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Copyright and Author Agreements for Open Access Law Journals

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Copyright and Author Agreements for Open Access Law Journals

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Commons Interests

- ▶ Goal of most law journal articles is to publish interesting, useful, and high-impact scholarly works.
 - ▶ This benefits both authors and journals by increasing prestige and influence.
 - ▶ Income from subscriptions, database aggregators, and reprint fees virtually always go to journal. Authors benefit financially through career advancement.



Why Worry About Copyright?

- ▶ Copyright gives authors certain rights on their original works: reproduction, distribution, display, performance and derivative works.
- ▶ Law journals want to reproduce and distribute authors' articles, and perhaps make derivative works (e.g., translations, repackaging in books).
- ▶ Non-exclusive licenses can be implied, but exclusive licenses or transfers of copyright must be in writing.
- ▶ So, virtually all journals ask authors to sign publication agreements.



What's the Problem?

- ▶ When author and journal partner to publish an article, decisions need to be made about how to achieve the common goals and balance conflicting goals.
- ▶ Copyright lasts a REALLY long time – life of longest-living author + 70 years OR 95 years after publication (if work for hire) – so you need to think both about short-term needs while avoiding problems in the future.



Basic Principles--AALS

Memorandum 98-24 - Windows Internet Explorer
http://www.aals.org/deansmemos/98-24.html

File Edit View Favorites Tools Help
Google Search Share Sidewiki Check Translate AutoFill Sign In

Memorandum 98-24

1. It is unacceptable to ask an author to agree that the work will be a work made for hire. By agreeing to a work-made-for-hire agreement, the author not only loses control of the work in every circumstance, he ceases to be the "author" for purposes of the copyright statute. No journal requires this level of control over a work, and no author should agree to relinquish this level of control over his creative works.

The academic community and the marketplace of ideas are enriched when the author retains some rights to exploit the work. Without work-made-for-hire, there are two entities exploiting the work in different forms, and they are entities with sufficiently different agendas and contacts to push the work into different forms more efficiently.
2. It is unacceptable for an author to engage in competing publications of the work during the first one or two years of the journal's publication. This principle arises not out of the copyright law, but rather out of a sense of fairness.
3. In order to avoid future disputes, both sides need to think very carefully about where the work might land beyond the journal's hard copy publication, such as edited books, the author's or the journal's websites, in classroom materials, and on data retrieval services (both legal and nonlegal). The information era has made it significantly more likely that a work can and will appear in other forms, and both parties need to prepare for that possibility, if not inevitability.
4. The overall function of student-edited law journals is to provide education for both the student editors and the readers. The law schools that house and commonly subsidize such journals have the purpose of uncovering and disseminating knowledge. Unlike the case of a trade publication seeking to make a profit, it is appropriate that most material in law journals be available to the author, and to others in nonprofit institutions, for use in the classroom and other instructional settings.

Would that we could have offered a one-paragraph agreement that would satisfy most needs. That we found impossible to do. Instead, we offer the following, which embraces as many reasonably likely eventualities as we could imagine (and some unlikely ones, like litigation) and which attempts to achieve a meaningful and fair balance of power between author and journal.

