universities in the United States that address the copyright ownership of employees' scholarship.<sup>71</sup> In reviewing the policies, I assessed their effectiveness in transferring

---

63. *Id.* § 203. Sections 302 and 203 are just two examples of how the Copyright Act treats works made for hire differently.

64. In *Forasté v. Brown University*, 290 F. Supp. 2d 234 (D.R.I. 2003), the court held that an employer could transfer ownership to an employee only through section 201(b), and not through section 204. The court reasoned that section 201(b) has stricter formalities than section 204, and that Congress could not have intended parties to bypass the stricter formalities by using section 204. *Id.* at 237–39. As Patry points out, this case is based on a misunderstanding of how sections 201(b) and 204 relate to each other. 2 PATRY, *supra* note 13, § 5:47. As I have explained in the text, the two sections are designed to bring about different results. Still, *Forasté* has not yet received any negative treatment from other courts.

65. 1 NIMMER & NIMMER, *supra* note 8, § 10.03[A][8]; see also *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943) (holding that authors may transfer their rights for a renewal period before the renewal has been secured).

66. *Forasté*, 290 F. Supp. 2d at 239–41 (as an additional reason for rejecting a transfer under section 204, the court held that the university's intellectual property policy failed to identify any specific works).

67. See generally Lape, *supra* note 60; see also Packard, *supra* note 56.

68. Lape, *supra* note 60, at 252.

69. Packard, *supra* note 56, at 294.

70. Lape, *supra* note 60, at 256; Packard, *supra* note 56, at 306.

71. In addition to these eighty-one policies, I found another three policies that I was unable to access because of password protections or technical problems. I was unable to find policies addressing copyright ownership at seven U.S.-based ARL universities, but this does not necessarily mean they had no such policies. I conducted my review in May and June of 2015.

copyright, and I counted the number of policies that did not include librarians within their scope.

¶52 Like Lape and Packard, I found that many policies are not well drafted, at least not from a legal perspective. Overall, the universities seem to be more concerned about providing information to employees than complying with the Copyright Act. None of the policies I reviewed specified whether they operated under section 201(b) or section 204.<sup>72</sup> It is clear that many of them do not meet the requirements of either section.

¶53 A common problem is that many policies offer an explanation of copyright law (often an incorrect explanation) instead of actually effecting a transfer of ownership. For example, Kent State University's policy offers a legal definition of "work made for hire" that excludes copyrightable works that result from "academic research or scholarly studies."<sup>73</sup> For the reasons discussed in part I, this definition is questionable, but more important, it does nothing to alter the default work-made-for-hire rules. A misstatement of law cannot function as a section 201(b) agreement or as a transfer under section 204.

¶54 Another common problem is that many policies disclaim university ownership rather than transfer ownership. For example, the University of Houston's policy states that it will "not assert ownership" of books, journal articles, and other scholarly works.<sup>74</sup> The Copyright Act does not recognize quitclaims, and this language is probably not effective under either section 201(b) or section 204. There is no language here that refers to the work-made-for-hire rule or to a copyright transfer. There is no statement about who will own the work if the university does not own it. It is not even clear that the university intends to disclaim ownership; perhaps the university intends to retain ownership but refrain from exercising its rights.

¶55 Other policies reveal a clear misunderstanding of copyright law. The University of Wisconsin's policy states that "the UW System does not assert a property interest in materials which result from the author's pursuit of traditional teaching, research, and scholarly activities." But the next sentence undermines this position by stating that "the creation of materials such as theses, scholarly articles, journal articles, research bulletins, monographs, and books occurs, in most circumstances, as an integral part of the author's position as a UW System employee."<sup>75</sup> The first sentence is probably not effective under section 201(b) or section 204, whereas the second sentence clearly supports a finding that scholarship is made for hire at the University of Wisconsin. Surely this is not what the university intended.

¶56 The only deficiencies I was able to review are in the language of the policies. A separate issue is whether the policies meet the signature requirements of sections

72. A policy does not need to cite the Copyright Act to be effective, but a statement that a policy is made pursuant to section 201(b) or 204 would certainly help lawyers and courts who are attempting to construe the policies.

