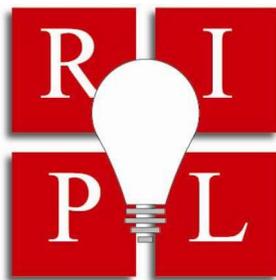


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AN EMPIRICAL STUDY OF LAW JOURNAL COPYRIGHT PRACTICES

BRIAN L. FRYE, CHRISTOPHER J. RYAN, JR. & FRANKLIN L. RUNGE

ABSTRACT

This article presents an empirical study of the copyright practices of American law journals in relation to copyright ownership and fair use, based on a 24-question survey. It concludes that many American law journals have adopted copyright policies that are inconsistent with the expectations of legal scholars and the scope of copyright protection. Specifically, many law journals have adopted copyright policies that effectively preclude open-access publishing, and unnecessarily limit the fair use of copyrighted works. In addition, it appears that some law journals may not understand their own copyright policies. This article proposes the creation of a Code of Copyright Best Practices for Law Journals in order to encourage both open-access publishing and fair use.

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I. INTRODUCTION

The publication of American legal scholarship is significantly different from the publication of scholarship in other academic disciplines. In most disciplines, scholarship is published primarily in peer-reviewed journals. By contrast, legal scholarship is published primarily in student-edited journals or “law reviews” associated with law schools.¹ While student-edited law journals typically have faculty advisors, the degree of faculty involvement varies, and student editors exercise substantial editorial independence.

This article presents an empirical study of the copyright practices of student-edited law journals, based on a 24-question survey sent to the overwhelming majority of United States law journals, focusing on copyright ownership and fair use. The study suggests that many student law journal editors have adopted copyright policies that are inconsistent with the expectations of legal scholars and the copyright doctrine. Specifically, many student-edited law journals have adopted copyright policies that preclude open-access publishing and prohibit the fair use of copyrighted materials. In addition, it appears that some student-edited law journals may not understand their own copyright policies.

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¹ See Christopher J. Ryan, Jr., *Not-So-Open Access to Legal Scholarship: Balancing Stakeholder Interests with Copyright Principles*, 20 RICH. J.L. & TECH. 1, 12-16 (2013), available at <http://jolt.richmond.edu/v20i1/article1.pdf>; Jessica Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779, 782-83 (2006), available at <http://law.lclark.edu/live/files/9593-lcb104litman.pdf>.

Open-access publishing, or publication with no restrictions on access and few restrictions on use, is increasingly the norm for academic publishing. Legal scholarship is unusually well suited to open-access publishing because of its independence from market factors and minimal reliance on commercial publishers. Legal scholars have universally embraced open-access publishing of law journal articles. But our study shows that many student-edited law journals have adopted copyright policies that needlessly and inefficiently restrict access to legal scholarship.²

The fair use doctrine is an exception to the exclusive rights of copyright owners that permits certain “transformative” uses of original elements of copyrighted works without the permission of the copyright owner.³ Criticism and commentary are paradigmatic forms of transformative fair use.⁴ Accordingly, the use of an original element of a copyrighted work in a scholarly article is typically a fair use which does not require permission. Our study shows that many student-edited law journals have adopted copyright policies that unnecessarily require authors to obtain permission for certain transformative fair uses of copyrighted works. Moreover, our study suggests that some journals do not understand their own copyright policies, because they indicated that they require or expect authors to obtain permission to make certain transformative fair uses of original elements of copyrighted works when they almost certainly do not.

In recent years, many academic, literary, and artistic disciplines have developed codes of copyright best practices in relation to publication and fair use.⁵ Our study shows that many student-edited law journals are unfamiliar with open-access publishing and the fair use doctrine, and suggests that they would benefit from a document explaining those principles and how they apply to law journals. Accordingly, we recommend the development of a “Code of Copyright Best Practices for Law Journals” that encourages law journals to adopt copyright policies that are consistent with open-access publishing and the fair use doctrine.

II. COPYRIGHT, OPEN-ACCESS & FAIR USE

A. *The Subject Matter of Copyright*

The Intellectual Property Clause of the Constitution authorizes Congress, “To promote the Progress of Science . . . , by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.”⁶ Congress exercised that authority by granting copyright protection to works of authorship.⁷

² See Dan Hunter, *Walled Gardens*, 62 WASH. & LEE L. REV. 607, 623-24 (2005); Ellie Margolis, *It’s Time to Embrace the New—Untangling the Uses of Electronic Sources in Legal Writing*, 23 ALB. L.J. SCI. & TECH. 191, 191-93 (2013).

³ 17 U.S.C. § 107 (2016).

⁴ *Id.*

⁵ See, e.g., Center for Media & Social Impact, Codes of Best Practices for Fair Use, <http://www.cmsimpact.org/fair-use/best-practices>.

⁶ US Const. Art. I, § 8, cl. 8.

⁷ 17 U.S.C. § 101 *et seq.*

Under United States law, copyright protects original works of authorship as soon as they are fixed in a tangible medium of expression.⁸ According to the Supreme Court, copyright can only protect the “original” elements of a work of authorship, or the elements of the work that were created by the author of the work and reflect some degree of creativity.⁹ As a consequence, copyright cannot protect facts, which are not created by an author, and cannot protect a compilation of facts, unless it presents a creative ordering, selection, or arrangement of those facts.¹⁰ Copyright also cannot protect abstract ideas or the functional elements of a work of authorship.¹¹ In practice, copyright protects all but the most trivial or most abstract elements of a work.¹²

Copyright initially vests in the authors of an original work of authorship.¹³ Typically, an author is anyone who contributed an original element to the work.¹⁴ In the case of “works made for hire,” the employer is deemed the author for the purpose of copyright ownership.¹⁵

Copyright grants authors certain exclusive rights to reproduce, adapt, distribute, display, and perform their original works of authorship, depending on the nature of the work in question.¹⁶ Copyright owners may transfer or license their exclusive rights in whole or in part, with few limitations.¹⁷ Copyright owners may file civil actions for the infringement of their exclusive rights, and recover damages or obtain an injunction.¹⁸ And under certain circumstances, the government may file a criminal action for willful infringement.¹⁹

In order to make a *prima facie* case of copyright infringement, a copyright owner must prove ownership of a valid copyright in a work of authorship, actual copying of one or more original elements of that work of authorship by the defendant, and substantial similarity caused by the copying of those original elements.²⁰ The outcome of a copyright infringement action typically depends on the substantial similarity determination, which is considered a “mixed question of law and fact.” The fact-finder must determine whether the defendant’s work is “substantially similar” to the plaintiff’s work because defendant copied original elements of the plaintiff’s work.²¹

1. Copyright Theory

The prevailing theory of copyright protection is the economic theory, which holds that copyright is justified because it solves market failures in works of authorship by

⁸ *Id.* § 102(a).

⁹ *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991).

¹⁰ *Id.*

¹¹ *Baker v. Selden*, 101 U.S. 99 (1879).

¹² *Feist*, 499 U.S. at 358-59.

¹³ 17 U.S.C. § 201(a) (2016).

¹⁴ *Id.*

¹⁵ *Id.* § 201(b).

¹⁶ *Id.* § 106.

¹⁷ *Id.* § 201(d).

¹⁸ 17 U.S.C. § 501 *et seq.*

¹⁹ *Id.* § 506.

²⁰ *Computer Associates Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 701 (2d. Cir. 1992).

²¹ *Id.* at 706.

providing a salient incentive to marginal authors.²² The Supreme Court has explicitly and repeatedly held that the Intellectual Property Clause adopted the economic theory:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'²³

Under the economic theory, copyright gives authors certain exclusive rights in their works of authorship in order to provide an incentive for them to invest in the production of those works. It follows that copyright is justified when it provides a salient incentive to marginal authors, and not justified when it does not.

2. Copyright in Scholarly Articles

Scholarly articles are inevitably original works of authorship protected by copyright. More specifically, a scholarly article consists of a constellation of discrete elements, some of which are original elements protected by copyright and some of which are not. The non-original elements of a scholarly article may be non-copyrighted facts, ideas, or public domain elements, or they may be copyrighted elements copied from a previously existing work. Copying a copyrighted element of a previously existing work is typically a *prima facie* infringing use of that element, because the copyrighted element and its copy are necessarily substantially similar.

The authors of a scholarly article are typically the people listed in the byline of the article.²⁴ Accordingly, the listed authors of a scholarly article are typically the copyright owners of the article and may transfer their copyright or license the use of the article.²⁵ Historically, scholars typically distributed their articles to the academic community via scholarly journals. Today, many scholars also distribute their articles to the general public via databases.

²² Of course, there are alternative, deontological theories of copyright protection. *See generally*, Peter S. Menell, *Intellectual Property: General Theories*, *ENCYCLOPEDIA OF LAW & ECONOMICS: VOLUME II* (Boudewijn Bouckaert and Gerrit de Geest eds. 2000), <http://encyclo.findlaw.com/1600book.pdf>.

