

3 AUTHORIZING ACADEMIC AGENCY: CHARTING THE TENSIONS BETWEEN WORK- FOR-HIRE UNIVERSITY COPYRIGHT POLICIES

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“Writing... occurs within a matrix of local and more global policies, standards, and practices. These variables often emerge as visible and at times invisible statements about what types of work are possible and valuable (encoded, often, in curricula, assessment guidelines, standards, and policies).”

DeVoss, Cushman, & Grabill, 2005, p. 16

For the better part of two decades now, writing and technical communication specialists have engaged in a spirited discussion about, as Andrea Lunsford and Susan West (1996) described it, “the question of who owns language” (p. 383). Taking seriously Lunsford and West’s call to action, writing and technical communication specialists have problematized the intersections of authorship, intellectual property, and copyright. The substantive body of research dedicated to topics such as plagiarism (DeVoss & Rosati, 2002; Johnson-Eilola &

Selber, 2007; Moore Howard, 2007; Valentine, 2006), the commodification of texts and authors (Lunsford, 1999; Ritter, 2005; Selfe & Selfe, 1994), the ethics of collaboration (DeVoss & Porter, 2006; Ede & Lunsford, 2001), and the ways in which federal law affects writing and communication (DeVoss, McKee, & Porter, 2008; Herrington, 199a, 199b, 2003; Reyman, 2006; Rife, 2008) illustrates that writing and technical communication specialists have not only concerned themselves with addressing *who* owns language, but also the *when, where, why, what, and how* of the matter.

This chapter, then, is situated within an already rich conversation. Adding to that conversation, I argue that academic authors—tenured and non-tenured faculty, instructional staff, research and teaching assistants, and graduate and undergraduate students—are positioned “within a matrix of local and global policies, standards, and practices” that seeks to determine their relationship to the ownership of scholarly products (DeVoss et al., 2005, p. 16). More specifically, I examine the ways that Title 17 of the United States Code and university policies associated with copyright affect the work possible within academic contexts.

Throughout the chapter, I offer a narrative account of the types of challenges I encountered when licensing a thesis for a Master of Arts under a Creative Commons License. At times, I weave in scholarship that either seeks to inform the types of specific challenges I faced or scholarship that provides an entry point into the more technical aspects of copyright and/or institutional IP policy. I also offer the findings and implications of a qualitative study that investigated how 14 academic institutions approach the ownership of copyrightable texts. In extending this research, I hope to demonstrate how various policies and agents coalesce, affecting how agency is constructed within the distributed forms of authorship unique to academic contexts. More simply, I seek to understand how tensions between copyright policy and copyright law can be approached as sites of fissure where academic authors might exert agency to redefine how universities construct and maintain relationships with academic authors through policy.

A NARRATIVE ON DISTRIBUTED AGENCY AND TEXTUAL GENERATION

The thesis I composed as a requirement for the Masters of Arts in English at Indiana University–Purdue University, Fort Wayne (IPFW), is unlike most other M.A. theses—well, at least those at IPFW. That thesis, *Institutional Authors, Institutional Texts? An Analysis of the Intellectual Property Polices Pro-*

mulgated at IPFW and Its Peer Institutions carries a Creative Commons (CC) Attribution 3.0 License. It—if one reads policy literally—shouldn't. The standard formatting requirements of "A Guide to the Preparation of Theses and Dissertations" (2007) explain that the copyright page should contain the symbol for copyright, "©", my name, the year of submission, and the language "All Rights Reserved." Mine doesn't; my copyright page is improperly formatted. If you were to cruise over to the English Department Office at IPFW, pick up my thesis, and turn to its copyright page, you would find that the page proudly displays the Creative Commons (CC) by attribution logo, my name, the year of submission, and the language "Licensed Under a Creative Commons Attribution 3.0 License ... Some Rights Reserved" (Amidon, 2007, p. iii). Those formatting deviations are deceptive little buggers; they won't reveal the intensive process that enabled them. I, however, will.

But before I get to the crux of that story, it is important that I stress what is offered is *one* story. Certainly, it is *an* account of how agency might be constructed in academic contexts. As such, I wish to make clear that I am not presenting grand claims about agency, but rather a story representative of a specific place in time and space—a story about the discursive flows of a deliberative process that involved members of a thesis committee, agents acting on behalf of IPFW, policies and texts local to that institution, copyright law, and myself. It is, as they say, a pretty mundane tale, and it of course involves two equally mundane arguments: standards and formats are not rigid, but flexible, and veering from standards and guidelines is often the result of a collaborative act, or as Stuart Blythe (2007) told us, "individuals seldom act autonomously" (p. 183). As the epigraph to this chapter holds, authorial decisions (in other words, agency)—and the textual artifacts that evidence them—often obscure the full complexity of processes, agents, and artifacts that lead to their production.

The vantage point and framework I employ within this chapter, especially as it relates to agency, is not my own. It derives largely from James E. Porter, Patricia Sullivan, Stuart Blythe, Jeffrey Grabill, and Libby Miles' (2000) "Institutional Critique: A Rhetorical Methodology for Change" and Blythe's (2007) "Agencies, Ecologies, and The Mundane Artifacts in Our Midst." Blythe expanded on the nuanced conceptualizations of institutional agency offered in "Institutional Critique," arguing that writing and agency "are best understood ... by identify[ing] and relat[ing]" variables (p. 183). Stuart Selber (2009) also offered his understanding of this perspective towards agency, describing a framework "not so much about defining but positioning. Researchers who employ its techniques are interested in relative weightings and interpretations" (p. 14). As Selber lucidly explained, the type of agency Porter et al. envisioned is one already implicated within a complex interplay of "contexts and constituent

parts (including operating procedures and working conditions)” where actors “acknowledge their own involvements and commitments” (p. 13). Agency for all of these scholars, then, is about working rhetorically *within* the parameters of a system, instead of fighting for change from the outside.