73. *Administrative Policy Regarding Copyrights*, KENT STATE UNIV. (Mar. 1, 2015), <http://www.kent.edu/policyreg/administrative-policy-regarding-copyrights> [<http://perma.cc/JF9U-UDSW>].

74. *UH System Board of Regents Policies*, UNIV. OF HOUSTON SYSTEM (Nov. 19, 2015), <http://www.uhsystem.edu/board-of-regents/policies/> [<http://perma.cc/NNL5-LDRS>].

75. *Copyrightable Instructions Materials Ownership, Use and Control*, UNIV. OF WIS. SYSTEM (Nov. 24, 1997), <https://www.wisconsin.edu/financial-administration/financial-administrative-policies-procedures/gapp-numeric-index/g27-copyrightable-instructions-materials-ownership-use-and-control/> [<http://perma.cc/8P8M-M5E6>].

201(b) or 204. On this issue, I did not obtain any information. Presumably, some of these policies were signed or incorporated by reference into signed employment contracts. But other policies may have been unsigned. For this reason, even the best-drafted policies may not be effective.

¶57 Although others before me have studied the effectiveness of universities' intellectual property policies, I believe this is the first study to consider whether the policies encompass librarians' scholarship. I found that most of them do, typically by referring more broadly to "university employees," "faculty and staff," "the university community" or similar terms.<sup>76</sup> But of the eighty-one policies I reviewed, I found eight that do not recognize ownership by librarians.<sup>77</sup> None of these eight policies explicitly single out librarians for different treatment. Some of them confer copyright ownership on teaching faculty without mentioning other employees, which might only mean that the drafters failed to consider the status of other employees' copyrights. Other policies clearly draw a distinction between faculty and nonfaculty employees in ownership of copyrighted material.

¶58 Harvard University's policy is one example of how faculty and nonfaculty are treated differently with respect to copyright ownership. Harvard's policy provides that authors generally own the copyright in their own work, but a "work created within the scope of employment by non-teaching employees of the University shall be a 'work made for hire' . . . and the University shall be deemed the Author and shall own the copyright."<sup>78</sup> Other examples include policies from Howard University and the University of Utah. Howard University's policy presumes that faculty's work is owned by faculty, whereas nonfaculty employees' work is made for hire.<sup>79</sup> The University of Utah's policy transfers copyright in traditional works of scholarship to faculty authors, but subjects staff to the usual work-made-for-hire rules.<sup>80</sup> For joint works coauthored by faculty and staff, Utah's policy provides that the collective rights of the authors are determined by the rights of the faculty author.<sup>81</sup> Apparently, the policy drafters were aware that faculty and staff might produce the same types of works, but made a conscious decision to treat them differently.

¶59 As it turns out, universities' intellectual property policies are rife with problems. Considering the shortcomings in drafting effective language, the strict signature requirements of section 201(b), and the exclusion of librarians from some policies, it seems that these policies do little to change the work-made-for-hire

76. I noticed only one policy that refers explicitly to librarians. George Washington University recognizes ownership by "faculty and librarians," whereas other staff are treated differently. *Copyright Policy*, GEORGE WASHINGTON UNIV. (Apr. 1, 2005), <http://my.gwu.edu/files/policies/CopyrightPolicyFINAL.pdf> [<http://perma.cc/ZA6M-TSWN>].

77. These policies are from the University of California (system-wide), Columbia University, Harvard University, Howard University, Ohio University, Princeton University, Rice University, and the University of Utah. There are several other policies that are limited to faculty, but are from institutions where librarians have faculty status (e.g., the University of Pittsburgh and New York University).

78. *Statement of Policy in Regard to Intellectual Property* II.B.3, HARVARD UNIV. (Dec. 12, 2013), <http://otd.harvard.edu/faculty-inventors/resources/policies-and-procedures/statement-of-policy-in-regard-to-intellectual-property/> [<http://perma.cc/93GZ-XP8V>].