²³ *Eldred v. Ashcroft*, 537 U.S. 186, 214 (2003) (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

²⁴ Arguably, academic institutions could argue that certain scholarly articles are works made hire. In addition, there is some dispute as to whether a person who contributed only ideas and other uncopyrightable elements to a work can be an author for copyright purposes. *Compare* *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068-69 (7th Cir. 1994) (holding that a co-author must contribute an original element to the work) *with* *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004) (holding that a co-author may contribute a non-original element like an idea to the work).

²⁵ 17 USC 201(d).

B. Open Access Publishing

Open access publishing is the publication of work of authorship in a form that is “digital, online, free of charge, and free of most copyright and licensing restrictions.”²⁶ Historically, legal scholarship was published in printed law journals that were distributed to subscribers at substantial expense.²⁷ But the Internet has reduced the costs associated with the reproduction and distribution of legal scholarship.²⁸

The open access movement began to crystallize with the Budapest Open Access Initiative, which was signed on February 14, 2002.²⁹ It observed that scholars have traditionally dedicated the fruits of their scholarship to the public good, and that the Internet has made it possible to provide open access to scholarship.³⁰ The Bethesda Statement on Open Access Publishing in June 2003 and the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities in October 2003 affirmed the principles of open access publishing.³¹

The desire to have a unifying document on open access goals spilled over into the legal academy on November 7, 2008, when the law library directors at the University of Chicago, Columbia University, Cornell University, Duke University, Georgetown University, Harvard University, New York University, Northwestern University, the University of Pennsylvania, Stanford University, the University of Texas, and Yale University met in Durham, North Carolina at the Duke Law School.³² That meeting resulted in the Durham Statement on Open Access to Legal Scholarship, which calls for two goals: (1) open access publication of journals published at law schools, and (2) that law schools stop printing law journals and rely instead on electronic publication in “stable, open, digital formats.”³³ Since its inception there have been over seventy online signatures supporting this initiative.³⁴

Applying open access publishing to legal scholarship was unthinkable thirty years ago, when articles were distributed via print copies to subscribers at substantial

²⁶ Peter Suber, *Open Access* 4 (2012), available at http://mitpress.mit.edu/sites/default/files/titles/content/9780262517638_Open_Access_PDF_Version.pdf.

²⁷ Michael W. Carroll, *The Movement for Open Access Law*, 10 LEWIS & CLARK L. REV. 741, 748 (2006).

²⁸ *Id.*

²⁹ Budapest Open Access Initiative (Feb. 14, 2002), <http://www.budapestopenaccessinitiative.org/read>.

³⁰ *Id.*

³¹ *Bethesda Statement on Open Access Publishing* (June 20, 2003), <http://www.earlham.edu/~peters/fos/bethesda.htm> (focused on the biomedical research community); *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities* (Oct. 22, 2003), <http://openaccess.mpg.de/Berlin-Declaration>.

³² *Durham Statement on Open Access to Legal Scholarship* (Feb. 9, 2009), <https://cyber.law.harvard.edu/publications/durhamstatement>.

³³ *Id.*

³⁴ *Id.*

expense.³⁵ Remarkably, a profession known for its conservatism (small “c”),³⁶ has positioned itself to be a leader in the open access movement.³⁷

How did legal scholars find themselves at the forefront of this revolution? Market forces. By and large, legal scholars are not selling their product, they are submitting their work into a competitive market where hundreds of law reviews are hungry for content.³⁸ Law reviews, however, are composed of an unpaid staff that works for the reward of scholastic pride, a notation on their resume, and (in most institutions) course credit hours.³⁹ In return for being a content provider, law professors receive a place to distribute their ideas and succor in their tenure or promotion process.⁴⁰ The basic needs of a law professor are not dependent upon the publisher, as law schools provide an adequate salary.⁴¹ In this model, we see the perfect ingredients for open access: a well-supported author that is given the room to become an expert on, and write about, a particular subject; a group of publishers that do not have labor costs; and technological tools that allow for the distribution of work free of charge to readers.⁴²

Another consideration that bolsters the open access movement in legal academia is its potential to increase the scholarly impact of an article.⁴³ A recent empirical study found that when an author’s law review article is available through open access, that article will see an average increase of 53% in citations in flagship journals.⁴⁴ The study’s authors had a clear message with respect to legal scholars: “The open access advantage is real, sizeable, and consistent.”⁴⁵

The final piece of the open access puzzle, and the one that publishers are struggling with, is that scholarship should be “free of most copyright and licensing restrictions.”⁴⁶ As described in the preceding section, the economic theory holds that copyright gives authors certain exclusive rights in their works of authorship in order to provide an incentive for them to invest in the production of those works.⁴⁷ But the copyright incentive is not salient to most scholars because scholarly articles lack

³⁵ Benjamin J. Keele, *Improving Digital Publishing of Legal Scholarship*, 34 LEGAL REFERENCE SERV. Q. 119, 120 (2015).

³⁶ Edgar Bodenheimer, *The Inherent Conservatism of the Legal Profession*, 23 IND. L.J. 221, 225-226, 233-235 (1948).

³⁷ See Durham Statement on Open Access to Legal Scholarship (Feb. 9, 2009), <https://cyber.law.harvard.edu/publications/durhamstatement>; Digital Commons, *About the Law Review Commons*, <http://lawreviewcommons.com/about.html> (last visited Oct. 27, 2015).

³⁸ John Doyle, *The Law Reviews: Do Their Paths of Glory Lead but to the Grave?*, 10 J. APP. PRAC. & PROC. 179, 179 (2009); Litman, *supra* note 1, at 787; see *infra* note 63 (mentioning the number of law journals contacted for our survey).

³⁹ Litman, *supra* note 1, at 788.

⁴⁰ Richard A. Danner, Kelly Leong, & Wayne V. Miller, *The Durham Statement Two Years Later: Open Access in the Law School Journal Environment*, 103 LAW LIBR. J. 39, 42 (2011).

⁴¹ BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 48-51 (2012); 2014-15 SALT Salary Survey, SALT Equalizer (Society of American Law Teachers), Vol. 2015, No. 1, at 1-4 (June 2015), available at <https://www.saltlaw.org/wp-content/uploads/2015/03/SALT-salary-survey-2015-REVISED-final.pdf>.

⁴² See Suber, *supra* note 26, at 2-4.

⁴³ See James M. Donovan, Carol A. Watson & Caroline Osborne, *The Open Access Advantage for American Law Reviews*, 97 J. PAT. & TRADEMARK OFF. SOC’Y 4 (2015).

⁴⁴ *Id.* at 22.

⁴⁵ *Id.* at 24.

⁴⁶ *Id.* at 4-5.

⁴⁷ See *supra* notes 13-16 and accompanying text.

significant market value. In arguing for an open access model, one scholar noted that copyright is largely “irrelevant” to legal scholarship and “plays no role” in its creation or dissemination.⁴⁸

Historically, law journals typically required authors to assign the copyright in their articles to the journal, in order to enable the journal to defray the cost of publishing and distributing the article.⁴⁹ And many law journals still request assignment of copyright. However, as the costs associated with the publication and distribution of legal scholarship have decreased, the copyright policies of law journals have often become more flexible.⁵⁰ When approached, many journals are willing to accept a non-exclusive license in lieu of assignment, amend the publication agreement to permit open-access distribution, or simply ignore the agreement and allow authors to distribute their articles on digital platforms like SSRN or Digital Commons.⁵¹

Today, copyright can create barriers to open access publishing. Law journal copyright policies that require authors to assign their copyrights can prevent authors from making their articles available in open access digital platforms. But law journal copyright policies that do not require assignment can limit the ability of the law journal to make articles available in open access platforms. Ultimately, both authors and law journals need publication agreements that to permit them to distribute articles as broadly as possible, whether on open access digital platforms or via commercial databases like HeinOnline, Westlaw, or Lexis Advance.⁵²

C. The Fair Use Doctrine

The exclusive rights of copyright owners have many statutory and common law exceptions and limitations.⁵³ Arguably the most important exception to the exclusive rights of copyright owners is the fair use doctrine, which provides that certain prima facie infringing uses of original elements of a copyrighted work are noninfringing. The fair use doctrine began as a federal common law doctrine, providing exceptions to copyright protection in certain circumstances.⁵⁴ The purpose of the fair use doctrine is to ensure that copyright does not conflict with the First Amendment and to reduce transaction costs associated with copyright.⁵⁵

The Copyright Act of 1976 codified the fair use doctrine, explaining that the unauthorized use of original elements of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom

⁴⁸ Litman, *supra* note 1, at 783, 790-791.

⁴⁹ See generally, BERNARD M. FRY, HERBERT S. WHITE & ELIZABETH L. JOHNSON, SURVEY OF PUBLISHER PRACTICES AND PRESENT ATTITUDES ON AUTHORIZED JOURNAL ARTICLE COPYING AND LICENSING (1977).

⁵⁰ Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW. LIBR. J. 383, 385 (2012); Litman, *supra* note 1, at 783.