This was the case as I worked toward deviating from the formatting standards set forth for theses at IPFW. Deviating from those standards—that is, utilizing a CC license, instead of copyrighting my thesis—meant working within a community that consisted of the members of my thesis committee. And, like other academic communities, we worked in contexts where local documents and institutional policies defined the parameters of our productive efforts. Yet, as I learned, local communities are also often subject to more global documents and policies (e.g., Title 17 of U.S.C.) that also set parameters for productive efforts.

As a graduate student of English operating within a graduate program at IPFW, “I” composed a thesis to which a number of institutional agents and institutional texts converged to give shape. Through completing institutional forms; garnering signatures; organizing committee members; authoring proposals; meeting formally and informally with agents of the university (e.g., the department chair, the director of graduate program, and the members of my committee); reading and creating memos, notes, and emails; conducting and synthesizing research; examining and understanding institutional policies; and, finally, by writing in the more traditional sense, “I” composed a thesis. This statement is indicative of the type of agency I sketched above.

Moreover, my case demonstrates what Blythe (2007) called “the paradox of agency” (p. 173)—a form of agency gained “not by being an autonomous individual, but by being part of something larger, by being a part of systems that constrain and enable simultaneously” (p. 173). There were many junctures where agency was exerted. I encountered the paradox of agency because, as the production of the thesis progressed, agency was distributed among numerous members who made up the local community I was situated within, and we commonly turned to local and global texts to guide our actions. Many texts and many people constrained and enabled our efforts, but ultimately they were all influential (in the positive sense) in helping me produce a thesis.

For the purposes of brevity, I touch upon four texts and four agents that, most notably, did the constraining and enabling: The texts include Title 17 of U.S.C., the *Purdue University Faculty and Staff Handbook: 2005–2006*, Indiana University’s “A Guide to the Preparation of Theses and Dissertations” (2007), and TyAnna Herrington’s (2003) *A Legal Primer for the Digital Age*. The human actors (in the Latourian sense) involved were the three members

of my thesis committee and myself. In retrospect, I now find it somewhat profound that my name on the thesis cover suggests sole authorship.

Given that, I wonder whether or not agency—in terms of writing—is synonymous with or inextricable from solitary notions of authorship. If not, how do we reconcile how ownership does or should relate to the types of more distributed understandings of agency and authorship emerging in disciplinary scholarship? It is my hope that this chapter convinces readers that these are the types of questions we in writing and technical communication should be asking.

THE NEBULOUS ORIGINS OF A RESEARCH PROJECT

It is difficult for me to determine what precipitating moment sparked my interest in questions of authorship and ownership and the complex spaces in which they exist. In a certain respect, my thesis research began before I was aware of it. In a graduate class on multimodal composition, the professor gave a lecture on open-source and free-source code, licensing, and publishing. That lecture sold me on the fact that the principles upon which open-source and free-source software, licensing, and publishing are built—cooperation, freedom, sustainability, and sharing—were principles I was concerned about (see Galin, this volume). I knew that I wanted to contribute to those principles. And I knew I could: I was a graduate student, and I had to write a pretty labor-intensive document (that is, an M.A. thesis), so I wanted that text to mean something. I also wanted to share it with others. I wished to produce a text that would be of institutional value (i.e., meet the university's requirements for theses) so I could graduate, but I also wished to create something of use to others. What I wanted to do, ultimately, was put a Creative Commons License on a text, and if it happened to be a totally awesome thesis, well, that would be good too.

I wasn't sure if I had the agency to make the licensing choice, so I did what other people do in these types of circumstances: I sought the assistance of the appropriate institutional agent. Oddly enough, the person who knew the most about copyright was also the chair of my thesis committee and the interim chair of the department. I went to his office with a list of topics I was interested in exploring in the thesis and asked if I could put a CC license on my thesis. I have a sense that, on first impression, he thought the timing of the question was kind of funny. It was as if he was thinking, "what does it matter at this point? Write the thing first, and we'll worry about the formatting issues later."

Having reflected on that moment, I realize that I had thought of the question as a document-shaping decision: If my thesis could be shared more openly

with others, I would care about it more. I mean, honestly, how compelling is writing a document that takes up so much time when only four or five people are likely to read it? I'm serious. As a student who struggled through my freshman year of college and now has a strong background in rhetoric and composition scholarship, I think it is obvious that students enabled to create viable audiences and strong writerly motivation produce better quality work. As Danielle Nicole DeVoss and James Porter (2006) put it,

people write because they want to interact, to share, to learn, to play and to help others. They engage others for connection, compatibility, love, sex, desire, self-fulfillment (or egomania), the thirst for justice, the thirst for freedom, out of boredom, out of need for interaction, to make their lives more comfortable, and yes, they engage others for money, which they need to survive. (p. 203)

After a bit of discussion, my professor's interest was sparked too. He did what other people do in these types of circumstances: He turned to his shelves, located the *Purdue University Faculty and Staff Handbook: 2005-2006*, opened the index to find "copyright," and then turned to the appropriate page.¹ He read the passage on copyright, looked quizzically at me, and passed the book to me. I read:

The University shall own all domestic and foreign rights in and to any and all inventions and materials made or developed by University personnel either in the course of employment by the University or through the use of facilities or funds provided by or through the University. [...] Materials, whether written or recorded, shall be considered as having been developed in the course of employment in those cases where the individual was employed by the University for the specific purpose of preparing or producing the materials or was specifically directed to do so as a part of his or her duties. The rights owned by the University include all economic and property rights as well as the right to patent inventions and copyright materials. In accordance with custom established in institutions of higher education, copyright ownership of textbooks and manuscripts prepared at the author's initiative for classroom, educational, or professional purposes, including all royalties from publication or distribution of such materials, belong to the author except when the material is prepared as an assigned project and/or University

facilities or resources were used, in which case these materials shall be University property, as described above. (pp. 55–56)

In turn, we each discussed portions of the policy that seemed ambiguous and contradictory. The text had failed to clarify how the institution would approach this type of action. Rather than clamping down on the idea (the too common institutional approach to problem solving), my chair suggested that I contact two scholars from our field more versed in issues of copyright. I emailed the two professors a copy of Purdue’s policy, and asked if they thought I had the agency to license my thesis under a CC license. One suggested that doing so may have consequences, such as having to write another thesis if the thesis was not accepted. The other suggested I pose the question at the 2007 Conference on College Composition and Communication Intellectual Property Caucus (CCCC- IP) meeting. Unfortunately, I had to wait to ask that question, but in the meantime I was accepted to attend the 2006 Digital Media and Composition Institute (DMAC) at Ohio State University.

