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## Copyright Provisions in Law Journal Publication Agreements\*

Benjamin J. Keele\*\*

*Mr. Keele examined copyright provisions of law journal publication agreements and found that a minority of journals ask authors to transfer copyright. Most journals also permit authors to self-archive articles. He recommends journals make their agreements publicly available and use licenses instead of copyright transfers.*

### Introduction

¶1 Authors, law journal editors, and librarians should always consider copyright law when dealing with scholarly articles. Generally, copyright issues relating to an article are handled through a publication agreement between the law journal and author. Because journal editors develop agreements, authors negotiate modifications, and law librarians advise and educate about copyright, all three parties have an interest in the terms under which articles are published.

¶2 Examining a sample of U.S. law journal publication agreements can provide information on the copyright practices used by most journals. With this information, editors can make more informed decisions about modifying their agreements, authors can more carefully weigh publication terms when choosing publication venues, and librarians can help both editors and authors establish a healthy balance between journal and author rights. The distribution of copyright privileges can also be analyzed to determine the extent to which publication agreements permit, or even encourage, open access to legal scholarship.

### Why Publication Agreements Matter

¶3 Publication agreements between journals and authors generally govern each party's ability to use the article covered by the agreement, and are thus an extremely important factor in the movement to increase open access to legal scholarship—making scholarly articles available to the general public online, without charge, and with minimal legal restrictions.<sup>1</sup> Open access can be achieved either by journals, as a matter of policy, making their contents freely available online, or by authors archiving their own works in institutional, disciplinary, or personal digital reposi-

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1. See Stephanie L. Plotin, *Legal Scholarship, Electronic Publishing, and Open Access: Transformation or Steadfast Stagnation?*, 101 LAW LIBR. J. 31, 40, 2009 LAW LIBR. J. 2, ¶ 28.

tories.<sup>2</sup> Because publication agreements bind both the journal's and the author's use of an article, agreements can either facilitate or hinder open access.

¶4 Open access emerged from the confluence of two trends in scholarly publishing: increasing prices for journal subscriptions and the growing practice of the digital dissemination of scholarship.<sup>3</sup> While the cost of subscriptions to law journals has never been as high as for other academic periodicals,<sup>4</sup> contracts between law journals and subscription databases such as Westlaw, LexisNexis, and HeinOnline have meant that most legal scholarship is available only in databases to which the general public does not have access. Law students and professors expect articles to be easily accessible online, and the general public can also benefit greatly from such access,<sup>5</sup> but this benefit is reduced when access to articles is subject to subscription fees. Assuming that open access to most law journal articles is desirable, do most publication agreements support or inhibit this goal?<sup>6</sup>

¶5 One widely publicized example of the ability of publication agreements to constrain open access was Dan Hunter's experience with the *California Law Review*. In 2003, the journal, with which Hunter had signed publication agreements that transferred copyright in his articles, ordered drafts of his articles removed from the Social Science Research Network (SSRN).<sup>7</sup> Hunter lost control of his academic work, and the journal, protecting its royalties from subscription databases (a major source of funding), had worked against open access to scholarship. After Hunter's protests, the *California Law Review* changed its copyright policy, further highlighting the importance of publication agreements and their effect on legal scholarship.

¶6 Just as agreements can give journals or authors control over which drafts of articles are made available and how costly access will be, they also determine who can have articles translated for readers in other countries, reprinted in anthologies or course packets, or migrated into new formats to help maintain long-term digital preservation. In sum, through copyright agreements, journals and authors structure the relationships between themselves, librarians, vendors, and readers for the foreseeable future.

### Trends Toward Author Rights and Open Access

¶7 In the past, like many academic journals, law journals often required authors to transfer all their copyright rights, giving the journals exclusive control over articles. Lawrence Solum noted that this exclusive control was an obstacle to open

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2. See Richard A. Danner, *Applying the Access Principle in Law: The Responsibilities of the Legal Scholar*, 35 INT'L J. LEGAL INFO. 355, 379–80 (2007).

3. Michael W. Carroll, *The Movement for Open Access Law*, 10 LEWIS & CLARK L. REV. 741, 749 (2006).

4. See Plotin, *supra* note 1, at 34, ¶ 8.

5. See Carroll, *supra* note 3, at 742–43 (presenting hypothetical scenario in which free access to legal scholarship is valuable).

6. See Plotin, *supra* note 1, at 40–45, ¶¶ 28–41, for a thorough discussion of the many factors advancing and resisting open access.