⁵¹ Keele & Pearse, *supra* note 50, at 385-86; see also Scholarly Publishing and Academic Resources Coalition, *SPARC Author Addendum to Publication Agreement*, <http://sparcopen.org/our-work/author-rights/sparc-author-addendum-text/>.

⁵² Keele & Pearse, *supra* note 50, at 386.

⁵³ See 17 U.S.C. §§ 107-21 (2016).

⁵⁴ *Folsom v. Marsh*, 9 F.Cas. 342 (C.C.D. Mass. 1841).

⁵⁵ *Eldred*, 537 U.S. at 221.

use), scholarship, or research, is not an infringement of copyright.”⁵⁶ The 1976 Act further provided:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁵⁷

Consistent with the language of the 1976 Act, the Supreme Court has held that the fair use doctrine permits the unauthorized use of original elements of copyrighted works for “transformative” purposes.⁵⁸ In particular, the reproduction and distribution of original elements of a copyrighted work for the purpose of scholarly commentary or criticism is typically considered a core transformative use, consistent with the purpose of the fair use doctrine. As a consequence, the use of original elements of copyrighted works for the purpose of scholarly commentary or criticism is generally protected by fair use, even if a substantial portion or the entirety of the work is used, so long as the elements used were necessary to make the relevant point.⁵⁹

III. EMPIRICAL ANALYSIS

A. Description of Survey and Responses

To collect descriptive information about the copyright practices of law journals, our study utilized a 24-question ordinal response survey sent to student-edited national law journals with publicly available contact information.⁶⁰ The survey instrument captured a variety of law journals’ copyright practices, including journal-author agreements, asking permission to republish protected works, and resources to dealing with copyright issues. The survey response period ran from January 2015 to

⁵⁶ 17 U.S.C. § 107.

⁵⁷ 17 U.S.C. § 107.

⁵⁸ *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994). *See also* Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

⁵⁹ *See, e.g.*, *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605 (2d Cir. 2006).

⁶⁰ Specifically, we sent our survey to the email address publicly listed for 509 of the 655 student-edited national law journals. Including refereed and commercial law journals there are 986 national law journals; however, these journals are so differently organized and operated from the standard student-edited law journal that we do not include them in our analysis. Thus, our sample may be considered a purposive sample, and our analysis is offered in service of describing trends among a student-edited law journal population.

August 2015. Follow-up and reminder correspondence was sent electronically to this same law journal sample in March 2015 and August 2015.

In all, at the conclusion of the survey response period in August 2015, we received a fair response rate—101 responses in total—which allowed us to process a descriptive statistical analysis of the response survey results. To deal with duplicate response transmissions from the same law journal, we preserved the most recent response as the most recent picture of that law journal’s copyright practices, while the earlier response from that journal was dropped from our analysis. Thus, 93 reportable responses remained for analysis, yielding a 18.27 percent participation rate and a 9.63 percent margin of error.⁶¹

Table 1: Total Survey Responses by Impact Factor Tier

	Total Responses	Duplicate Responses	Unique Responses
Tier 1 (1-200)	34	4	30
Tier 2 (201-400)	22	1	21
Tier 3 (401-600)	22	2	20
Tier 4 (601-800)	23	1	22
Total	101	8	93

Since we do not proffer causal claims and merely offer descriptive analysis, our margin of error should not be viewed as a limitation to our findings. However, despite the response rate, our sample seems to mirror the population of national journals in key areas, namely: by quartiles of overall impact and by distribution of intellectual property specific journals, as well as by content type (i.e. general versus specialized journals). For instance, we find that our response sample is remarkably well-drawn from and representative of the population distribution of all American law journals by Impact Factor (“IF”) score. As a proxy for the relative importance of a law journal, the

⁶¹ We recognize that the response rate could be a possible limitation to our findings, if we were making causal claims. However, this analysis is descriptive and not causal. As such, it is intended to demonstrate the associational patterns we discover from the responses to our survey. For example, Table 1 demonstrates the relative distribution of respondent journals in our sample by Impact Factor quartile. This table also illustrates another issue that we uncovered in creating our survey pool that reflects in our response rate: a lack of publicly available, current contact information for law journals and their editorial boards, all of which change over year to year, and many of which have abandoned email submission in recent years, and thus their email addresses, in favor of a submission via platforms such as ExpressO or Scholastica. This fact undoubtedly impacted our response rate and our sample; we could reduce to a 5 percent margin of error, which is a standard level of error tolerance, unless we doubled our sample size (i.e. 187 unique responses). However, doubling our sample is not only impractical, it may in fact be impossible given the number of current email addresses that may be in use by law journals and their editorial boards.

Washington & Lee University School of Law Library assigns impact factor scores to each law journal on the basis of citations to articles published in that journal. Using the 2014 Washington & Lee Law Library's IF ranking, running from 1-800, we observe that our responses from Tier 1 (i.e. ranks 1-200) predominate responses from all other tiers; the 30 unique responses from journals classified in this IF tier may reveal a self-selection pattern into the study on the part of the respondents, which is not uncommon among respondents in elite tiers.⁶² However, respondents from the latter tiers nearly mirrored each other: Tier 2 (ranks 201-400) journals produced 21 unique responses; journals in Tier 3 (ranks 401-600) provided 20 unique responses; and Tier 4 (ranks 601-800) journals gave 22 unique responses.⁶³

Also, we observe that the journals identified as specialty journals with a focus in Intellectual Property ("IP") content account for 7.52 percent of our sample, while the actual proportion of IP specialty law journals in the population of student-edited national law journals is 7.33 percent, approximating a modicum of external validity for our sample.⁶⁴ Thus, even though our results are not proffered as causal, based on these similarities between our sample the population of student-edited law reviews, our results below can be viewed as offering key insights to trends among journals in our sample as well as the population of national law journals.

B. Research Questions and Methods

The responses from our survey are essential to answering the following research questions that motivated our study:

1. To what extent do law journals' practices illustrate: (a) a move toward mass digitization and open-access; and (b) an accurate understanding of the scope of copyright protection, including the fair use defense?
2. To what extent is there a consensus about how journals decide questions that implicate copyright law?
3. Finally, to what extent do law journal responses vary, if at all, across journal content category and impact factor tiers?

We employed descriptive analysis methods to apply these research questions to our survey responses from a representative sample of American law journals by 2014 Washington & Lee University Law Library IF tiers. We selected descriptive analysis

⁶² See, e.g., Jelke Bethlehem, *How Accurate Are Self-Selection Web Surveys?* (2008), available at: https://www.researchgate.net/publication/238713376_How_accurate_are_self-selection_web_surveys (detailing the pitfalls of self-selection bias patterns). While self-selection is ordinarily a problem in causal studies, because we present descriptive results, we do not believe that Tier 1 journals by impact factor are unduly influencing our results simply because there are journals in our sample that are classified in this tier than in another tier. In fact, it would be unlikely to find balance among journals by impact factor tier, given that a greater number of law journals with impact factor scores in Tier 1 have publicly available contact information than the other tiers, which made them eligible to receive our survey in the first place. Irrespective of this fact, the distribution of journals by impact factor tier in our sample reflects a balance among respondents in Tiers 2-4.

⁶³ See *supra* Table 1

⁶⁴ See *infra* Table 2

methods for our analysis in order to provide readers a straightforward and current snapshot of law journal copyright practices. Our findings are summarized in the text, tables, and graphs below.

C. Descriptive Statistics about the Respondents

Responses indicate that our sample is composed mostly of journals that do not classify themselves as IP content journals. That is, 7.52 percent indicate that they exclusively publish IP articles, and another 8.89 percent indicated that they frequently publish IP articles. An overwhelming proportion of journals in our sample indicated that they do publish IP articles but only occasionally (32.61 percent) or rarely (34.78 percent). A significant proportion indicated that they do not publish IP articles (16.30 percent).

Table 2: Responses to Content Type Questions

	Yes (Exclusively)	Yes (Frequently)	Yes (Occasionally)	Yes (Rarely)	No	Total
Q1: Does your journal publish articles on subjects related to intellectual property?	7.52	8.89	32.61	34.78	16.30	100.00

Note: Values described in percentages.

Also, our sample contains a substantial majority of journals who make their article content available online before or contemporaneous with the publication of an issue (71.43 percent), while 9.89 percent indicated that online publication was not immediate or depended on the circumstances. Lastly, 17.58 percent of journals in our sample indicated that their policy is not to make journal content publicly available online.

Table 3: Responses to Online Publication Question

	Yes (As Soon as Possible)	Yes (When Issue is Published)	Yes (But Not Immediately)	Depends on Circumstances	No	Don't Know
Q6: Does your journal make its articles publicly available on the Internet?	26.37	45.05	4.40	5.49	17.58	1.10

Note: Values described in percentages.