At that institute, a multimodal presentation by DeVoss, McKee, and Porter (2006) expanded the underdeveloped notions of copyright and IP that I had at the time. I came to understand that IP, copyright, and work-for-hire are wickedly complex conceptual entities. Prior to that institute, I had little understanding about my rights as an author. Prior to that, though, I had not had any reason to want to know about those rights. I took an important lesson home with me from DMAC: If the chair of my committee did not know if I had the right to utilize a CC license, and if other students didn’t know if I had that right, it was likely that others encountered the same difficulty. The curiosity stemming from that lack of knowledge led me to an appropriate research question for my thesis: How do IPFW and its peer institutions approach copyrightable IP created by university authors? I knew by the time I was finished conducting the research I would be closer to having an answer to my about licensing the thesis through Creative Commons.

RELATING TEXTS: SITUATING HOW TEXTS SHAPE TEXTS

Up to this point in the chapter, my aim has been to argue that a number of agents and texts influence the composition of a text in educational contexts, focusing on the discipline of writing. But what mundane texts influence textual generation in these contexts? As Blythe (2007) posited, they are “documents that set parameters for our labor and for the labor of those who work with us—including secretaries, students, editors, and so on” (p. 181). Think about the

influence an assignment sheet has upon how a student approaches an assignment; think about institutional policies like the excerpt provided earlier from the *Purdue Faculty and Staff Handbook*; think about documents like IU’s “A Guide to the Preparation of Theses and Dissertations”; and think about texts that have the power of law behind them, like Title 17. I now delve deeper into how those “mundane” texts influenced the production of my thesis. As I began my research into how IPFW and its peer institutions approach copyrightable IP created by university authors, I encountered a number of difficulties.

First, I had to determine which universities were IPFW’s peer institutions, and although this should have been relatively easy, in practice it was not. The administrative assistant I was directed to ask was somewhat reluctant to hand over the document containing that information. The document was for faculty; I was a graduate student and may not have been authorized to ask for such a document. She acted, in my assessment, quite appropriately. So, I talked to the chair of my thesis committee who, in turn, procured a copy of *IPFW’s Strategies for Excellence: The Strategic Plan 2001–2006*. The document detailed 13 institutions with similar missions and identities (see Table 1).

Table 1. IPFW’s Peer Institutions and Identifying Acronyms.

Institution	Identifying acronym
Boise State University	BSU
Cleveland State University	CSU
CUNY—College of Staten Island	CSI
Northern Kentucky University	NKU
Oakland University	OU
Portland State University	PSU
University of Central Oklahoma	UCO
University of Nebraska–Omaha	UN
University of New Orleans	UNO
University of Texas–El Paso	UTEP
Wichita State University	WSU
Wright State University	WS
Youngstown State University	YSU

Second, while collecting the respective policies dealing with copyrightable IP (all but one were available publicly online, and links to each are included in

the references at the end of this chapter), I found that like IPFW (which follows Purdue's policy mandates in most instances), UTEP, UNO, UN, and CSI are governed via policy through the larger institutional systems of which they are a part. This finding posed a difficulty, because it excluded the ability to make claims or trace patterns based on institutional similarities. For example, IPFW and Purdue—while part of the same system—are quite dissimilar in many respects.

Third, I was underprepared to understand aspects of the policy language useful to the study. TyAnna Herrington (1999a, 1999b, 2003) proved invaluable in preparing me to analyze the respective institution's IP policy language.² From Herrington's work, I came to understand that copyright law defines four types of circumstances in which texts are authored: independent authorship, work-for-hire, contractual or commissioned, and collaborative. Put simply, U.S. copyright code defines authorship as contingent upon a variety of contextual factors.

Understanding who owns independent, contractual or commissioned, and collaborative works is relatively simple: If an author has not signed a contract to produce work or been commissioned to produce work (which is contractual or commissioned authorship), if an author is not working with another author to produce the work (which is collaborative authorship), and if the work is not work for hire, then the author is creating the work independently.

Work for hire is much more complex. Herrington (1999a) described work for hire as “a legal fiction that makes the author of a work the employer or hiring party who contracted for the work” (p. 129). An author is working under work for hire when two factors are met:

- 1) An author must be found to have produced the work as an employee, determined by a 13-element agency law test, and
- 2) he or she must have produced the work within the scope of employment and have not specifically contracted rights to the work (Herrington, 2003, p. 97)

However, the difficulty with this test is that many scholars do work under the provisions of signed or unsigned contracts, and institutions can and do—as the data I provide later suggests—claim these contracts to be binding. Additionally, Herrington (2003) informed us that work-for-hire relationships are fixed, those involved may negotiate the ownership of copyrights. Moreover, because little case law dealing with work for hire and university authorship exists, courts could find university policies to be binding just because those policies are overly restrictive (in relation to Title 17).³ Those who work in business con-

texts, for example, routinely sign over rights to the copyrightable works they create, and it is not unlikely that courts could turn to those cases in making a decision about how work for hire operates in university contexts. Martine Courant Rife (2008) wrote in an essay focused on fair use that

if our institutions have restrictive guidelines that we disobey, you can bet that the courts will not listen to our pleas when we explain. Judges love to use ‘official guidelines’ as heuristics for evaluation. Our institutional guidelines will be used, and the courts will tell us that, if we do not approve of the guidelines, we should change them rather than engage in blatant civil disobedience. (p. 152)

Still, as Herrington (1999a) advised, universities “distribute detailed guidelines listing additional criteria to help clarify their own interpretations of the work for hire doctrine, but these guidelines do not peremptorily carry the force of law” (p. 3). Herrington provided Brinson and Radcliff’s 13-element agency law test to use in deciding who and what constitutes legal definitions of ownership. It is important for faculty, staff, and students to use these factors to approach policy as judges do—that is, as heuristics for gauging how to determine work-for-hire authorship and not legally supported dicta. Because these factors are important, I include here the 13-element test as found in Herrington (1999b):