7. Dan Hunter, *Walled Gardens*, 62 WASH. & LEE L. REV. 607, 608 (2005).

access, because the transaction costs of obtaining permissions discouraged potential users.<sup>8</sup> In 1998, recognizing that complete copyright transfers granted journals more power than was necessary to efficiently publish their content, an Association of American Law Schools (AALS) committee produced a model publication agreement.<sup>9</sup> The chair of the committee, Marci Hamilton, explained the process behind the model agreement by listing four presuppositions of the committee underlying the agreement's provisions: (1) articles should never be works-for-hire, depriving scholars of any copyright interest; (2) authors should not publish the same work in competing venues within one or two years after first publication; (3) provision should be made for disseminating articles to other audiences and in other forms; and (4) the educational mission of student-edited law journals' means their articles should be available for noncommercial use.<sup>10</sup>

¶8 The AALS agreement leaves copyright with the author and gives the journal an exclusive license for one year, after which the license is nonexclusive. Although drafted when the open access movement was just beginning to influence the dissemination of legal scholarship, the agreement was prescient in providing that authors may self-archive online (although it is unclear if third-party sites are under the author's "effective control" as required by the agreement), provided that original publication is acknowledged. The agreement also permits educational, non-commercial reproduction of articles, making it much easier for teachers to legally distribute material for class reading.

¶9 In 2005, the Open Access Law Program, a joint venture of Creative Commons and Science Commons, issued an Open Access Law Model Publication Agreement.<sup>11</sup> While the AALS agreement emphasizes permitting educational uses, the Open Access Law Program's agreement focuses on self-archiving, explicitly stating that posting drafts online does not constitute prior publication and committing the journal to giving the author a digital copy of the published article. Creative Commons licenses,<sup>12</sup> which did not exist at the time the AALS agreement was drafted, are included as options for journals to allow and authors to select. The Open Access Law Program also developed four principles that journals can publicly adopt. The principles call for journals to require no more than a temporary exclusive license, permit authors to use Creative Commons licenses, provide digital copies of articles to authors for self-archiving, and post their publication agreements online. Authors are required to attribute original publication to the journal, unless the journal omits this requirement.<sup>13</sup>

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8. See Lawrence B. Solum, *Download It While It's Hot: Open Access and Legal Scholarship*, 10 LEWIS & CLARK L. REV. 841, 848–49 (2006).

9. Model Author/Journal Agreement, attachment to Memorandum from Bari Burke, Ass'n of Am. Law Sch., to Deans of Member & Fee-Paid Sch. (May 18, 1998), available at <http://www.aals.org/deansmemos/98-24.html>.

10. Marci A. Hamilton, *Why a Model Author/Journal Agreement?*, attachment to Memorandum from Bari Burke, *supra* note 9.

11. Sci. Commons, *Open Access Law: Publication Agreement*, <http://sciencecommons.org/projects/publishing/oalaw/oalawpublication> (last visited Jan. 21, 2010).

12. Creative Commons, *License Your Work*, <http://creativecommons.org/choose> (last visited Jan. 21, 2010).

13. See Sci. Commons, *Open Access Law: Principles*, <http://sciencecommons.org/projects/publishing/oalaw/principles> (last visited Jan. 21, 2010).

¶10 Authors also have the option of negotiating different copyright provisions before signing the publication agreement. The Scholarly Publishing and Academic Resources Coalition (SPARC) has developed a publication addendum that (with publisher assent) supersedes contrary copyright agreement provisions to ensure that authors can self-archive, make derivative works, and reproduce for noncommercial purposes as long as the original publication is credited.<sup>14</sup> Some law journals have accepted the SPARC addendum,<sup>15</sup> and several journal editors responding to my requests for publication agreements noted that they often negotiate with authors on copyright terms. Legal scholars and librarians have become more aware of the importance of retaining crucial rights to their articles, and tools have been created to help preserve authors' rights. But how many law journals have embraced the trend toward author rights and open access?

¶11 Several authors have examined the extent of law journals' shift from copyright transfers to nonexclusive rights. Richard Danner notes that the popularity of SSRN and Berkeley Electronic Press's repositories indicates that journals "are comfortable with a culture that both allows and encourages authors to assume some of the responsibility for disseminating their works."<sup>16</sup> This observation comes with a caveat, though: "It is difficult to know how many journals actually allow broad self-posting in their author publication agreements."<sup>17</sup> Carol Parker, in her article on self-archiving in open access institutional repositories, claims that as awareness of open access increases among authors and editors, "a growing number of law journal editors are reviewing journal publication agreements to ensure that they do not needlessly demand exclusive rights, even for a limited period of time."<sup>18</sup>