D. Descriptive Findings for General Copyright Practices

Our general copyright practices analysis focused on the following policies: (1) requiring authors to assign copyright; (2) requiring exclusive publication licenses; (3) prohibiting public dissemination of an article before publication; and (4) allowing third parties to publish and/or redistribute articles. In terms of general copyright practices on average, we observe that practices of journals in our sample vary greatly with regard to their copyright assignment and public dissemination policies. For instance, while most journals do not ask authors to assign copyright in their articles (48.91 percent), almost as many journals do ask authors to assign copyright in their articles (42.39 percent). Also, most journals in our sample ask authors not to publicly disseminate their article before publication: 21.98 percent of journals prohibit public dissemination before publication, 14.29 percent ask but do not require authors not to publicly disseminate articles before publication, and 21.98 percent of journals will ask authors not to publicly disseminate depending on the circumstances. However, 38.46 percent of journals responding to our survey do not ask authors not to publicly disseminate their work prior to publication.

Table 4: Responses to General Copyright Practice Questions

	Yes (Required)	Yes (Not Required)	Depends on circumstances	No	Don't Know	Total
Q2: Does your journal ask authors to assign the copyright in their article to the journal?	32.61	9.78	1.09	48.91	7.60	100.00
Q3: Does your journal ask authors to provide an exclusive license to publish their article?	52.22	8.89	11.11	25.56	2.20	100.00
Q4: Does your journal ask authors not to publicly disseminate their article before it is published?	21.98	14.29	21.98	38.46	3.30	100.00
Q5: Does your journal ask authors for a credit if their article is republished?	73.63	3.30	7.69	12.09	3.30	100.00
Total	45.05	9.07	10.44	31.32	4.10	100.00

Note: Values described in percentages.

That said, more consensus among journals in our sample emerges around the issues of exclusive publication, republication credits, and third party republication agreements. Most journals (52.22 percent) require authors to sign an exclusive publication agreement. Only 25.56 percent of journals do not ask authors to sign

exclusive publication agreements at all, while 20.00 percent do ask authors to sign exclusive publication agreements but, depending on the circumstances, do not require the author's exclusive publication agreement. Additionally, an overwhelming majority of journals (73.63 percent) require credits upon the republication of the author's article, and 10.99 percent ask authors for a republication credit but may not require it, leaving just 12.09 percent of journals that do not ask for such a credit. Finally, responses show that journals in our sample tend to grant third parties the ability to republish or otherwise distribute the journals' articles. While most journals grant third party republication permission with a credit (43.96 percent), others require payment of a licensing fee (8.79 percent), while others yet permit third party republication without restriction (4.40 percent). A significant number of journals in our sample indicated that third party republication permission depended on the circumstances (29.67 percent), while 5.49 percent of journals do not allow third party re-publication. Finally, 7.69 percent of journals in our sample responded that they did not know whether their journal allowed third party re-publication.

Table 5: Responses to Third Party Republication Questions

	Yes (Without Restriction)	Yes (If Give a Credit)	Yes (If Pay a Licensing Fee)	Depends on Circumstances	No	Don't Know
Q7: Does your journal allow third parties to republish or otherwise distribute its articles?	4.40	43.96	8.79	29.67	5.49	7.69

Note: Values described in percentages.

We also find remarkable variation by content (i.e. IP journals as opposed to non-IP journals) and by IF tier with regard to a journal's approach to general copyright practices. For example, over 70 percent of IP law journals do not ask authors to assign copyright, as opposed to under 50 percent of non-IP journals.⁶⁵ By tiers, we observe that an overwhelming majority—Tier 4 journals, followed by Tier 1 and Tier 3 journals—indicate that they do not ask authors to assign copyright, while most Tier 2 journals do ask authors to assign copyright.⁶⁶ Well over 60 percent of IP journals do not ask for exclusive publication licenses, while almost 60 percent of non-IP journals do require exclusive publication licenses.⁶⁷ Over 70 percent of Tier 1 and 2 journals ask authors to assign exclusive publication licenses, compared with less than 50 percent of Tier 3 and 4 journals who ask for the same assignment.⁶⁸ While relatively equal numbers of non-IP and IP journals ask authors not to publicly disseminate their article before publication, over 5 percent more of IP journals indicate that they do not

⁶⁵ See *infra* Figure 1.

⁶⁶ See *infra* Figure 2.

⁶⁷ See *infra* Figure 3.

⁶⁸ See *infra* Figure 4.

ask for this same restriction, as compared with non-IP journals,⁶⁹ though no systematic relationship exists by IF tier.⁷⁰ Similarly, no substantial difference exists between journals by content or IF tier on the subject of republication credits,⁷¹ or online publication,⁷² apart from the fact that over 35 percent—substantially more than any other tier—of Tier 2 journals indicate that they do not make articles available online.⁷³ Finally, more than 50 percent of non-IP journals allow third party republication of content without restriction or with a credit,⁷⁴ while a small majority of IP journals would only allow such a republication with a credit.⁷⁵ The lack of concurrence about standard general copyright policies among journals may be cause for concern, but these differences are nominal when compared to applied copyright practice differences among journals.

E. Descriptive Findings for Applied Copyright Practices

To get a more concrete sense of how journals treat more specific copyright issues in practice, we asked respondents to indicate, for instance, if they sought an original author's permission when his or her work was used in part in a publishing author's article for commentary or without commentary. On average, most journals indicated that they did not seek an original author's permission to be included in a publishing author's article if the piece of the original work quoted for commentary by the publishing author was a sentence (64.84 percent) or a paragraph (54.44 percent). Notably, in the quotation for author commentary cases, a number of journals responded that they would seek permission in such an instance (8.79 percent for a sentence quotation and 12.22 percent for a paragraph quotation), while several journals indicated that asking permission depended on the circumstances (16.84 percent for a sentence quotation and 22.22 percent for a paragraph quotation).

Problematically, only slightly fewer journals on average asked permission if original work quoted was not republished by the publishing author for commentary, even if the quotation was a sentence (57.78 percent) or a paragraph (49.45 percent). However, several journals responded that they would seek an original author's permission even if the quotation was not used for commentary (8.89 percent for a sentence quotation and 12.09 percent for a paragraph quotation), while several journals indicated that asking permission depended on the circumstances (23.33 percent for a sentence quotation and 24.18 percent for a paragraph quotation). This pattern seems to illustrate that journals are not aware that such republication use does not merit seeking permission of the original author. In fact, the US Copyright Office's Circular 21 describes an "educational use," which includes "planned noncommercial study or investigation directed toward making a contribution to a field of knowledge," and under which the quotation of a sentence or paragraph used in this

⁶⁹ See *infra* Figure 5.

⁷⁰ See *infra* Figure 6.

⁷¹ See *infra* Figure 7, Figure 8.

⁷² See *infra* Figure 9.

⁷³ See *infra* Figure 10.

⁷⁴ See *infra* Figure 11.

⁷⁵ See *infra* Figure 12.

manner is likely to fall, as being a use which would not require seeking permission in such an instance.⁷⁶

Table 6: Responses to Publishing a Copyrighted Work for Commentary Questions

	Yes (Required)	Yes (Not Required)	Depends on circumstances	No	Don't Know	Total
Q8: An author wants to quote a sentence from a copyrighted work, in order to comment on the copyrighted work. Does your journal ask the copyright owner for permission?	8.79	0.00	16.48	64.84	9.89	100.00
Q10: An author wants to quote a paragraph from a copyrighted work, in order to comment on the copyrighted work. Does your journal ask the copyright owner for permission?	10.00	2.22	22.22	54.44	11.11	100.00
Q12: An author wants to quote the entirety of a copyrighted ten-line poem, in order to comment on the poem. Does your journal ask the copyright owner for permission?	25.84	2.25	23.60	23.60	24.72	100.00
Q14: An author wants to quote the entirety of a copyrighted two-page letter, in order to comment on the letter. Does your journal ask the copyright owner for permission?	30.00	0.00	21.11	18.89	30.00	100.00
Q16: Your journal wants to republish a copyrighted article in a symposium issue commenting on the article. Does your journal ask the copyright owner for permission?	57.78	4.44	12.22	6.67	18.89	100.00
Total	26.44	1.78	19.11	33.78	18.89	100.00

Note: Values described in percentages.

⁷⁶ United States Copyright Office, *Reproduction of Copyrighted Works by Educators and Librarians*, Circular 21 (last revised Aug. 2014), <http://www.copyright.gov/circs/circ21.pdf>.

Table 7: Responses to Publishing a Copyrighted Work without Commentary Questions

	Yes (Required)	Yes (Not Required)	Depends on circumstances	No	Don't Know	Total
Q9: An author wants to quote a sentence from a copyrighted work, but does not comment on the copyrighted work. Does your journal ask the copyright owner for permission?	8.89	0.00	23.33	57.78	10.00	100.00
Q11: An author wants to quote a paragraph from a copyrighted work, but does not comment on the copyrighted work. Does your journal ask the copyright owner for permission?	9.89	2.20	24.18	49.45	14.29	100.00
Q13: An author wants to quote the entirety of a copyrighted ten-line poem, but does not comment on the poem. Does your journal ask the copyright owner for permission?	32.58	0.00	21.35	22.47	23.60	100.00
Q15: An author wants to quote the entirety of a copyrighted two-page letter, but does not comment on the letter. Does your journal ask the copyright owner for permission?	31.11	1.11	18.89	20.00	28.89	100.00
Q17: Your journal wants to republish a copyrighted article, without any commentary. Does your journal ask the copyright owner for permission?	62.92	5.62	8.99	5.62	16.85	100.00
Total	28.95	1.78	19.38	31.18	18.71	100.00

Note: Values described in percentages.