79. *Intellectual Property Policy* III.A.1, HOWARD UNIV. (Sept. 23, 1993), [http://ip.howard.edu/documents/IP\\_Policy.pdf](http://ip.howard.edu/documents/IP_Policy.pdf) [<http://perma.cc/EC7N-6XD6>].

80. *Ownership of Copyrightable Works and Related Works*, UNIV. OF UTAH (May 14, 2001), <http://regulations.utah.edu/research/7-003.php> [<http://perma.cc/6AFP-KG9X>].

81. *Id.* at II.B.3.

status of librarians' scholarship. Many policies will not even be effective as transfers under section 204. However, they do evince universities' lack of interest in owning their employees' scholarship. When we consider copyright notices in the next section, we will see that universities are not claiming ownership of librarians' scholarship, whatever the law or their policies may say.

### Copyright Notices in Librarians' Articles

¶60 To see who is claiming copyright in librarians' scholarship, I reviewed the copyright notices in more than 400 articles written by U.S.-based librarians published in recent issues of *College and Research Libraries*, *Journal of Library Administration*, *Law Library Journal*, *Library Resources & Technical Services*, *Reference and User Services Quarterly*, and *Research Library Issues*. These articles were written by librarians from a wide range of employment settings, but academic librarians appeared as authors more often than any other type of librarian. *The Journal of Library Administration* is published by a for-profit company, and the rest are published by library associations. I found that the named authors or the journal publishers claimed copyright in all of the articles, with only one exception.<sup>82</sup> In a 2015 issue of *Research Library Issues*, two employees of the National Library of Medicine disclaimed copyright in their article because they wrote it as federal employees acting within the scope of their employment.<sup>83</sup>

¶61 The Copyright Act provides that works of the U.S. government cannot be copyrighted.<sup>84</sup> A work of the U.S. government is defined as "a work prepared by an officer or employee of the United States Government as part of that person's official duties."<sup>85</sup> The use of the phrase "as part of that person's official duties," in place of the standard "scope of employment" language used for other works made for hire, has been known to cause some confusion.<sup>86</sup> But a House Report accompanying the 1976 Act clarifies that the work-made-for-hire doctrine is construed in the usual way when applied to U.S. government employees.<sup>87</sup>

¶62 After discovering the aforementioned example of a copyright disclaimer, I searched for other articles authored by U.S. government librarians to see whether

82. I reviewed 414 articles, columns, and essays, excluding short pieces such as book reviews, in issues published from 2013 to 2015, through and including vol. 76, no. 4 of *College and Research Libraries*; vol. 55, no. 3 of *Journal of Library Administration*; vol. 106, no. 4 of *Law Library Journal*; vol. 58, no. 4 of *Library Resources & Technical Services*; vol. 54, no. 3 of *Reference and User Services Quarterly*; and no. 286 of *Research Library Issues*. Some of the copyright notices applied to individual articles, whereas others applied to journal issues. In these journals, I saw a small number of articles written by librarians from outside the United States or by nonlibrarians, including two in which the copyright was held by the author's employer, but I disregarded these articles as not relevant.

83. The authors made the following statement in lieu of a copyright notice: "The authors' contribution to this work was done as part of the authors' official duties as National Institutes of Health employees and is a work of the United States Government. Therefore, copyright may not be established in the United States." Kathel Dunn & Joyce E.B. Backus, *Pipelines and Partnerships in Diversity at the National Library of Medicine*, RES. LIBR. ISSUES, no. 286, 2015, at 3, 7.

84. 17 U.S.C. § 105 (2012).

85. *Id.* § 101.

86. See 2 PATRY, *supra* note 13, §§ 4:69, 4:73.

87. H.R. REP. NO. 94-1476, at 58 (1976) ("Although the wording of the definition of 'work of the United States Government' differs somewhat from that of the definition of 'work made for hire,' the concepts are intended to be construed the same way.").

they also disclaimed copyright.<sup>88</sup> This search was complicated by the fact that U.S. government librarians who publish often do so with coauthors who are not U.S. government employees, and in these situations I found no disclaimers. I managed to find nine additional articles (for a total of ten) authored exclusively by U.S. government librarians that include a copyright notice or disclaimer specific to the article. In all, three out of ten articles disclaim copyright as works of the U.S. government,<sup>89</sup> and the other seven claim copyright by the named authors or publisher.<sup>90</sup>

¶63 These results are curious. In theory, the scope-of-employment test is no different as applied to U.S. government librarians, but in practice clearly a difference is recognized. While I found no examples (out of hundreds of articles) of university librarians who recognize their scholarship as made for hire, I found that a significant proportion of U.S. government librarians are recognizing their scholarship as made for hire. Why the difference?