¶12 A study of law journals' copyright policies, published before the Danner and Parker articles, was not optimistic about open access. In 2004, Hunter surveyed the general law reviews of American Bar Association (ABA)-accredited law schools. From the sixty-five journals that disclosed their policies on self-archiving, Hunter found that thirty had no set policy or went on a case-by-case basis, twenty-six permitted self-archiving in some form, and nine prohibited self-archiving.<sup>19</sup> Hunter suggests that law journals, especially the top-ranked ones, feared that open access archiving would adversely affect their royalties from database providers. Even some of the journals that permitted self-archiving imposed conditions, such as embargo periods, removal of drafts after publication, or not using the published, definitive version.<sup>20</sup> On the whole, Hunter writes, "the fact remains that the majority of law reviews that responded to the survey do not allow open-access archiving, have yet to develop a policy on archiving, or claim to allow archiving but only in a way that effectively negates the public benefit of open-access archiving."<sup>21</sup>

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14. See Scholarly Publ'g & Academic Res. Coal., Addendum to Publication Agreement, [http://www.arl.org/sparc/author/Access-Reuse\\_Addendum\\_HTML.shtml](http://www.arl.org/sparc/author/Access-Reuse_Addendum_HTML.shtml) (last visited Jan. 21, 2010).

15. Carol A. Parker, *Institutional Repositories and the Principle of Open Access: Changing the Way We Think About Legal Scholarship*, 37 N.M. L. REV. 431, 471 (2007).

16. Danner, *supra* note 2, at 384.

17. *Id.*

18. Parker, *supra* note 15, at 471.

19. Hunter, *supra* note 7, at 629.

20. See *id.* at 630-31.

21. *Id.* at 631.

¶13 A more recent study gives some reason to be optimistic about journal policies. Plotin examined the copyright policies (often contained in publication agreements) of the top twenty law journals in the ISI Journal Citation Reports. She found that “while traditional law reviews may contain copyright restrictions for future uses, many have become open-access journals” and that several journals only required nonexclusive licenses from authors, thereby permitting authors to self-archive their articles.<sup>22</sup> Perhaps the arguments for open access and authors’ rights have more widely influenced law journals since Hunter’s study.

## Examination of Publication Agreements

### Methodology

¶14 Hunter’s study surveyed the main law journals of every ABA-accredited law school. Plotin looked at the copyright and open access policies of the twenty most-cited journals according to the ISI Journal Citation Reports.<sup>23</sup> Following in the vein of Coleman’s study of library and information journals,<sup>24</sup> my study focused on publication agreements. Using the Washington and Lee law journal rankings,<sup>25</sup> I made a list of the top-200 ranked U.S. law journals, regardless of whether the journals were general or specialized, student-edited or peer-reviewed.<sup>26</sup> In August and November 2009, each journal’s web site was examined for a copy of its publication agreement. I did not exhaustively search each web site, but checked the two sections most likely to contain an agreement: the “About Us” and “Submissions” sections. If an agreement was found, I downloaded it and did not contact the journal. If no agreement was found, I e-mailed the journal at the address listed on its web site. Forty-nine agreements were collected in August, and twenty-nine more were obtained in November.

¶15 Of the 200 journals, only fourteen (7%) had agreements available on their web sites. Seventy-one journals (35.5%) responded to my e-mails with their agreements (some by indicating that their agreements were online in a part of the web site I had not seen); seven (3.5%) said their agreements were in the process of being

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22. See Plotin, *supra* note 1, at 50, ¶ 50.

23. *Id.* at 45, ¶ 42. Plotin’s study included *Harvard Law Review*, *Columbia Law Review*, *UCLA Law Review*, *Texas Law Review*, *Yale Law Journal*, *University of Pennsylvania Law Review*, *California Law Review*, *Stanford Law Review*, *Cornell Law Review*, *Virginia Law Review*, *Georgetown Law Journal*, *Michigan Law Review*, *Journal of Legal Studies*, *Minnesota Law Review*, *Northwestern University Law Review*, *Vanderbilt Law Review*, *New York University Law Review*, *University of Chicago Law Review*, *Harvard Environmental Law Review*, and *Law and Human Behavior*. *Id.* at 45 n.115. My sample contains agreements from twelve of these journals. Only *Law and Human Behavior* was not in the set of journals I contacted.

24. Anita Coleman, *Self-Archiving and the Copyright Transfer Agreements of ISI-Ranked Library and Information Science Journals*, 58 J. AM. SOC’Y FOR INFO. SCI. & TECH. 286 (2007).