Additionally, we asked respondents if they sought an original author's permission when the original author's work was used in its entirety in a publishing author's article. Most journals indicated that they did seek an original author's permission to be included in a publishing author's article if the piece of the original work quoted for commentary by the publishing author was a poem (28.09 percent, as compared with 23.60 percent of journals that did not seek permission in such a case), a letter (30.00

percent, as opposed to 18.89 percent of journals that did not seek permission), or an article (62.22 percent, as opposed to 6.67 percent of journals that did not seek permission in this same instance). Interestingly, these distributions changed only nominally when respondents were asked if they would still seek the original author's permission if the publishing author did not comment on the original work. For instance, only 22.47 percent (for a poem), 20.00 percent (for a letter), and 5.62 percent (for an article) of journals indicated that they would not seek the original author's permission to quote the entirety of the work. A majority of journals do seek permission from the original author in this circumstance if the work is a poem (32.58 percent), a letter (32.22 percent), and an article (68.54 percent). The difference between the use of the entirety of the work for commentary or without commentary is not reflected in the responses of the journals in our sample and represents a substantial misunderstanding of the permitted use among these journals.

The variation by content and by IF tier continues between journals in terms of their varied approach to applied copyright practices. Yet, relatively similar responses exist between non-IP and IP journals with regard to asking permission to quote a sentence with or without comment; IP journals tended to indicate that permission depended on the circumstances in greater proportions than non-IP journals,⁷⁷ though these systematic patterns dissipate by IP tier.⁷⁸ Although far more non-IP journals responded that they do not ask permission of an original author to quote a paragraph with or without comment,⁷⁹ Tier 1 and Tier 3 journals overwhelmingly did not indicate that they ask permission of an original author to quote a paragraph with or without comment.⁸⁰ However, no strong systematic differences exist between journal content types or IF tiers regarding their treatment of asking original author's permission to quote sentences, paragraphs, poems, letters, or articles for or without comment.⁸¹ That said, the overall variation in responses represents a problematic dichotomy among journals in applied copyright practices.

F. Descriptive Findings for Copyrighted Images

In our final analysis, we asked respondents how they would treat the republication of copyrighted images. Responses ranged substantially, with a large proportion of journals indicating that they did not know how to treat the republication of copyrighted images. For example, 30.34 percent of journals indicated that they did not know whether to ask for permission for a copyrighted image used in public litigation for comment (as opposed to 30.34 percent that did ask for permission and 15.73 percent that did not ask for permission). By contrast, 32.22 percent of journals responded that they did not know whether to ask for permission for a copyrighted image used in non-public litigation for comment (as opposed to 36.66 percent that did ask for permission and 11.11 percent that did not ask for permission). However, 35.56 percent of journals expressed that they did not know whether to ask for permission for

⁷⁷ See *infra* Figure 13.

⁷⁸ See *infra* Figure 14.

⁷⁹ See *infra* Figure 15.

⁸⁰ See *infra* Figure 16.

⁸¹ See *infra* Figures 17-22.

a copyrighted image that was the subject of non-public litigation used for comment (as opposed to 30.00 percent that did ask for permission and 12.22 percent that did not ask for permission).

We also inquired as to whether journals asked for permission to republish a copyrighted image in order for a publishing author to comment on it. On average, 39.56 percent of journals indicated that they would ask permission, as opposed 12.09 percent of journals that would not as permission; 24.18 percent of journals expressed that they did not know how to treat such a situation. When asked whether a journal asked for permission to republish a copyrighted image where publishing author was not commenting on it, 50.00 percent of journals indicated that they would ask for such permission from an original author. Only 8.89 percent of journals responded that they would not ask permission in this case, and 23.33 percent did not know how to treat this situation.

Table 8: Responses to Publishing a Copyrighted Image Questions

	Yes (Required)	Yes (Not Required)	Depends on circumstances	No	Don't Know	Total
Q18: An author wants to republish a copyrighted image that was included in a public litigation document, in order to comment on the litigation. Does your journal ask the copyright owner for permission?	24.72	5.62	23.60	15.73	30.34	100.00
Q19: An author wants to republish a copyrighted image that was included in a non-public litigation document, in order to comment on the litigation. Does your journal ask the copyright owner for permission?	34.44	2.22	20.00	11.11	32.22	100.00
Q20: An author wants to republish a copyrighted image that was the subject of litigation, in order to comment on the litigation. Does your journal ask the copyright owner for permission?	26.67	3.33	22.22	12.22	35.56	100.00
Q21: An author wants to republish a copyrighted image, in order to comment on it. Does your journal ask the copyright owner for permission?	37.36	2.20	24.18	12.09	24.18	100.00
Q22: An author wants to republish a copyrighted image, without commenting on it. Does your journal ask the copyright owner for permission?	48.89	1.11	17.78	8.89	23.33	100.00
Total	34.44	2.890	21.56	12	29.11	100.00

Note: Values described in percentages.

While no strong systematic differences exist between journal content types or IF tiers regarding treatment of copyrighted images from public or non-public litigation, substantially more IP journals than non-IP journals indicated that asking permission depended on the circumstances.⁸² Although most IP journals indicated that they would ask permission to include a copyrighted image not for comment as opposed to asking permission to include a copyrighted image for comment,⁸³ by tier, more Tier 1 and 3 journals expressed that they would ask permission to republish copyrighted images for comment, while more Tier 2 and 4 journals said that they would ask permission to republish copyrighted images not for comment.⁸⁴

Lastly, results for journals responding to resources they rely on for copyright advice show no statistically significant relationship across content type or IF tier.⁸⁵ However, the resource journal editor respondents were least likely to consult was a general counsel or administrator, followed by the journal editorial board, in the event of a question about copyright issues. By contrast journal editors were more likely to consult a professor of the journal's policies to clarify appropriate action with regard to copyright issues.

G. Summary of Analysis

In sum, our analysis suggests that legacy policies at law journals may create unnecessary barriers to open access as well as impact scholars' abilities to use certain kinds of materials in their articles. This is evidenced by the significant number of journal respondents indicating that they: (1) require copyright transfers; (2) require exclusive copyright agreements; and (3) do not permit the public dissemination of articles by the author prior to publication. Additionally, considerable confusion about when to seek permission from an original author to reproduce a copyrighted work, even for uses which would fall under the coverage of an educational use, is presented by the responses from journals in our sample indicating that: (1) many journals place impediments to the production of scholarship by seeking permission from original authors of copyrighted works when such permission is unnecessary; (2) several journal respondents indicated that they did not know how to proceed in situations with applied copyright issues involving text; and (3) journal respondents exhibited great variation with regard to handling the republication of copyrighted images. Given these findings, we believe that sufficient grounds exist for organizing and adopting a common code of copyright practice among American law journals is necessary.

IV. NORMATIVE SUGGESTIONS

This empirical study of the copyright practices of American law journals shows that many law journals have adopted copyright policies that are inconsistent with open access publishing and fair use doctrine. Many law journals stated that their copyright

⁸² See *infra* Figures 23-28.

⁸³ See *infra* Figure 29.

⁸⁴ See *infra* Figure 30.

⁸⁵ See *infra* Figures 27-30.

policies require assignment of the copyright in the articles they publish, which may conflict with open access publishing. Many law journals stated that their copyright policies prohibit alternative distribution of articles before or after publication, which directly conflicts with open access publishing. Many law journals stated that their copyright policies require authors to obtain permission to use elements of copyrighted works in ways that are clearly protected by the fair use doctrine. And many law journals provided implausible answers that suggest that they do not understand their own copyright policies.

A. Law Journal Copyright Policies & Open Access Publishing

Open access publishing is now the norm in legal scholarship. Legal scholars expect and want their law journal articles to be distributed free of charge and as broadly as possible. The only right legal scholars typically want to assert in their articles is an attribution right, which is not explicitly provided by copyright, but is practically created by the exclusive rights of copyright owners and academic plagiarism norms.⁸⁶

Accordingly, open access publishing is a natural fit for legal scholarship. Legal scholars want their work to be disseminated as widely as possible, and typically desire only attribution. Law journals exist for the purpose of disseminating legal scholarship as broadly as possible. Open access publishing offers the ideal means of achieving this mutual goal. Copyright now creates one of the most intractable barriers to that goal, but imposing transaction costs on the publication and distribution of legal scholarship.