¶64 This is likely the result of both legal and policy differences with respect to U.S. government librarians. First, when U.S. government librarians create works while acting within the scope of their employment, the works are not copyrightable, and nothing can alter that outcome.<sup>91</sup> In contrast, in nonfederal employment settings, the parties can alter the usual work-made-for-hire rules by written agreement<sup>92</sup> or by assigning existing copyrights.<sup>93</sup> Second, the U.S. government has a policy interest in disclaiming copyright in its works in accordance with federal law,<sup>94</sup> and this may motivate the government to advise its employees to respect the work-made-for-hire rules. Universities and other nonfederal libraries usually have no comparable policy interest in claiming their employees' scholarship as works

---

88. I ran searches through journal databases in Lexis.com, WestlawNext, JSTOR, and Academic Search Complete, with no restrictions on date or source. Finding the articles was difficult since databases are generally not designed to identify articles by author's affiliation. Lexis.com allows segment searching within an author's biographical note, but in other databases I had to rely on unrestricted full-text searching. I also tried identifying U.S. government librarians and then searching for their publications by author name.

89. The additional copyright disclaimers I found were in the following: Bonnie Klein & Sandy Schwal, *A Delicate Balance: National Security vs. Public Access*, 25 *COMPUTERS IN LIBR.* 16, 23 (2005) (authors from the Defense Technical Information Center, part of the U.S. Department of Defense); Becky J. Lyon, Kathel Dunn & Sally Sinn, *Leveraging Partnerships to Develop a Strong and Diverse Workforce*, 51 *J. LIBR. ADMIN.* 231, 231 (2011) (authors from the National Library of Medicine).

90. The copyright claims I found were in: Shelley L. Dowling, *Variety Is the Spice of Life*, 93 *LAW LIBR. J.* 552, 2001 *LAW LIBR. J.* 27 (author from the U.S. Supreme Court library); Barbara L. Fritschel, *An Index to Special Court Sessions in West's Federal Reporters*, 93 *LAW LIBR. J.* 109, 2001 *LAW LIBR. J.* 4 (author from the Fifth Circuit U.S. Court of Appeals library); John Hessler, *Editing Justinian's Corpus: A Study of the Paul Krueger Archive*, 103 *LAW LIBR. J.* 459, 2011 *LAW LIBR. J.* 28 (author from the Library of Congress); Eve-Marie Lacroix & Joyce E.B. Backus, *Organizing Electronic Information to Serve the Needs of Health Practitioners and Consumers*, 54 *LIBR. TRENDS* 605 (2006) (authors from the National Library of Medicine); Cynthia B. Love, Stacey J. Arnesen & Steven J. Phillips, *National Library of Medicine Disaster Information Management Research Center: Establishment and Growth, 2008–2010*, 33 *INFO. SERVICES & USE* 273 (2013) (authors from the National Library of Medicine); Deanna B. Marcum, *Toward a National Agenda: Landscape of Digital Archiving*, 96 *LAW LIBR. J.* 605, 2004 *LAW LIBR. J.* 39 (author from the Library of Congress); M. Kathleen Price, *Law Library of Congress: Building a National Law Library to Serve the World Legal Community*, 83 *LAW LIBR. J.* 225 (1991) (author from the Law Library of Congress).

91. 17 U.S.C. § 105 (2012).

92. *See id.* § 201(b).

93. *Id.* §§ 201(d)(1)–(2), 204.

94. For the public policy reasons behind section 105, see 2 *PATRY, supra* note 13, § 4:58.

made for hire. Thus, the differences we see between U.S. government librarians and their nonfederal peers is a good illustration of how law and policy intersect in determining who actually claims (or disclaims) ownership of librarians' scholarship.