1. whether the hiring party had a right to control the manner and means by which the product is accomplished;
2. the level of skill required;
3. whether the instruments and tools used were provided by the hiring party or the hired party;
4. whether the hired party worked at the hiring party’s place of business or the hired party’s place of business;
5. the duration of the relationship between the two parties;
6. whether the hiring party had the right to assign additional projects to the hired party;

7. the extent of the hired party's discretion over when and how long to work;
8. the method of payment;
9. whether the hired party had a role in hiring and paying assistants;
10. whether the work was part of the regular business of the hiring party;
11. whether the hiring party was doing business;
12. whether employee benefits were provided by the hiring party for the hired party;
13. how the hiring party treated the hired party for tax purposes.
(p. 406)

Equally important are two aspects of this test: first, that the Copyright Act of 1909 held the first factor to be the “sole determinant of employment status”; and, second, that the 1976 act holds that the “totality” of each of these ‘factors’ is important” in making these types of determinations (Herrington, 1999b, p. 407). In other words, after the introduction of the 1976 act, courts began to approach agency, ownership, and authorship as in a highly situated, highly contextualized way.

The fourth difficulty of the study arose out of the contextual distinctions associated with authorship under work for hire. Before reading and understanding the nuances of Brinson and Radcliffe's 13-point test, I originally believed that authors were the people who created a work. Once I came to realize that work-for-hire authorship complicates traditional notions of authorship, I developed not only a better ability to approach the policies through a legal lens, but also to understand the ways that work for hire relates to the prior discussions of agency and location *apropos* Blythe (2007), Selber (2009), DeVoss et al. (2005), and Porter et al. (2000). Most simply, determining one's “employee-ness,” and resultantly a text's author, has as much to do with challenging traditional notions of what a worker/author is as it does with the conditions under which the work was created. This poses difficulties for the work performed in writing classrooms for, and with, academic intentions; the work-for-hire doc-

trine challenges traditional concepts of employees and institutional authors and texts produced in these working environments.

The work-for-hire doctrine seems to suggest that full professors, associate professors, assistant professors, adjunct professors, visiting professors, emeritus faculty, lecturers, fellows, graduate students, undergraduate students, administrative assistants, maintenance personnel, safety and police staff, and even visitors to academic institutions could be viewed as producing works for hire. Herrington (1999b) indicated the problems tied to authoring in nonacademic contexts:

Work for hire status usually is clear when nonacademic employees create their projects at the employer's work site, using their employer's equipment and supplies, within an ongoing business relationship. But conflict arises when any one factor or any combination of factors is otherwise. Disagreement often arises over whether a work was created within or outside the creator's scope of employment when industry employees create their own work away from their place of employment and on their own time. (p. 130)

However, these disputes are further exacerbated by authoring in academic contexts, where various faculty, staff, and students "work under unique circumstances" (Herrington, 1999a, p. 135). This is due in large part to the fact that "employee status," under the 13-point test, is not easily discernible. Courts may truly be, then, the only decision-makers in how various readings of the test might apply to faculty, students, and staff. It still seems reasonable to warrant that as more of the test's permutations are met a text is more likely to be considered a work for hire and its author an employee.

This has significant implications for the individuals who create texts for and within academic contexts. For instance, the expertise required to produce a literacy narrative, a manuscript for a journal, or a chapter like this varies; moreover, the institutions we write for and within often supply us with access to libraries, computer labs, and writing centers, all of which could be viewed as types of academic instruments and tools. Even more confusing is the variance with which institutions control the manner and means by which the products are produced. If an undergraduate student and an assistant professor compose literacy narratives, the agency test will apply much differently. The agency test will also apply differently if, for example, the professor writes the narrative in his or her respective office on a computer provided by the university while the student writes his or hers at home on a personally owned computer.

Understanding the basics of work for hire seems a good start toward clarifying complexities. However, many of us are not fully versed in the legal complexities associated with U.S. copyright law. My experiences (then and since) suggest that, relatively speaking, few professors and fewer students are aware of how these laws exert a shaping power on how we produce texts. Again, knowing how copyright and work for hire function is important, but approximating how these laws correspond to institutional policies and documents is just as important if we wish to better clarify our ownership claims to texts we produce.

For instance, recall the excerpt from Purdue's IP policy concerning copyrightable texts. As I noted, portions of the policy seemed ambiguous and contradictory. The policy both claimed and disclaimed certain copyrightable works. Why is it that the policy first claimed ownership to "all rights in all materials made or developed by University personnel either in the course employment ... or through use of facilities and funds," but then later disclaimed "ownership of textbooks and manuscripts prepared at the author's initiative" (p. 55)? What this policy fails to account for, acknowledge, or forward to those authoring in and for the institution is that work for hire does make these types of renderings. Simply put, such policies may not necessarily carry the force of law, whereas Title 17 does. PU's policy is problematic in that it does not fully disclose the totality of factors that constitute legal authorship. Rather, the institution works from the position that it owns a controlling interest in all works, but releases control of some. This fails to mesh with the 13-point agency test. Academic institutions cannot determine work for hire status; only courts can do this *legally*. Why, then, does the policy work from this premise?

WHAT DO ACADEMIC COPYRIGHT POLICIES TELL US?

Generally speaking, the policies I collected⁴ sought to delineate three aspects: First, who was and was not included within the policy parameters; second, which texts were included or excluded from institutional ownership and control; and, third, when or under what circumstances authors would be creating work that would be considered under university control (i.e., the policies defined how the institution interpreted work for hire). These are the reasons why I, initially, felt that the analyses were less useful: The policies were not in line with the scholarly definitions of work for hire, authorship, and textual ownership with which I was familiar. The policies did not resonate with what I knew about work for hire and copyright. However, this aspect is precisely what made the analyses useful. Simply put, while Herrington's explanations of authorship, textual ownership, and work for hire suggest that Title 17 takes an

ecological view that synthesizes the interconnectivity of these concepts, some policies seem to do the opposite.