Therefore, law journals should abandon and never adopt copyright policies that prohibit or restrict the publication or distribution of the articles they publish. To the extent that copyright imposes transaction costs on the publication and distribution of legal scholarship, law journals should adopt copyright policies designed to reduce those transaction costs, by limiting the scope of copyright protection.

Law journals should adopt copyright policies that facilitate and promote open access publishing. If a law journal's copyright policy requires assignment of the copyright in an article, it should do so for the purpose of distributing the article subject to a Creative Commons attribution license, or some equivalent alternative.⁸⁷ If a law journal's copyright policy does not require assignment of the copyright in an article, it should require a non-exclusive license to publish and distribute the article, in order to ensure that the author can grant the same license to others. It should also require a non-exclusive right to publish and distribute the article in other media, subject to a Creative Commons attribution license, or some equivalent alternative.⁸⁸ Ideally, it should also require the authors to distribute the article subject to a Creative Commons attribution license, or some equivalent alternative.⁸⁹

Many law journals provided answers to our survey questions that are inconsistent with open access publishing. For example, many law journals stated that their

⁸⁶ See generally Brian L. Frye, *Plagiarism is Not a Crime*, 54 DUQ. L. REV. 133 (2016).

⁸⁷ *About the Licenses*, CREATIVE COMMONS, <https://creativecommons.org/licenses/> (last visited Nov. 28, 2016).

⁸⁸ <https://creativecommons.org/licenses/>

⁸⁹ <https://creativecommons.org/licenses/>

copyright policies require or request authors to grant the journal an exclusive license. Law journals do not need and should never request an exclusive license, which can only serve to prevent open access publication and limit access to legal scholarship. Likewise, many law journals stated that their copyright policies prohibit or limit the republication of articles. Law journal copyright policies should always permit republication of articles, with attribution to the author and journal of original publication.

Moreover, some law journals provided answers to our survey questions that suggested they do not understand their own copyright policies. For example, many law journals stated that their copyright policies prohibit authors from publicly distributing their article before it is published. But pre-publication public distribution via SSRN and other electronic database is nearly universal among legal scholars. While some law journal publication agreements may prohibit pre-publication public distribution, it is clearly a prohibition observed in the breach, if at all. Law journals should eliminate any such nominal restrictions on pre-publication public distribution.

B. Licensing & Fair Use

The fair use doctrine permits the use of copyrighted elements of a work without permission for transformative purposes like scholarly commentary and criticism. Accordingly, the scope of the fair use doctrine as applied to legal scholarship is quite broad, because legal scholars typically use copyrighted elements of works for scholarly commentary and criticism. It follows that under copyright law, legal scholars have broad discretion to use copyrighted elements of works without permission.

However, many law journals provided answers to our survey questions that indicating that their copyright policies are considerably more restrictive than required by the fair use doctrine. For example, using a copyrighted image in a law review article for the purpose of scholarly commentary or criticism is clearly a fair use. But many law journals stated that they would require an author to get permission in order to use a copyrighted image. Notably, some law journals even stated that they would require an author to obtain permission to use a copyrighted image that appeared in a judicial opinion or litigation document for the purpose of commenting on the image. The answers provided by many law journals showed that they did not realize that copying a copyrighted work in its entirety is a fair use if it is necessary in order to effectively comment on or criticize the work.

Notably, the responses provided by some law journals suggested that they did not understand their own fair use policies. For example, a surprising number of law journals stated that they require an author to obtain permission to quote a sentence from a copyrighted work. Not only is this an obvious fair use that does not require permission, but also it is unlikely that any law review has ever asked permission to quote a sentence from a copyrighted work.

Applying the fair use doctrine can be complicated and confusing. Law journal editors often don't know how to apply the fair use doctrine or who to ask about developing a fair use policy. Consequently, they are reluctant to rely on the fair use doctrine, and they adopt copyright policies that prohibit any copying without

permission. But ironically, the fair use doctrine applies in spades to law journals, which publish non-commercial scholarly articles consisting of scholarly commentary and criticism.

The needlessly conservative copyright policies adopted by law journals chill academic speech by limiting the ability of legal scholars to rely on the fair use doctrine. When law journal copyright policies unnecessarily require authors to obtain permission to use elements of copyrighted works, scholars often choose to omit those elements, either because they cannot obtain permission or because obtaining permission is too burdensome. The quality of legal scholarship suffers as a consequence, because authors exclude information that would benefit their readers. Law journals should adopt copyright policies that are consistent with the broad scope of the fair use doctrine as it applies to legal scholarship.

V. CONCLUSION

A. Code of Copyright Best Practices for Law Journals

Our study suggests that law journals would benefit from the creation and adoption of a “Code of Copyright Best Practices for Law Journals.” Such a code of best practices would help law journals evaluate and improve their copyright policies relating to ownership and fair use. Specifically, it would encourage law journals to adopt copyright policies that are consistent with open access publishing and the fair use doctrine.

As a preliminary matter, we suggest that such a code of best practices should reflect the following principles:

1. In order to promote open access to legal scholarship, law school administrators, faculty members, law librarians, and law journals should adopt and comply with the Durham Statement.⁹⁰
2. Law journal publication agreements should require copyright transfer only to enable publication subject to a Creative Commons attribution license or its equivalent.
3. Law journal publication agreements should require only non-exclusive licenses.
4. Law journal publication agreements should never prohibit publication or distribution with attribution in any form.
5. Law journal publication agreements should encourage authors to publish their article subject to a Creative Commons attribution license or its equivalent.
6. Law journals should encourage open access publication by either providing open access to all the articles they publish, or by enabling authors to provide open access to their articles.
7. Law journals should make their publication agreements publicly available online.

⁹⁰ *Durham Statement*, *supra* note 32.

8. Law journals should adopt fair use policies that reflect the broad scope of the fair use doctrine as it applies to legal scholarship.
9. Law journals should not require authors to obtain permission to use elements of copyrighted works in ways that are protected by the fair use doctrine.
10. Law journals should encourage authors to exert their right to use elements of copyrighted works under the fair use doctrine.