¶65 In addition to searching specifically for articles authored by U.S. government librarians, I also searched specifically for articles authored by librarians at the eight universities whose intellectual property policies do not recognize librarians as the owners of their own scholarship. If these universities and their librarians are taking their own policies seriously, we should expect to see that at least some of these librarians' articles have copyright notices in the name of the universities. To test this theory, I searched issues of *Law Library Journal* published since 2000 for articles authored by librarians at these eight universities.<sup>95</sup> I reviewed seventeen copyright notices in these articles and did not find a single one that was held in the name of a university. It seems that these universities are not enforcing the work-made-for-hire law or their own policies.

### Submission Guidelines in Library Journals

¶66 Library journals have reason to be concerned about who owns librarians' scholarship. The journals all include copyright notices that routinely claim ownership by the librarians or the journals. At least some of these notices must be legally incorrect, a conclusion supported by the legal analysis in part I, as well as part II's discussion of the deficiencies in intellectual property policies. If an article is made for hire and the journal gets no license from the employer, the journal is infringing the employer's copyright by printing and distributing the article.<sup>96</sup> The journal would also be misleading its readers about who owns the articles, which could create further problems if readers ask permission to make copies.

¶67 To see whether the journals address the possibility that submitted articles are works made for hire, I reviewed the submission guidelines in *College and Research Libraries*, *Journal of Library Administration*, *Law Library Journal*, *Library Resources & Technical Services*, *Reference and User Services Quarterly*, and *Research Library Issues*.<sup>97</sup> I found that only the *Journal of Library Administration* addresses the issue at all, and then only briefly.

---

95. I searched on Lexis.com on June 30, 2015, using the search query *AUTHOR(librarian /5 ("University of California" OR UCLA OR berkeley OR boalt OR "U.C. hasting" OR "hastings college" OR "U.C. Davis" OR "U.C. Irvine" OR "U.C. San Diego" OR "U.C. Riverside" OR "U.C. Santa Barbara" OR "U.C. Santa Cruz" OR "U.C. Merced" OR "Columbia University" OR "Harvard University" OR "Howard University" OR "Ohio University" OR Princeton OR "Rice University" OR "University of Utah"))*). On Lexis.com, the AUTHOR segment includes the author's biographical statement. The initial search retrieved twenty-four results, but I had to eliminate some of the results because they were false hits or lacked a copyright notice that was specific to the article.

96. Copyright infringement is based on strict liability, with damages assessed through joint and several liability. 6 PATRY, *supra* note 13, § 21:38. Therefore, it is no defense for journals to claim that they were misled by the named author. But the journals' liability for statutory damages might be limited by the innocent infringer provisions of 17 U.S.C. § 504(c)(2) (2012).

97. I reviewed guidelines printed in the journals or posted on the journals' websites.

¶68 Taylor & Francis, the publisher of the *Journal of Library Administration*, offers a detailed FAQ webpage for authors.<sup>98</sup> This webpage is for all Taylor & Francis journals, not just the *Journal of Library Administration*, and it addresses both U.S. and U.K. law. The guidance it provides is perfunctory, at best. For authors who are university employees, Taylor & Francis advises that “a university is not considered to be an employer if you are grant-funded,” a questionable statement that does not address authors who are not grant-funded.<sup>99</sup> The work-made-for-hire doctrine is then succinctly explained in one sentence, with no link provided for additional information. No warnings are given.

¶69 Interestingly, Taylor & Francis provides very different advice for authors who are U.S. government employees. The FAQ page pointedly tells these authors that they should not claim copyright in their articles.<sup>100</sup> Like the advice provided to university employees, this statement is an oversimplification, but this time it points in the opposite direction. As discussed previously, the scope-of-employment test is the same as applied to U.S. government employees, so the difference in advice probably arises from different customs and practices.