25. Washington & Lee Univ. Sch. of Law, Law Journals: Submissions and Ranking, <http://lawlib.wlu.edu/LJ> (last visited Jan. 21, 2010). The rankings are based on citation counts. The methodology is explained at Washington & Lee Univ. Sch. of Law, Law Journals: Submissions and Ranking Introduction, <http://lawlib.wlu.edu/LJ/method.asp> (last visited Jan. 21, 2010).

26. My original study was of the top 100 journals; the number was increased to 200 and a second round of requests was sent to all journals in order to obtain more responses.

revised, and four (2%) declined to provide their agreements, stating that they were only given to authors. Two journals indicated that they did not ask authors to sign a publication agreement. In the end, after searching journal web sites and e-mailing journals, I obtained publication agreements from seventy-eight (39%) of the top 200 U.S. law journals.

¶16 Of the journals for which I obtained agreements, sixty-six (84.6%) were student-edited; the other twelve were peer-reviewed. Forty-two (53.8%) were general law journals while thirty-six (46.2%) were specialized. The higher-ranked journals were somewhat more represented. Twenty-two (28.2%) journals were in the top quarter (ranks 1–50) of the Washington and Lee rankings, twenty-nine (37.1%) were ranked 51–100, seventeen (21.7%) were ranked 101–150, and ten (12.8%) were ranked 151–200.

¶17 I examined each publication agreement and noted whether it asked for a transfer of copyright, an exclusive license, or a nonexclusive license; the term of the exclusive license (all copyright transfers and nonexclusive licenses were for the duration of copyright); whether self-archiving by the author in SSRN, an institutional repository, or any other web site was permitted; and whether self-archiving was limited by an embargo or conditioned on attributing first publication to the journal. While some editors indicated that other journals published by the same school or publisher used identical publication agreements, I chose to only report what I found in agreements I actually examined. A list of the journals I contacted and which agreements were included in this study can be found in the appendix.

### Findings

¶18 The findings regarding what type of license the publication agreements request are presented in table 1. Copyright transfer was the least common practice. Only seventeen journals (21.9%) asked authors for their copyright. Twenty-six journals (33.3%) requested an exclusive license of some sort. Most of the exclusive licenses were temporary. Slightly under half (35, or 44.8%) of the publication agreements asked for a nonexclusive license. One journal took the unusual approach of giving authors a choice between transferring copyright and merely granting a nonexclusive license. Since that agreement would allow an author to choose a nonexclusive license, I categorized it as a nonexclusive agreement. This sample of agreements suggests that nonexclusive licenses may now be much more prevalent than copyright transfers, and somewhat more common than exclusive (usually temporary) licenses. Of course, this study had some limitations. The

**Table 1**

License Categories, Student-edited or Peer-reviewed

Type of Journal	Copyright Transfer	Exclusive License	Nonexclusive License	Self-archiving Permitted	Attribution Required
Student-edited	11	24	31	61	61
Peer-reviewed	6	2	4	12	10
<b>Total</b>	<b>17</b>	<b>26</b>	<b>35</b>	<b>73</b>	<b>71</b>

sample could be biased in that journals willing to disclose or put their publication agreements online may also be more likely to require nonexclusive licenses. The percentages of each type of license changed only slightly when the twenty-nine agreements obtained in November were added to the forty-nine gathered in August, indicating that the sample is reasonably representative of the journals willing to disclose their agreements. While I strove to be thorough and consistent, I coded the agreements myself, so human error in reading the agreements and recording the results could have affected the findings.

¶19 In other academic disciplines in which articles are peer-reviewed and published in journals managed by corporate publishing conglomerates and university presses, copyright transfers are more common.<sup>27</sup> Twelve of the agreements I collected were from peer-reviewed journals. These twelve peer-reviewed journals were published by eight different publishers: the University of California Press (one journal), the University of Chicago Press (three), Wiley-Blackwell (two), the American Bar Association (ABA) (two), and four law schools that each published one journal. The university presses and Wiley-Blackwell required copyright transfers, while the ABA and law schools did not. This would seem to support the notion that university and corporate presses generally tend to require copyright transfers, but with only three such publishers in the sample it would be hasty to draw that conclusion. Further comparison of the copyright practices of law school-published journals with university and corporate presses would be interesting.

¶20 The sample of agreements indicates that most journals permit self-archiving, regardless of peer-review, or even copyright license requested. Seventy-three (93.5%) of the copyright agreements specifically authorize self-archiving or provide for non-exclusive licenses and are silent about self-archiving. The five agreements that did not authorize self-archiving specifically reserved electronic publication rights to the journal, took exclusive rights and did not grant back self-archiving rights to the author or, in the case of one journal, permitted the author to post drafts online, but then mandated their removal before final publication of the article.