* * *

VI. APPENDIX

Figure 1: Copyright Assignment Practices by Content Type

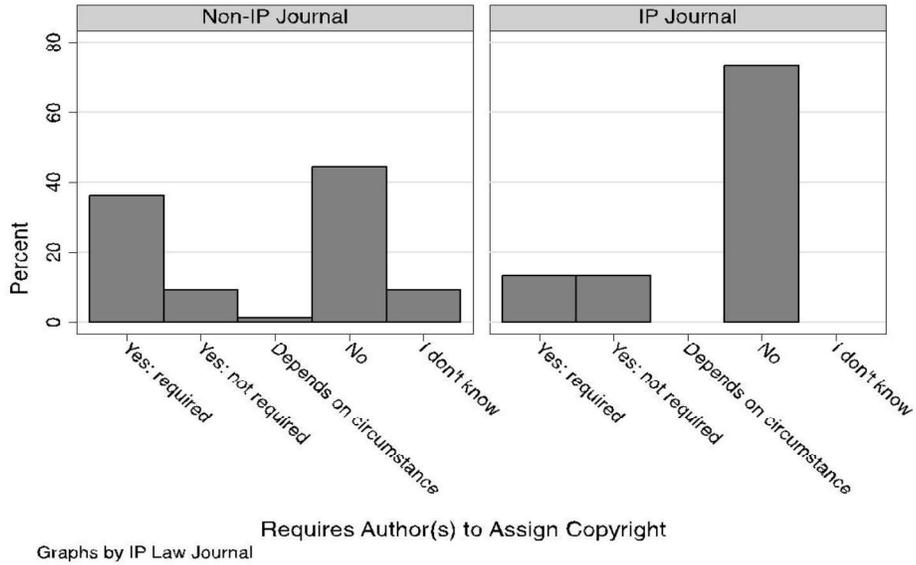


Figure 2: Copyright Assignment Practices by Impact Factor Tier

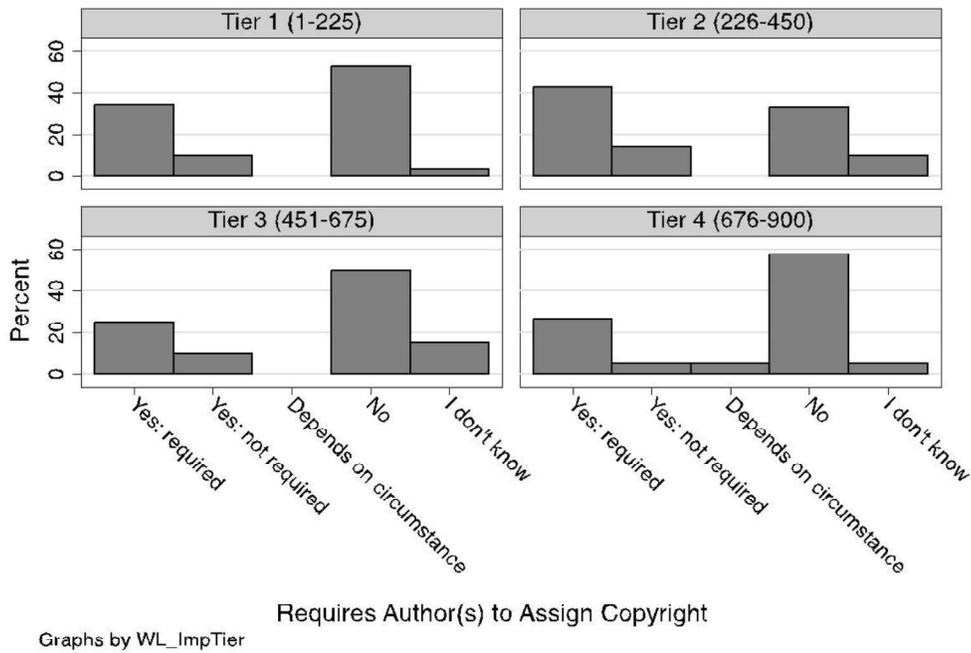


Figure 3: Exclusive Publication Requirements by Content Type

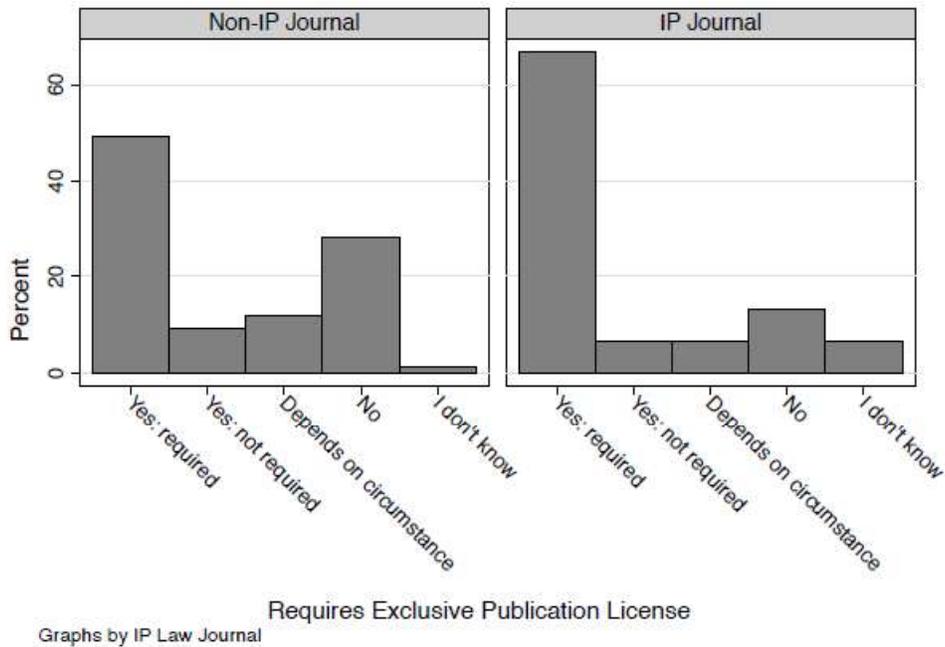


Figure 4: Exclusive Publication Requirements by Impact Factor Tier

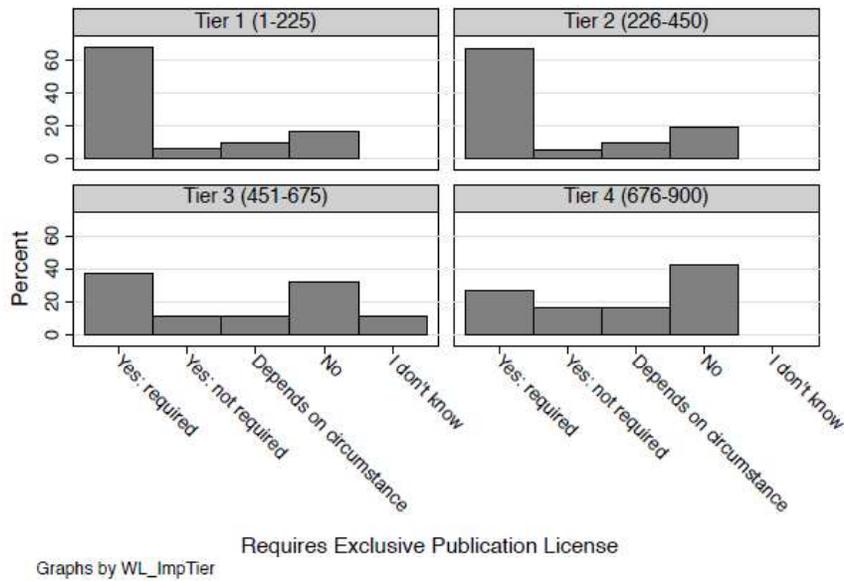
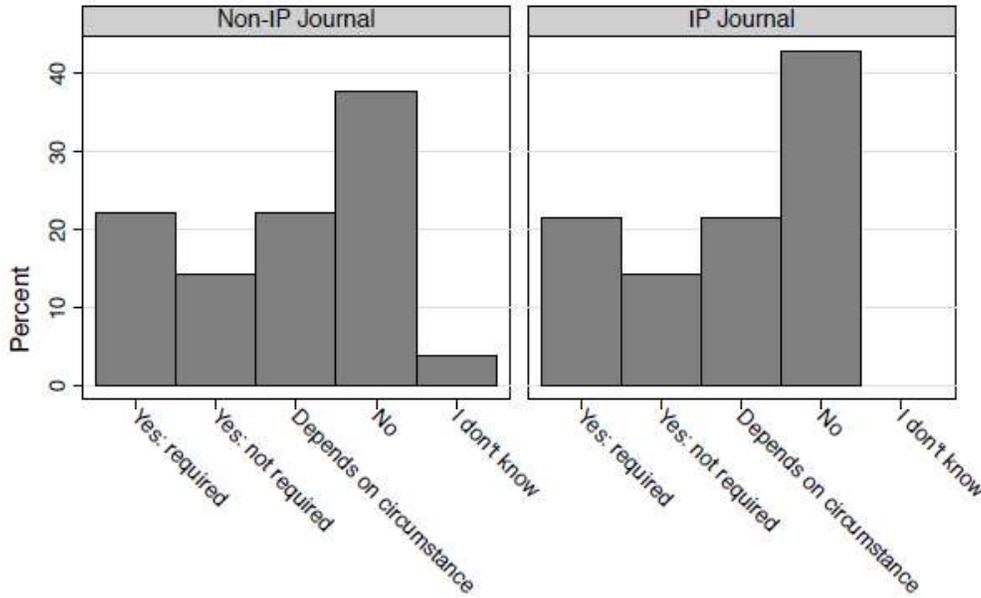
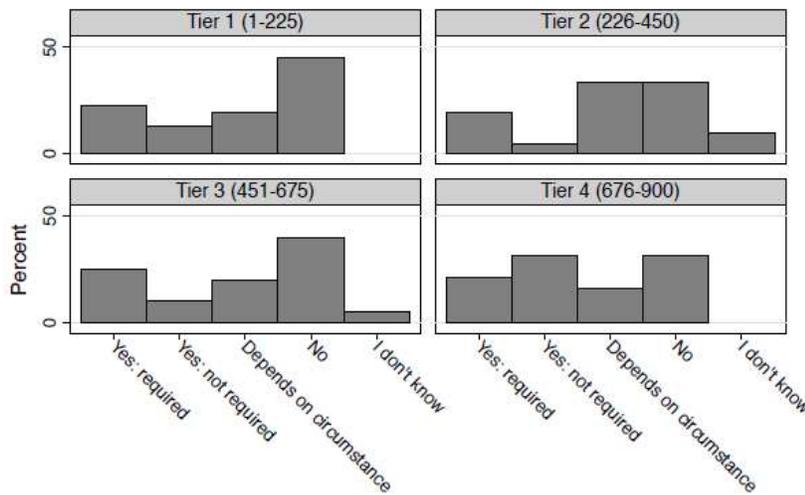


Figure 5: Public Dissemination Before Publication Practices by Content Type



Prohibits Public Dissemination before Publication
 Graphs by IP Law Journal

Figure 6: Public Dissemination Before Publication Practices by Impact Factor Tier