Model Author/Journal Agreement
AALS Special Committee

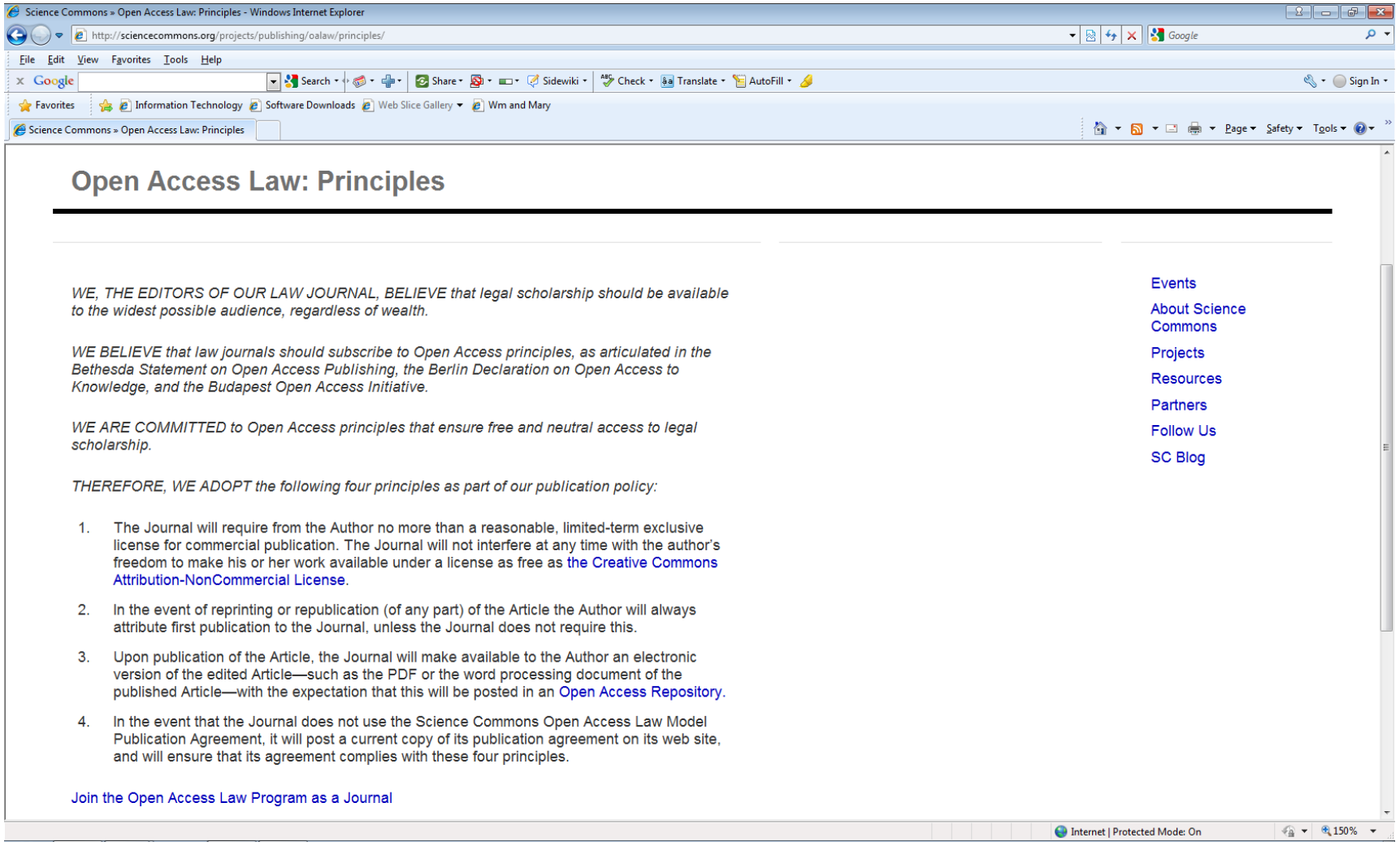
Done Internet | Protected Mode: On 150%

Basic Principles--AALS

- ▶ No articles should be works for hire.
- ▶ No competing publications for the first one or two years.
- ▶ Flexibility for unforeseen media and publication forums.
- ▶ Purpose of law journals is educational, so articles should be freely available for classroom and other educational uses.
- ▶ <http://www.aals.org/deansmemos/98-24.html>



Basic Principles—Creative Commons



The screenshot shows a Windows Internet Explorer browser window. The address bar displays the URL <http://sciencecommons.org/projects/publishing/oalaw/principles/>. The page title is "Open Access Law: Principles". The main content area contains several paragraphs of text and a numbered list of four principles. On the right side, there is a vertical navigation menu with links to "Events", "About Science Commons", "Projects", "Resources", "Partners", "Follow Us", and "SC Blog". The browser's status bar at the bottom indicates "Internet | Protected Mode: On" and a zoom level of 150%.

Open Access Law: Principles

WE, THE EDITORS OF OUR LAW JOURNAL, BELIEVE that legal scholarship should be available to the widest possible audience, regardless of wealth.

WE BELIEVE that law journals should subscribe to Open Access principles, as articulated in the Bethesda Statement on Open Access Publishing, the Berlin Declaration on Open Access to Knowledge, and the Budapest Open Access Initiative.

WE ARE COMMITTED to Open Access principles that ensure free and neutral access to legal scholarship.

THEREFORE, WE ADOPT the following four principles as part of our publication policy:

1. The Journal will require from the Author no more than a reasonable, limited-term exclusive license for commercial publication. The Journal will not interfere at any time with the author's freedom to make his or her work available under a license as free as [the Creative Commons Attribution-NonCommercial License](#).
2. In the event of reprinting or republication (of any part) of the Article the Author will always attribute first publication to the Journal, unless the Journal does not require this.
3. Upon publication of the Article, the Journal will make available to the Author an electronic version of the edited Article—such as the PDF or the word processing document of the published Article—with the expectation that this will be posted in an [Open Access Repository](#).
4. In the event that the Journal does not use the Science Commons Open Access Law Model Publication Agreement, it will post a current copy of its publication agreement on its web site, and will ensure that its agreement complies with these four principles.