¶21 Most agreements imposed some sort of condition on self-archiving. By far the most common condition was attribution of first publication to the journal. Of the seventy-three journals that permitted self-archiving, only four did not have this term in their publication agreements. Some journals took further steps to protect their brand. In addition to requiring original attribution, some journals asked authors to take down pre-publication drafts and replace them with the definitive version once it has been published. The motivation behind this policy is presumably to avoid confusion between a rough draft and the cite-checked, edited, definitive version.<sup>28</sup> Some journals only permitted the final, published version to be

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27. See Elizabeth Gadd, Charles Oppenheim, & Steve Proberts, *RoMEO Studies 4: An Analysis of Journal Publishers' Copyright Agreements*, 16 *LEARNED PUBL'G* 293, 295 (2003).

28. Univ. of Chicago Press, Guidelines for Journal Authors' Rights, <http://www.journals.uchicago.edu/page/rights.html> (last visited Jan. 21, 2010) ("To avoid citation confusion, we discourage online posting of pre-prints and working papers. If you choose to submit a pre-publication version of your accepted paper to a *non-commercial*, discipline-specific pre-print or working paper archive, however, we require that appropriate credit be given to the journal as described above and ask you to remove the working paper from the archive after your article is published or replace it with the published version.").



self-archived. This policy contrasts strongly with the self-archiving policies of publishers in other disciplines, many of whom only allow archiving of preprints (drafts before peer review) or postprints (drafts including revisions made in response to peer review, but not including the publisher's final editing and formatting).

¶22 Most journals that asked for more than nonexclusive licenses seemed more concerned about competition in print publication than online distribution. Of the forty-three agreements that contained copyright transfers or exclusive licenses, only eight placed embargoes on self-archiving. Rather, most exclusive licenses bar republication in other journals or edited books for a time. This period of exclusivity is apparently intended to position the journal to collect license fees from commercial publishers of textbooks and periodicals and to prevent the author from publishing in another journal immediately after first publication (most of the publication agreements in the sample required the author to warrant that the article had not been previously published). Embargo periods ranged from six months to two years, with most journals selecting the middle ground of a one-year embargo.

¶23 It is difficult to quantify the influence of the AALS and Open Access model agreements on law journals, because many journals use the model agreements as templates and modify them to suit their particular needs. As I read publication agreements for this study, I noticed that many provisions bore a strong resemblance to their model counterparts, so it is clear that these model agreements have had some effect on journals' copyright policies. Fourteen agreements appeared to adopt the AALS agreement with few or no changes. The AALS agreement was developed before the Open Access agreement and had the backing of a major legal education organization, so it is not surprising that many more journal agreements had adopted or borrowed from the AALS model. Only three of the agreements examined in this study expressly provided for Creative Commons licenses. While nonexclusive licenses would not prevent an author from attaching a Creative Commons license, the lack of a specific provision indicates that most journal editors have not yet considered these licenses common enough to warrant express mention in their publication agreements.

¶24 Based on the publication agreements I examined, it appears that journals are accepting author rights and moving from copyright transfers to nonexclusive licenses or exclusive licenses that are limited in scope and duration. Self-archiving has also become widely permitted. The practice of transferring copyright and then granting back a nonexclusive license to the author in the same publication agreement seems to have little practical difference from a carefully crafted exclusive or nonexclusive license for the journal. On the whole, most journal publication agreements provided for a nonexclusive license (either immediately or after the exclusive license expires), and virtually all agreements permitted self-archiving at some point, with some conditions. This indicates that journals are becoming more accepting of author rights and the green road to open access. However, there is still some work to be done.

### Recommendations

¶25 Publication agreements can have long-lasting consequences for authors, journals, libraries, book editors, and readers, so when authors are considering which journals to publish in, the terms of publication agreements are a relevant factor. The Open Access Law Principles call for journals subscribing to the principles to post their agreements online if they do not adopt the Open Access Law model agreement.<sup>29</sup> Unfortunately, most of the agreements in my sample were not readily accessible. Only fourteen (17.9%) journals had agreements available on their web site in a place where a busy author would have a realistic chance of finding them.

¶26 In terms of access to publication agreements, most discouraging is the stance of some journals that their publication agreements should not be fully public. Several journals would not share the agreement with me, stating that they show them only to committed authors. Several more provided their agreements, but asked for assurances that the text would not be published. Such policies are particularly troublesome because most authors submit manuscripts to multiple journals at once. They thus may have competing publication offers, and knowing copyright terms could be valuable in selecting the best offer. Publication decisions are often made very quickly, so even if journal editors send a publication agreement with an offer, this may not give authors enough time to make informed decisions.