Policies Delineate Institutional Authors

The institutional policies evidenced six different approaches to defining the types of authors generating texts in academic contexts. The policies also evidenced one wild card group that resists classification into the six otherwise normative approaches:

1. The ambiguous language⁵ approach: Institutions used only ambiguous language to define authors (e.g., “originators,” “creators”).
2. The mixed-language approach: Institutions used both ambiguous and precise language (e.g., “faculty,” “adjunct faculty,” “emeritus faculty,” “undergraduate student”).
3. The one-tiered approach: Institutions used precise language situating authors into one category (e.g., “employee”).
4. The two-tiered approach: Institutions used precise language situating authors into one of two categories (e.g., either “student” or “staff”).
5. The three-tiered approach: Institutions used precise language situating authors into one of three categories (e.g., either “student,” “faculty,” or “staff”).
6. Collective bargaining agreement (CBA) approach: Institutions used precise language situating authors into one category (e.g., “members of the union”);
7. Wild card: Institutions used mixed language that suggested others were also subject to the provisions of policies (e.g., “visitors,” “users of facilities”).

At a general level, these approaches suggest that the institutions make distinctions regarding authorship in two ways: 1) the policies’ language evidences that institutions either make authorial distinctions between faculty, staff, student, and/or other types of authors (BSU, CSU, IPFW, UCO, UN, UNO,

UTEP, WSU, WS), or make no authorial distinctions (CSI, NKU, PSU, OU, YSU); 2) the authorial distinctions suggest that policies may vary in applicability based on which type of author is creating a text (BSU, CSU, IPFW, UCO, UN, UNO, UTEP, WSU, WS). That there were at least six types of approaches within 14 institutions demonstrates a wide variance in how institutions approach concepts of institutional authorship (see Table 2).

This variance may suggest that these institutions, more specifically the administrators vested with the responsibility of creating those IP policies, are uncertain as to whom the policies should and should not apply. For instance, whereas a number of policies did not expressly state that policies applied to “faculty” (they used ambiguous language such as “originator,” “creator,” or “staff”; YSU, WS, WSU, PSU, OU, NKU, IPFW), other institutions used precise language denoting nearly every conceivable type of “faculty” (“post-doctoral fellows,” “instructors,” “visiting faculty,” “adjunct faculty,” “emeritus faculty”; UCO, UNO).

Table 2. Approaches to Application of Policies.

Approach	Institutions
Ambiguous language approach	CSI, NKU
Mixed-language approach	IPFW
One-tiered approach	PSU
Two-tiered approach	WS, WSU
Three-tiered approach	BSU, CSU, UCO, UN, UNO, UTEP
Collective bargaining approach	OU, YSU
Wild card	IPFW, UCO, UN, UTEP, WS

Identifying these approaches is important because the 13-factor agency test provided by Herrington (1999a) posited that distinctions cannot be made based solely on who performs the work conducted. The differences associated with the roles and functions performed by the various types of authors creating work will be important in determining if a work is made for hire, but these policy distinctions seem to blur some of the other factors important to determining whether or not a work is made for hire. The most troubling approach is that of PSU; PSU’s policy either seems to hold that all institutional authors are “employees” or that “employees” are much different authors than faculty and student authors, but the policy fails to clarify which view it may be taking. Ironically, the works that utilize the terms “creator,” “author,” or

“originator” may be most useful because they insist on the more wholesale renderings homogeneous to work for hire’s 13-factor agency test.

Policies Claim and Disclaim Texts

The policies evidenced six different institutional approaches towards claiming work and five approaches toward disclaiming work. Analysis of the policy language also yielded a trend in how the institutions codify types of works: Texts can be independent works (commonly referred to by policies as traditional works), texts can be works made for hire, texts can be contractual works, and works can be those works that make significant use of facilities and/or funds. The conflation of independent works and traditional works problematizes independent works, because traditional works could be approached as works made for hire. This conflation suggests that institutions may not be aware of the 13-point agency law of the work-for-hire doctrine that aids in making these types of distinctions between works produced independently and works produced for hire. The presence of distinctions between works made for hire and works that make significant use of facilities and/or funds suggests that some of these institutions may not understand that uses and significant uses of facilities and/or funds is just one part of the 13-point agency test associated with work for hire. If the policies had subsumed uses and significant uses within works made for hire, and if the policies had included language on collaborative works, the policies would have been closely aligned with the four types of circumstances in which authors generate texts as posited by U.S. copyright law.

Texts policies claim include:

1. All-inclusive approach: Policies claim all works.
2. Catch-and-release approach: Policies claim all works but disclaim others.
3. Claim three–disclaim one approach: Policies explicitly claim works that make use of facilities and/or funds, works made under contract, and works made for hire, but disclaim traditional works.
4. Claim two–disclaim two approach: Policies explicitly claim works that make use of facilities and/or funds and works made under contract but disclaim works made for hire and traditional works.

5. Claim contractual–ignore others approach: Policies claim works made under contract and do not discuss other types of works.

Claim works made for hire–ignore others approach: Policies claim works made for hire but do not discuss other types of works. (See Table 3 for corresponding institutional approaches.)

Table 3. Approaches toward Claiming Work.

Approach	Institutions
All-inclusive approach	PSU
Catch-and-release approach	BSU, CSI, IPFW, WS, UN, UNO UTEP
Claim three–disclaim one approach	CSU, UCO
Claim two–disclaim two approach	NKU
Claim contractual–disclaim others approach	OU
Claim works made for hire–ignore others approach	WSU, YSU

Texts policies disclaim include:

1. Disclaim none approach: Policies disclaim no works.
2. Traditional works approach: Policies disclaim all traditional works.
3. Some traditional works approach A: Policies disclaim traditional works, except those subject to work for hire, but do not discuss use of facilities and/or funds.
4. Some traditional works approach B: Policies disclaim traditional works, except those that make significant use of facilities and/or funds, but do not discuss works made for hire.
5. Some traditional works approach C: Policies disclaim traditional works, except those which are made for hire or that make use of facilities and/or funds. (See Table 4 for corresponding institutional approaches.)

Table 4. Approaches toward Disclaiming Work.