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Basic Principles—Creative Commons

- ▶ Journals should ask for no more than a temporary, exclusive license for commercial purposes. Authors should be able to license works under Creative Commons Attribution-NonCommercial.
- ▶ First publication should always be attributed.
- ▶ Journals should provide authors with final PDFs.
- ▶ Journals should post agreement forms online.
- ▶ <http://sciencecommons.org/projects/publishing/oalaw/oalawpublication/>



Basic Principles--Ben

- ▶ There is no *legal need* for a journal to own copyright over the articles it publishes.
- ▶ Author should keep copyright, just in case new rights are created.
- ▶ Both author and journal should have maximum flexibility rights over articles while respecting author's moral rights and journal's need for a sustainable business model.
- ▶ Everyone should be properly credited.



Some Things are Easy...

- ▶ **Virtually all copyright agreements I've seen...**
 - ▶ Require that the grant (transfer, exclusive license, nonexclusive license) be perpetual and irrevocable — but see 17 U.S.C. § 203.
 - ▶ Cover both print and digital media.
 - ▶ Ask the author to warrant that the article doesn't do things that are likely to get someone sued.
 - ▶ Require attribution of the author and journal in any subsequent publications.



But What Questions are Hard?

- ▶ **What type of license supports the journal's sustainable business model?**
 - ▶ Is an exclusive period needed to protect subscriptions, database royalties, or reprint fees? How long? For what uses? These circumstances will vary by journal. And may involve \$\$\$.
- ▶ **How will version control be handled?**
 - ▶ Can the author post drafts? The published version? Both? Neither?
- ▶ **How open are you to negotiation?**
 - ▶ Some authors will ask for amendments or addenda. Are any provisions so important that a change is a deal-breaker?



But What Questions are Hard?

- ▶ What does it take for a journal to be “open access”?
 - ▶ Two types of barriers to access
 - ▶ Price—making articles available online without charging money removes this barrier—becoming more common
 - ▶ Permissions—Copyright can limit use of articles—lots of degrees of openness here (Creative Commons, Open Knowledge Definition)
 - ▶ Depends a lot on how the materials could/should be used: datasets could be repurposed more than article PDFs.
 - ▶ As legal studies becomes more empirical, how do you want to handle data?



Key Language

▶ Copyright transfer

- ▶ You **grant and assign exclusively...any and all rights of whatsoever kind or nature now or hereafter protected** by the Copyright laws of the United States and all foreign countries in all languages in and to your article...

▶ Exclusive License

- ▶ You hereby grant the Law Review the perpetual, royalty-free right to publish...The right provided shall be **exclusive** for a period starting from the date of this contract and **ending one year** after the date of actual publication...

▶ Non-exclusive License

- ▶ The Author hereby licenses to the Journal the irrevocable, **nonexclusive**, and royalty-free rights...



Norms

- ▶ Some journals ask for copyright transfer, but it is the least popular option. Temporary exclusive licenses are most common, with non-exclusive licenses in the middle.
- ▶ Most exclusive licenses were temporary, lasting between three months and three years. One year was the most common exclusive period.
- ▶ The vast majority of law journals permit self-archiving by authors, and many even prefer that the version of record be posted.



Quick Numbers

- ▶ Out of the 133 agreements I've examined:
 - ▶ 42.8% were exclusive licenses.
 - ▶ 40.6 were non-exclusive licenses.
 - ▶ 16.5% were copyright transfers.
 - ▶ 77.4% were non-exclusive or became so when the exclusive period expired.
 - ▶ 21% were based on the AALS model, 2% on CC
 - ▶ 86.4% expressly allowed authors posting online
 - ▶ 85.7% required attribution



Could / Should We...

- ▶ put agreements on journal site or central repository?
- ▶ consider whether we really need copyright transfers to perform our functions?
- ▶ reexamine the length of the exclusive period?
- ▶ look at what kinds of exclusivity we need?
- ▶ rethink our business model in a way that is responsible to all stakeholders?
- ▶ decide what amendments we are willing to accept from authors and what permissions we will grant?



Thank you!

- ▶ Email: bjkeele@wm.edu
- ▶ Slides online at <http://www.slideshare.net/benjamin7423/copyright-and-author-agreements-for-open-access-law-journals>