¶27 Publication agreements often contain provisions not relating to copyright, such as descriptions of the production process, author warranties to reduce the journal's liability, and information regarding reprints. It is not clear, though, what would make them in any sense proprietary. A journal's value is largely determined by the scholarly quality of its content and the efficient execution of editing and production. None of these factors are influenced greatly by the secrecy of publication agreements, so it is difficult to imagine what competitive edge nondisclosure provides. One journal explained to me that it regarded its publication agreement as an internal document. But publication agreements directly affect many parties outside the staff and are, in many ways, concrete expressions of the journal's copyright policies; thus they should be not regarded as any more internal than their submission guidelines.

¶28 Publicly posting agreements online would enable authors to place their articles in journals that have favorable publication agreements. Librarians and authors seeking to archive scholarship could gain useful information about journal policies, and journal editors would be able to ascertain if their agreements were within the discipline's norm. To the extent that a certain copyright policy causes a competitive disadvantage for a journal, then the journal could adapt by negotiating alternative terms with authors or amending its agreement. If authors are to know whether they will be able to retain their copyright and librarians are to know what works can be self-archived by their faculty, public disclosure of publication agreements is a crucial first step. Several projects collect and present information on journal copyright policies online, enabling authors to easily inform themselves

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29. Sci. Commons, *supra* note 13.

about journals with which they may publish.<sup>30</sup> Journals should disclose their copyright and self-archiving policies to these groups and keep their information current and accurate.

¶29 It appears that authors expect certain rights to their articles, regardless of whether they transfer copyright. If a journal wants to have the right to publish an article in an issue, on its web site, in any database, and control permissions for reprinting articles in textbooks and anthologies, while also permitting the author to self-archive and reproduce for classroom use and later work (perhaps with some conditions), then copyright transfer is unnecessary. Properly worded exclusive or nonexclusive licenses can achieve the same objectives while also letting the author retain rights that might have been left unaddressed.

¶30 Many journals have successfully adopted nonexclusive or limited exclusive licenses to allocate copyright privileges to authors. Journals that request copyright transfers should reevaluate whether copyright ownership is necessary to fulfill their publishing objectives. Limited embargoes to avoid direct competition clearly aid journals' interests in publishing original scholarship, and requiring original attribution acknowledges journals' editing contributions and eases citation for the reader.

¶31 Requiring authors to archive the definitive version also simplifies citation and increases articles' value to most readers, who want the final version, but it also reduces authors' autonomy over their drafts. Perhaps during editing an author decides to remove a section and develop it into another article. She may want to leave the draft in SSRN to obtain comments about that section. Or maybe an author wishes to leave documentation about her scholarly thought process. The popularity of preprint archives should also lead journals to adopt clear policies on archiving pre-publication drafts. A journal's interest in ensuring that the definitive version is clearly marked may be served by asking authors to clearly mark archived drafts as unpublished instead of requesting their removal.

¶32 These recommendations are not entirely novel,<sup>31</sup> but the information gained from this examination of journal publication agreements indicates that they are well-grounded in journals' growing experience with open access and author rights. Many journals have adopted agreements that keep copyright and other valuable rights with authors. Authors can encourage journals with which they publish to use nonexclusive or limited exclusive licenses, request modifications to agreements, or attach addenda. Librarians should continue to educate authors about their options and advise editors to use agreements distributing rights over legal scholarship that serve all parties, including the general public. Based on responses to my inquiries, it appears that for some schools, publication agreements for all journals are developed by a central office. In some schools, those

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30. See, e.g., CopyrightExperiences, [http://commons.uml.edu/index.php?title=Main\\_Page](http://commons.uml.edu/index.php?title=Main_Page) (last visited Jan. 21, 2010); SHERPA/RoMEO, Publisher Copyright Policies & Self-Archiving, <http://www.sherpa.ac.uk/romeo> (last visited Jan. 21, 2010). The Washington and Lee journals site contains some, although not complete, information on journal copyright policies. Washington & Lee Univ. Sch. of Law, Law Journals: Submissions and Ranking, *supra* note 25.