Approach	Institutions
Disclaim none approach	PSU
Traditional works approach	CSU, NKU, UN, OU, YSU
Some traditional works approach A	WS
Some traditional works approach B	BSU, UTEP
Some traditional works approach C	CSI, IPFW, UCO, UNO, WSU

At a general level, the approaches suggest that institutions make distinctions regarding texts to which they claim or disclaim a controlling interest. The most noteworthy aspects of these approaches is the great variance in which works the respective institutions claim and disclaim and great variance in how the policies define works that will fall into the respective categories (for instance, works made for hire are delineated quite differently across policies). The most unique approach toward claiming and disclaiming texts appeared in PSU's policy, which claimed all works and disclaimed none.

This is problematic for two reasons: First, it seems to suggest that authors at PSU are always creating works for hire.⁶ This cannot be the case, as the 13-factor agency test associated with work for hire tells us. Other problematic issues exist; for instance, BSU, CSI, IPFW, WS, UN, UNO, and UTEP—in what could be labeled the majority approach—claim all works but then disclaim others. Why these universities employ this catch-and-release approach is uncertain. It could be that these institutions seek to build false ethos with faculty (i.e., through claiming all works and then disclaiming some of the works) wherein the institution appears to be giving the authors back their work. It could be that the institutions are creating a back door (i.e., through claiming all works and then disclaiming some of the works so the institution can later reclaim those works with little resistance). It could be that those who wrote these policies do not realize that even if an institution disclaims works, the work-for-hire doctrine still applies to those works and the institution may still exert a controlling stake in those works. Although the first two explanations are certainly quite disillusioning if applicable, I would suggest it is the last that is the most troubling, because the institutions may be trying to cede authorial rights to the individuals who create texts, but are in actuality making a terrible go at it.

To reiterate, approaches to the works policies claim suggest that institutions make distinctions regarding textuality that are not representative of

all of the factors yielding legal distinctions as to whether or not works may be works made for hire. Simply, an institution may claim to have a controlling interest in certain texts, or may claim and then disclaim those interests, but in many cases those claims or disclaims may not be accurate—or, worse yet, they mislead those who operate as authors within and for university contexts.

These findings correspond to a study similar to this one, but much larger in scope and conducted almost 20 years ago, in which Laura Lape (1992) noted that “none of the policies collected in this study fails to claim at least some faculty works, which suggests the purpose of [policy] adoption was to...claim ownership of certain works for the university” (p. 253). Lape also observed that genre is the basis upon which some policies claim and disclaim work. And, like Herrington, Lape indicated that the ambiguity of policies may be territory for future contentions.

What appears most striking, in relation to this chapter, is that Lape’s (1992) investigation revealed the following aspect: “It should be noted that under neither the 1909 Act nor the 1976 act can an agreement between employee and employer determine whether a work is a work made for hire within the terms of the statute” (p. 239). With that in mind, I now shift attention toward how the policies defined or otherwise interpreted work for hire.

Policies Seek to Self Define Work for Hire

The policies evidenced four approaches to outlining or otherwise defining when or within what contexts institutions would approach texts as work for hire. Institutionally described contexts creating work-for-hire circumstances include:

1. All contexts approach: In all contexts authors are creating works for hire.
2. Some, but not other contexts approach: Specifically assigned tasks are works made for hire; traditional works are not.
3. Contractual contexts approach: Works made by, or under, provisions of signed contracts is work for hire.
4. These contexts are ignored, or ambiguously defined: Contexts signaling work for hire are not discussed, or unclear. (See Table 5 for corresponding institutions.)

Table 5. Approaches toward Work-for-hire Contexts.

Approach	Institutions
All contexts approach	PSU
Some, but not other contexts approach	CSU, UN
Contractual works approach	UCO, UTEP, WS, YSU
Ignores or ambiguously defines contexts approach	BSU, CSI, IPFW, NKU, UNO, OU, WSU

Generally, the approaches suggest that institutions often attempt to self-define contextual conditions for work for hire. As with the approaches toward defining authors operating under institutional control and texts that will or will not be regarded institutionally controlled or owned, the policies evidenced variance in how the universities sought to define or delineate work-for-hire contexts. All of the approaches in this section are problematic in one way or other; for instance, the *all contexts approach* does not account for the 13 factors creating work-for-hire distinctions. Quite simply, this approach takes no notice that authors performing within institutions can, and may, be operating outside of work for hire.

The *some, but not other contexts approach* attempts to disclaim certain contexts, but these institutions do not exert the legal agency needed to render these types of decisions. The *contractual contexts approach* is problematic in that it conflates contractual authorship with work for hire authorship. This is a misrepresentation, as the discussion copyright law designated that these are two distinct forms of authorship. The last approach is both more and less problematic. In ignoring contexts that could create work-for-hire distinctions, the policies are less problematic because they do not misrepresent how work for hire operates. However, the policies also fail to disclose circumstances that signal work-for-hire distinctions, which vests the responsibility for understanding work for hire with institutional authors—authors who may be unaware of the conditions that signal if a text was made as work for hire. The ambiguous approach is problematic in that it fails to acknowledge the complexity and vastness of the 13 factors that signal that texts could be made as works for hire. Consequently, it is difficult to determine which policy is most or least problematic, but one could argue that it again is PSU's, as it approaches all contexts in which institutional authors could be operating as work for hire. PSU's approach seems to suggest that authors at this institution are always creating works for hire. Certainly, this cannot be the case, as the 13-factor agency test associated with work for hire tells us.

Other problematic issues exist regarding how the policies delineated contexts and conditions that would signal when institutions would approach work as made for hire. Institutions also sought to outline which uses of facilities, funds, and institutional time would create an institutional claim (see Table 6 for examples and associated institutions). Again, use is just one of the thirteen provisions that help courts determine if a work is or is not made for hire. Trends in the approaches to use show that policies more ambiguously defined contexts or uses constituting institutional claims, and more clearly defined contexts or uses not resulting in institutional claims. This finding demonstrates the types of territories rife for future contention—the type of contention Lape (1992) and Herrington (1999a, 1999b) forecasted.