¶70 If their submission guidelines are any indication, library journals have a relaxed attitude about works made for hire. Copyright law does not give them any reason to be complacent, so they must be relying instead on the usual practice of libraries to forgo copyright claims in their librarians' articles. The only exception is Taylor & Francis' advice to U.S. government employees. Both the general practice and the exception are further evidence of how copyright law and actual practices diverge.

### Part III: Librarians' Scholarship Should Belong to Librarians

¶71 As a matter of policy, who should own librarians' scholarship? My instinct is to immediately answer “librarians.” The arguments for this answer are easy to see. As an author, owning the copyright to my own article is meaningful. It gives me the freedom to do whatever I want with my article and grant whatever permissions I wish to give, while empowering me to halt any unfair use of the article. Knowing that I would own this article gave me additional incentive to write it. I don't believe that ownership would mean anything to my library, and ownership wouldn't give my library any incentive to produce scholarship.

¶72 But a recent article by Alissa Centivany has caused me to think twice about this issue. Centivany argues that if universities own their employees' scholarship, they will be in better positions to promote open access.<sup>101</sup> This is a timely argument, given the recent proliferation of online institutional repositories. The argument also happens to be particularly appealing to librarians, who have long advocated for

---

98. *Publishing Agreements: FAQs*, TAYLOR & FRANCIS, <http://journalauthors.tandf.co.uk/copyright/publishingAgreementsFaqs.asp> (last visited June 1, 2015) [<http://perma.cc/FRN7-M5MR>].

99. *Id.*

100. *Id.*

101. See generally Alissa Centivany, *Paper Tigers: Rethinking the Relationship Between Copyright and Scholarly Publishing*, 17 MICH. TELECOMM. & TECH. L. REV. 385 (2011). For a contrary view, see Lape, *supra* note 60, at 265–66.

open access and have at times struggled to get faculty members on board. Although authors could freely distribute their own scholarship through individual effort, universities have more resources and expertise. Universities would also be in stronger bargaining positions vis-à-vis publishers. If major universities hold the copyrights and demand that publishers allow open access, publishers will have to comply or find themselves bypassed altogether. If institutions owned scholarship, librarians would probably play a key role in deciding how the copyrights should be exercised.

¶73 But as tempting as this idea may be, I must ultimately refrain from adopting it. There is an unshakeable tradition of universities recognizing authors as the owners of their own scholarship. Despite the dictates of the Copyright Act and the vagaries of intellectual property policies, we see that copyright notices in scholarly publications are not in the name of the employer. Any attempts to change this tradition are likely to provoke widespread anger, and ultimately fail. If librarians pushed for such a change, they would likely lose the trust of the communities they serve. And as long as librarians recognize that other authors own their scholarship, it seems only fair that librarians should be permitted the same ownership rights.

¶74 As this article has demonstrated, securing these rights is not a simple matter. The best solution would be to amend the Copyright Act to recognize an academic exception to the work-made-for-hire doctrine. As it is currently written, the Copyright Act's work-made-for-hire provisions are a poor fit for the academic community. Universities have usually responded by ignoring the law or making a half-hearted effort to comply with its requirements. The divergence that we see between the law and actual practices suggests not so much that our practices are flawed, but that the law itself is flawed and needs to be amended to bring it in line with long-standing community standards.

¶75 Until we can achieve that amendment, I believe the best practice is for universities or libraries to develop written intellectual property policies like the one at my own institution, which is designed to operate as a copyright transfer under section 204.<sup>102</sup> Although it is possible in theory to write a blanket policy that operates under section 201(b), the strict signature requirements of that section are unlikely to be met. A university or library might secure an employee's signature as part of the hiring process, but they are unlikely to secure signatures from all employees every time an intellectual property policy is amended. For this reason, the section 204 method is more reliable. As part of their policies, universities and libraries should also offer to execute individual section 201(b) agreements with any employees upon request.<sup>103</sup> This approach, together with efforts to lobby Congress to amend the Copyright Act, can best ensure that librarians and other scholars will own the rights to their own work.

---

102. *Intellectual Property Policy*, *supra* note 55, at § 3.2.

103. This could be achieved through a simple form that employees could access online. The form could be written to apply to any scholarship produced by the employee.