31. For proposals to make law journals more friendly to open access, see Danner, *supra* note 2, at 394–95; Hunter, *supra* note 7, at 638–39; Parker, *supra* note 15, at 471–72.

offices were located in the law school library. On the other hand, some journals appeared to operate independently from the law school administration or other journals. Thus, it is not clear who (law school administrator, librarian, or journal editor) is most responsible for setting policies relating to publication agreements. The study also shows that many agreements permit self-archiving, so legal scholarship is fertile ground for librarians seeking to harvest articles for institutional and disciplinary repositories.

¶33 Further research would help answer questions such as: How have journal copyright policies changed over time? What are the differences between peer-reviewed and student-edited journals or between journals published by law schools instead of academic publishers? How many journals impose embargoes on self-archiving or require (or prohibit) use of the definitive version instead of drafts? To what extent are authors and editors negotiating and modifying agreements? It appears copyright agreements are not the primary obstacle to widespread self-archiving of legal scholarship. If this is so, what obstacles require more attention?

## Appendix

### List of Law Journals Contacted by Rank

(Titles in bold indicate publication agreement was obtained)

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|---|---|
| 1. Harvard Law Review                         | 32. Hastings Law Journal  |
| 2. <b>Yale Law Journal</b>                    | 33. Harvard International Law Journal                               |
| 3. Columbia Law Review                        | 34. <b>Boston College Law Review</b>                                |
| 4. <b>Stanford Law Review</b>                 | 35. Ohio State Law Journal  |
| 5. New York University Law Review             | 36. Cardozo Law Review  |
| 6. <b>California Law Review</b>               | 37. Virginia Journal of International Law                           |
| 7. University of Pennsylvania Law Review      | 38. <b>Law and Contemporary Problems</b>                            |
| 8. <b>Georgetown Law Journal</b>              | 39. Wisconsin Law Review  |
| 9. <b>Virginia Law Review</b>                 | 40. <b>Harvard Civil Rights-Civil Liberties Law Review</b>          |
| 10. <b>Cornell Law Review</b>                 | 41. <b>Harvard Journal of Law &amp; Public Policy</b>               |
| 11. <b>Texas Law Review</b>                   | 42. <b>Houston Law Review</b>                                       |
| 11. University of Chicago Law Review          | 43. <b>Indiana Law Journal</b>                                      |
| 13. UCLA Law Review                           | 44. Wake Forest Law Review  |
| 14. Michigan Law Review                       | 45. <b>Berkeley Technology Law Journal</b>                          |
| 15. <b>Northwestern University Law Review</b> | 46. Florida Law Review  |
| 16. <b>Minnesota Law Review</b>               | 47. American University Law Review                                  |
| 17. Fordham Law Review                        | 48. <b>Washington University Law Review</b>                         |
| 18. <b>Vanderbilt Law Review</b>              | 49. American Journal of Comparative Law                             |
| 19. <b>Duke Law Journal</b>                   | 50. Harvard Journal on Legislation                                  |
| 20. William and Mary Law Review               | 51. Arizona Law Review  |
| 21. Southern California Law Review            | 51. <b>Connecticut Law Review</b>                                   |
| 22. Iowa Law Review                           | 53. <b>University of Pennsylvania Journal of Constitutional Law</b> |
| 23. Harvard Journal of Law & Technology       | 54. <b>Journal of Legal Studies</b>                                 |
| 24. <b>Supreme Court Review</b>               | 55. Journal of Empirical Legal Studies                              |
| 25. <b>Notre Dame Law Review</b>              | 56. University of Colorado Law Review                               |
| 26. North Carolina Law Review                 | 56. <b>Villanova Law Review</b>                                     |
| 27. American Journal of International Law     | 58. Yale Law & Policy Review  |
| 28. University of Illinois Law Review         |   |
| 29. Boston University Law Review              |   |
| 30. Emory Law Journal                         |   |
| 31. <b>UC Davis Law Review</b>                |   |