Table 6. Uses Signaling Institutional Claim.

Type of use	May signal claim	May not signal claim
Use of office		BSU, CSI, UCO, UN, WS
Use of facilities	UCO, UN, WS, CSI	BSU, CSU, CSI, UCO, UN, WS
Provision of salary		CSU, CSI, UN
Use of administrative staff	UN, WS	CSU, UCO, UN, WS
Additional costs	BSU, UCO, WS	
Research grants		CSU, YSU
Leave/sabbatical		CSU, CSI, UCO, YSU
Reduced instruction or other assignments	UCO, WS	CSU, CSI, YSU
Use of computers	UCO	CSU, UCO, UN, WS
Use of phones		UCO
Use of equipment/tools	UCO	UCO, UN, WS
Ambiguous language	CSU, UCO, WSU	
Does not specify (either)	IPFW, NKU, OU, PSU, UNO, UTEP, YSU	

Policies that attempt to undo some of the work-for-hire provisions are problematic in that they could lull institutional authors into a false sense of security, leading authors to believe that they are not authoring under the conditions that may create a work made for hire, when in fact they could be. Further, policies stressing the use provision fail to acknowledge the twelve other factors that aid courts in making work-for-hire distinctions are problematic in that they could

lead institutional authors into believing they may be creating a work made for hire, when in fact they are not.

Lape (1992) noted that these types of policy provisions could lead to contention between institutions and institutional authors:

Aside from the possibility that the university may be found to have waived promises by faculty members to assign copyrights by nonenforcement of the policy, broad claims that are selectively enforced will lead to surprise on the part of professors and increased conflict between professors and the university. (p. 258)

Institutional authors may still utilize the 13-factor test to produce baseline action. Additionally, authors could sign contracts explicitly delimiting ownership rights for each copyrightable text they create. Institutional actors could also use areas of ambiguity to prompt discussion and perhaps prompt revision of policies that administration, faculty, and students find problematic.

What, then, do these policies tell us? They tell us we should not be shocked, as evidenced in Blythe (2007): “the possibility that policy must be interpreted, and will be interpreted differently by different people, should not be surprising” (p. 178). The presence of institutional variances toward work for hire, authorship, and ownership of texts seems to suggest that Blythe’s insight could be extended to readings of copyright upon which institutions base policies.

RECONSTITUTING AGENCY IN ACADEMIC CONTEXTS: OPPORTUNITIES FOR CHANGING COPYRIGHT POLICIES

There are many lessons to be learned about utilizing agency as authors performing work within and for academic institutions. Here, I have attempted to demonstrate how agency worked in such one specific context. The analysis of institutional policies suggests that institutional policy related to copyright might misrepresent or muddle legal distinctions of work for hire, authorship, and/or textual ownership. It is imperative, then, to keep two points in mind as we move forward.

First, as Rife (2008) and Jeffrey Galin (2008) posited, institutional policies and governing documents are not law, but courts may and often do use them to assemble interpretations of cases related to copyrightable intellectual property. Second, these policies and their implementation are not rigid but flexible; they are, as Porter et al. (2000) explained, important elements that give consistency

to institutions. Porter et al. posited that institutions “are rhetorically constructed human designs (whose power is reinforced by buildings, laws, traditions, and knowledge making practices) and so are changeable” (p. 611). As such, it is important to remember that *we*—people that work for and within these institutions—are endowed with situated and distributed agency.

If we are dissatisfied by policies or governing documents, we can work rhetorically to change those documents and policies. Recall Blythe’s (2007) statement on the paradox of agency and Rife’s (2008) statement on civil disobedience. As these scholars suggested, ignoring these policies is not only a counterproductive action, but an act not responsible to our roles within the institutions within which we work. Working through and within the institutions is not just a way to affect change, but a *deliberate* way to do so. As this applies to institutional documents and policies concerned with copyright, we need to ensure that people entering institutional contexts are alert to and cognizant of not only the implications of these documents and policies and how they give shape to institutional knowledge about copyright, but also how these policies derive from interpretations of larger governing texts and policies.

Perhaps the most important contextual factor is the impact emergent technologies have had with how information and knowledge is invented and delivered. These technologies have already affected how scholarship is performed for and within academic institutions. Physicist Gordon Kane (2008), for instance, noted that in his field, an open-access publishing venue called arXiv has largely replaced and altered the way research is performed. Open-access venues, as Kane warranted, have extremely small operating costs with respect to traditional forms of information delivery; Kane noted that arXiv functions at approximately 2% of the budget of the largest traditional print U.S. physics journal. Journals like *Computers and Composition Online* and *Kairos* have turned to Creative Commons licensed open-publishing and sharing, and this might be a clue that CC is becoming a popular alternative to traditional forms of copyright with scholars from within our field.

However, policies that require institutional authors to protect their work with copyright may discourage—or, worse, prohibit—authors from pursuing these types of publications. For instance, if an author creates a text borrowing from others using “share-alike” forms of CC licensing, but that author’s institution claims ownership to all texts, it places that scholar in a difficult ethical and legal position. Are authors working in institutions with restrictive IP policies prohibited from working with “share-alike” texts? If yes, then we need to seriously consider how these policies affect our abilities to perform scholarship. Doing so will mean preparing institutional constituents—staff, faculty, administrators, and students—to communicate so that they may act

purposefully with regard to these issues. Preparing these individuals to partake (institutionally and communally) in this debate is the work that we perform as teachers of rhetoric, communication, and writing. Locally, this means working with others to decide what is in our institutions' interests. But, it also means thinking reflectively and globally to ensure that we are making the types of ethical choices that enable our disciplines to proceed in a sustainable fashion. We must work on various contextual levels to affect social change. What we do at one contextual level has implications for other contexts. The choices we make about how to act within institutions and which journals and publishers we choose to submit articles to will affect the coherence and cohesion of how connected contexts relate and assume consistency.

We must participate in the full breadth of that process—not in a solitary fashion independent from the ways that policies, documents, and people interrelate. As to the way copyright functions within institutions, we have to acknowledge questions about who owns language (Lunsford & West, 1996). Enabling individuals to affect change in informed, responsible, ethical, and fair ways is primarily the work our field advocates and performs. As Selber (2004a, 2004b) noted, writing can be approached as a tool, an artifact, and a process, and each perspective affords vantage points that are vital to one another. If we do not take up the work of identifying and relating, we are left with impartial views.

As I see it, it is difficult to exercise rhetorical change without a multitude of views. Blythe (2007) offered one way to exercise rhetorical action based on how texts function in context. Blythe explained that texts “derive power in three ways ... the way they are written, presented, and received” (p. 182). Acting locally, then, requires rhetorical action that attends to these matters. If Blythe were to apply this reading of power to the case of institutional copyright policies and documents, I bet he would argue that this is rhetorical action that faculty, staff, and students can precipitate. For example, there will be institutional constituents with the agency to revise policies by serving on committees that address and revise policies. These individuals can work to ensure that policies are more sensibly written. Those without the authority to write, however, can still educate those who do about the implications these issues hold for scholars and the multiple communities they inhabit. This may take the form of addressing policies within faculty and student senate meetings. Others with the agency to control how these policies are disseminated could ensure that all members of universities get copies of the policies. Those with knowledge of these topics can utilize the opportunities common to classrooms, departmental and institutional meetings, and scholarly and non-scholarly publishing—as well as local, statewide, and/or national conferences—to help bring others up to speed about

how important these issues are for writers and readers. Quite simply, there are a number of routes we can take to prepare members of our communities to participate within these conversations.

SOME FINAL THOUGHTS

I learned a great deal about how texts derive power when I wanted to license my thesis through Creative Commons. I learned how different institutional perspectives toward policy (such as PU's institutional policy on copyright) relate to the perspectives found in documents such as IU's formatting guide (2007). Part of this meant understanding how to navigate IPFW, a hybrid of two institutional systems. I came to learn that as an employee of IPFW, I worked under PU's policy, but as a graduate student of IPFW, I worked under IU's policies. The expertise and professionalism of the members of my thesis committee facilitated this understanding. By helping locate institutional documents and by explaining how those documents shaped the thesis-composing process, I learned what it means to work within a system.

When it came time to make a formal decision about how I was to format the copyright page of my thesis, I also had to demonstrate to my committee that the knowledge I had procured strengthened the claims I made for my CC licensing choice. To accomplish this, I used the thesis itself to communicate; for instance, I included explanations of CC licensing in the review of the literature section, outlining that CC licensing operates not against, but in conjunction with, copyright. This section also provided explanations of copyright, work for hire, and concepts of legal authorship. In some senses, the text became a performative space, where law, policies, and interpretations converged. I was responsible for ensuring that my committee felt comfortable signing off on a text that deviated from the normative route of copyright formatting for theses at IPFW. In my rendering, then, to say "I" authored the thesis is reductive; this one project suggests just how collaborative our scholarly processes are. Without *our* interactions (neither wholly my own understandings, nor wholly theirs), the thesis and this chapter would not be possible. I conclude by echoing Blythe (2007): "I hope that my arguments here may prompt some to begin redefining our sense of agency [authorship, ownership, writing, and possibility] as a highly situated, ecological construct" (p. 183).

NOTES

1. At this point, I assume there will be some confusion, as I noted that I attended IPFW, consulted a Purdue handbook for the copyright policy, and consulted an Indiana University guide for thesis-formatting requirements. This confusion is quite precisely my purpose. Navigating institutions is a complex activity, and the confusion a reader likely feels here should mimic the confusion I felt when trying to come to understand the contexts in which I would have to defer to IU policy or PU policy as a member of an institution demonstrating a confluence of both the IU and PU institutional systems. I clarify the confusion later in the chapter.

2. It is important to make the following delimitation regarding my thesis study and this chapter: IP constitutes works that can be protected through trademark, patent, and copyright protection. Generally speaking, most of the work that writing scholars and students produce falls under the protection of copyright, and thus the study only covers works that could be regarded as copyrightable. Computer programs are examples of works not addressed here, as they could be protected by copyright and/or patent protection.

3. Galin (2007), writing on one of the most recent cases of faculty work for hire, *Bosch v. Ball-Kell*, told us that the court's summary may suggest that "unless, there are explicit statements in letters of appointment or other university policies ... faculty may typically own copyrights in their teaching materials" and scholarship (p. 45). Moreover, as Galin reported, a number of documents were employed by the court (including the American Association of University Professors statement on copyright and a report from the university senate) in making this decision. This demonstrates the importance of weighing in within professional organizations and local contexts and producing documentation that supports a constructive political approach to changing policies.

4. In gathering and analyzing the policies, I did not conduct interviews of policy writers. Nor did I conduct interviews with members of the respective institutional IP offices. Yet, this seems a fruitful area for future research, and certainly would improve our understandings of how and why policies come to appear as they do. Additionally, I gathered the policies in 2007; in some cases, the policies have probably been updated, revised, and/or changed. I gathered policies; however, it is common for universities to have a number of other institutional IP documents that could be requested by courts in forming determinations of legal authorship and ownership.

5. I can think of a number of explanations for the use of ambiguous language in the policies: 1) Title 17 itself utilizes ambiguous terminology; policy writers may have applied this strategy; 2) policy writers may be writing a flex-

ible, fail-safe policy that allows them to apply the policy to institutional authors who create texts that they would like to assert ownership for; and/or 3) the language may evidence “zones of ambiguity ... where change can take place because of the boundary instability they highlight” (Porter et al., 2000, p. 623).

6. There are a number of reasons why universities may take a restrictive approach: 1) universities may have signed contracts with institutional members allowing them to claim these works; 2) universities may be using policies to create binding standards that hold members to the policies; and/or 3) the universities may have adopted an approach allowing them to claim works when they deem appropriate. Moreover, that policy language is restrictive does not necessarily denote that these institutions enforce these policies. Interviews would be useful in determining how, why, when, and in which circumstances institutions enforce policies claiming ownership. Another issue that might be best addressed through interviews is if and when ownership disputes are settled in house, which may partially account for the lack of case law on academic work for hire.

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