59. **Brooklyn Law Review**
60. **Business Lawyer**
61. **Harvard Environmental Law Review**
62. **DePaul Law Review**
62. University of Cincinnati Law Review
64. Michigan Telecommunications and Technology Law Review
64. Yale Journal on Regulation
66. **George Washington Law Review**
67. **American Criminal Law Review**
67. Washington Law Review
69. **Tulane Law Review**
70. **Hofstra Law Review**
71. Harvard Negotiation Law Review
71. University of Michigan Journal of Law Reform
73. **Chicago Journal of International Law**
74. **Washington and Lee Law Review**
75. **Georgia Law Review**
76. Alabama Law Review
77. **Harvard Journal of Law & Gender**
78. **Columbia Journal of Transnational Law**
79. **Yale Journal of International Law**
80. Akron Law Review
80. **San Diego Law Review**
82. **University of Chicago Legal Forum**
83. Buffalo Law Review
83. Fordham Urban Law Journal
83. Michigan Journal of International Law
86. Loyola of Los Angeles Law Review
87. **Chicago-Kent Law Review**
87. **Georgetown Journal of Legal Ethics**
89. Columbia Human Rights Law Review
90. **Journal of Corporation Law**
90. Stanford Environmental Law Journal
92. **Brigham Young University Law Review**
93. Berkeley Journal of International Law
93. **Vanderbilt Journal of Transnational Law**
95. **American University International Law Review**
96. **Florida State University Law Review**
97. American Business Law Journal
97. **University of Pittsburgh Law Review**
99. **Arizona State Law Journal**
99. SMU Law Review
101. **Stanford Technology Law Review**
101. **Supreme Court Economic Review**
103. American Journal of Law & Medicine
103. **Cornell Journal of Law and Public Policy**
105. Indiana Law Review
106. Columbia Journal of Environmental Law
107. **Oregon Law Review**
107. **Virginia Law Review In Brief**
109. Columbia Science and Technology Law Review
110. **Utah Law Review**
111. Michigan Journal of Race & Law
111. William & Mary Bill of Rights Journal
113. New York University Annual Survey of American Law

114. George Washington International Law Review
114. Nebraska Law Review
116. Columbia Business Law Review
116. **Cornell International Law Journal**
116. South Carolina Law Review
119. Administrative Law Review
119. Antitrust Law Journal
119. **Delaware Journal of Corporate Law**
119. **Harvard Law & Policy Review**
119. **Pepperdine Law Review**
125. Catholic University Law Review
125. Chapman Law Review
127. Loyola University Chicago Law Journal
128. **Stanford Law & Policy Review**
129. Fordham International Law Journal
129. **Ohio State Journal of Criminal Law**
131. Case Western Reserve Law Review
132. Journal of Criminal Law and Criminology
132. Santa Clara Law Review
132. Texas International Law Journal
135. Stanford Journal of Law, Business & Finance
135. University of Richmond Law Review
137. Journal of National Security Law & Policy
137. Saint Louis University Law Journal
139. Boston College International and Comparative Law Review
139. **California Western Law Review**
139. University of Kansas Law Review
139. University of Pennsylvania Journal of International Law
143. Boston University International Law Journal
143. **Rutgers Law Review**
143. Seton Hall Law Review
146. **Clinical Law Review**
146. **Ohio State Journal on Dispute Resolution**
146. **St. John's Law Review**
149. American Bankruptcy Institute Law Review
149. Lewis & Clark Law Review
151. Fordham Intellectual Property, Media & Entertainment Law Journal
151. Harvard Human Rights Journal
153. Penn State Law Review
153. University of Miami Law Review
155. **Albany Law Review**
155. Missouri Law Review
155. Tax Law Review
158. Columbia Journal of Law & the Arts
159. Journal of Gender, Race & Justice
160. Kentucky Law Journal
160. New England Law Review
162. New York University Environmental Law Journal
162. **New York University Review of Law & Social Change**
164. University of San Francisco Law Review
165. Boston College Third World Law Journal
166. Albany Law Journal of Science & Technology
166. Temple Law Review
166. Virginia Journal of Social Policy & the Law
169. Drake Law Review

169. William Mitchell Law Review  
171. Harvard Latino Law Review  
172. Minnesota Journal of International Law  
172. Tennessee Law Review  
172. Washington University Journal of Law and Policy  
175. **Cardozo Arts & Entertainment Law Journal**  
175. Duke Journal of Comparative & International Law  
175. Ecology Law Quarterly  
175. Rutgers Law Journal  
179. **Boston University Journal of Science & Technology Law**  
179. Review of Litigation  
181. Baylor Law Review  
181. Law and Inequality  
183. Santa Clara Computer and High Technology Law Journal  
183. William & Mary Journal of Women and the Law  
185. Maryland Law Review  
185. **New Criminal Law Review**  
187. American Bankruptcy Law Journal  
187. Capital University Law Review  
187. **Constitutional Commentary**  
187. Environmental Law  
187. **Law & Social Inquiry**  
192. **Louisiana Law Review**  
193. **Real Property, Trust and Estate Law Journal**  
194. Environmental Law Reporter, News & Analysis  
195. Berkeley Business Law Journal  
195. **Law & Society Review**  
195. Virginia Environmental Law Journal  
198. Brigham Young University Journal of Public Law  
198. Brooklyn Journal of International Law  
198. North Carolina Journal of International Law and Commercial Regulation