Prohibits Public Dissemination before Publication
 Graphs by WL_ImpTier

Figure 7: Republication Credit Requirements by Content Type

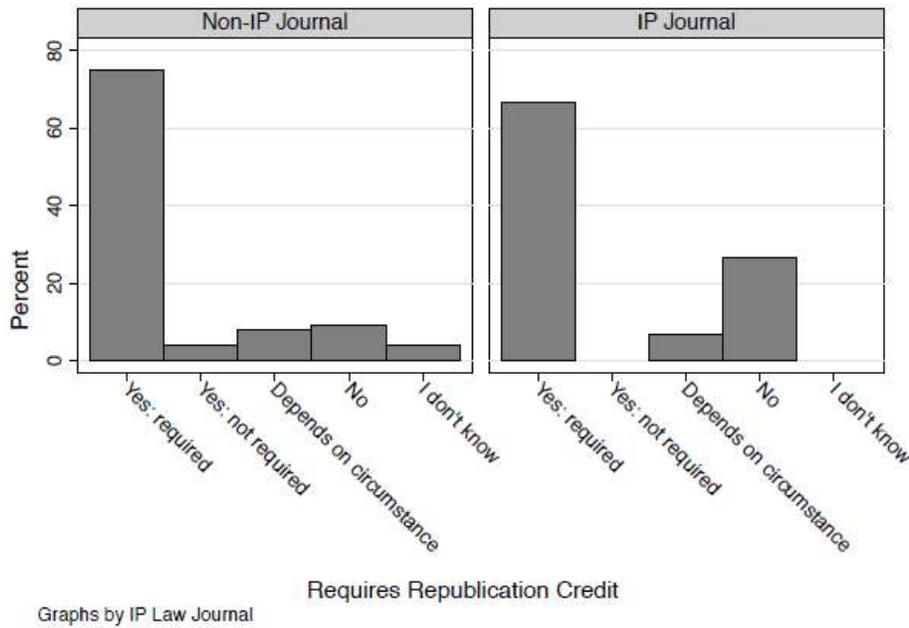


Figure 8: Republication Credit Requirements by Impact Factor Tier

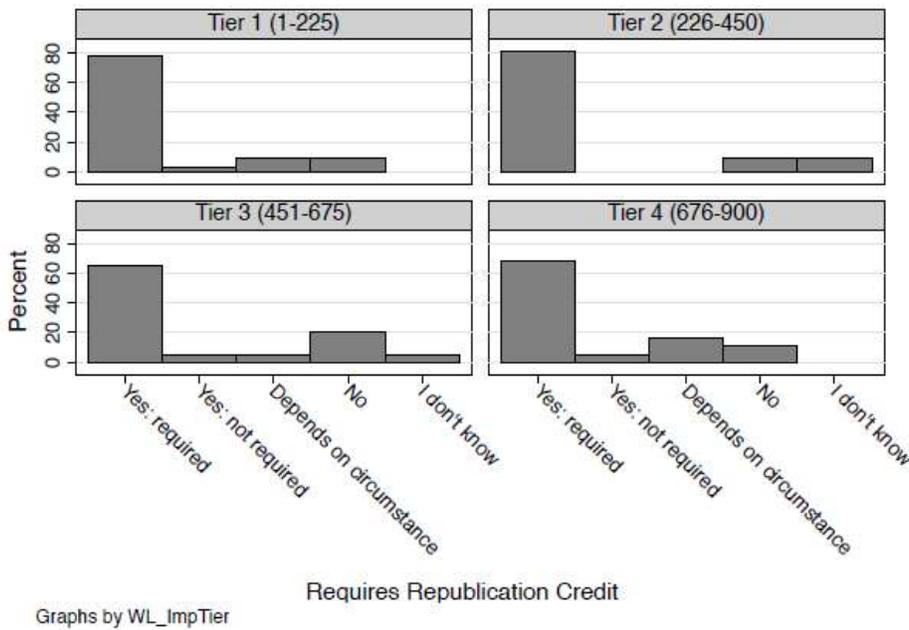
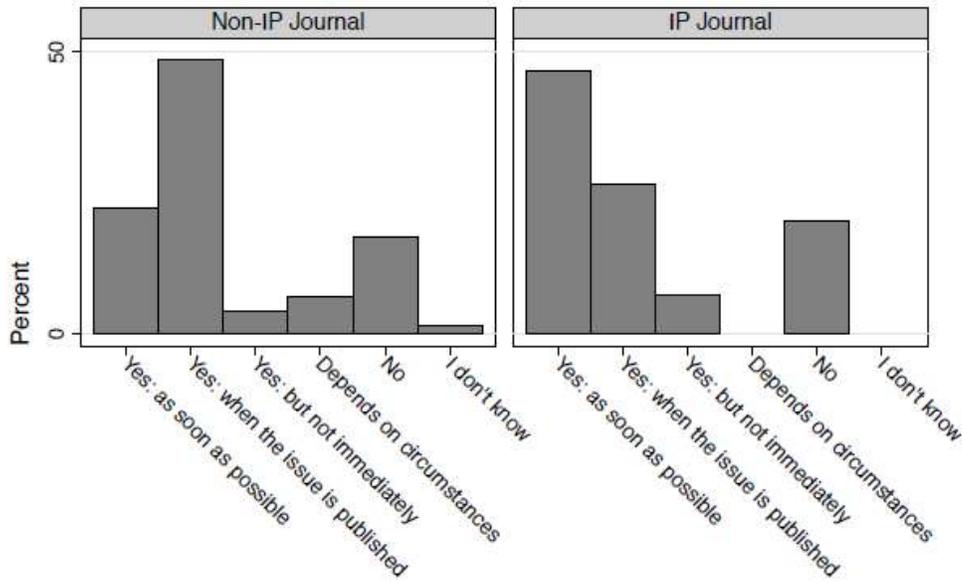


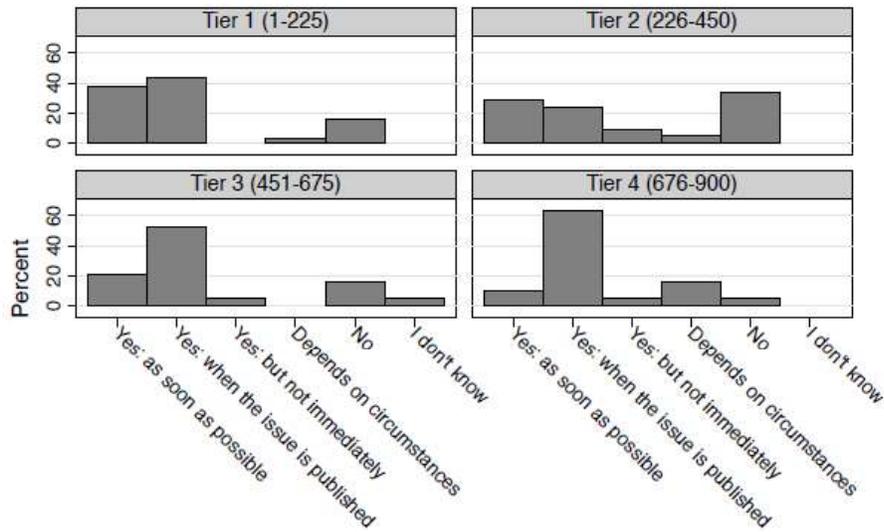
Figure 9: Online Publications Practices by Content Type



Makes Articles Publicly Available on Internet

Graphs by IP Law Journal

Figure 10: Online Publications Practices by Impact Factor Tier



Makes Articles Publicly Available on Internet

Graphs by WL_ImpTier

Figure 11: Third Party Republication Practices by Content Type

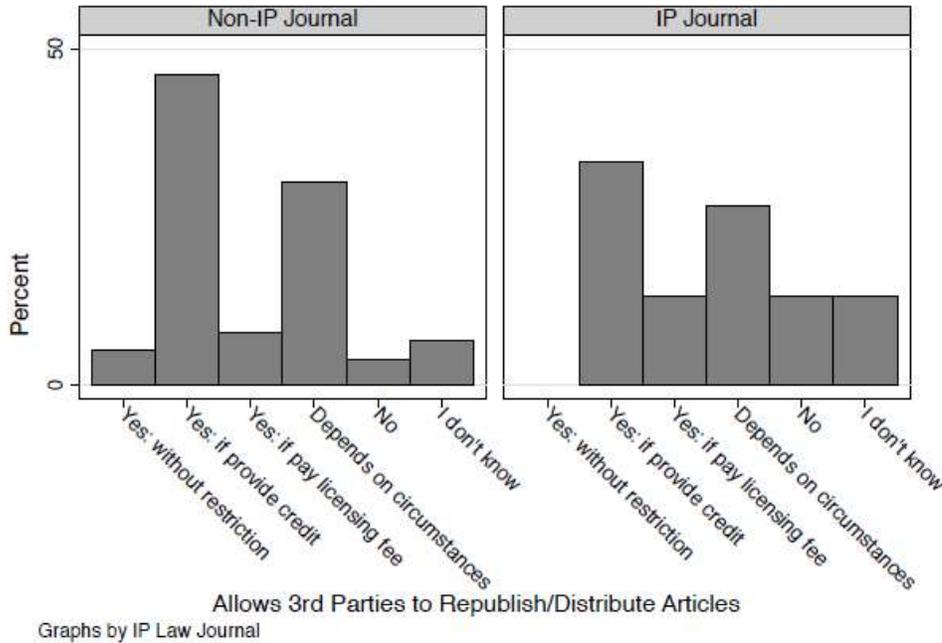


Figure 12: Third Party Republication Practices by Impact Factor Tie

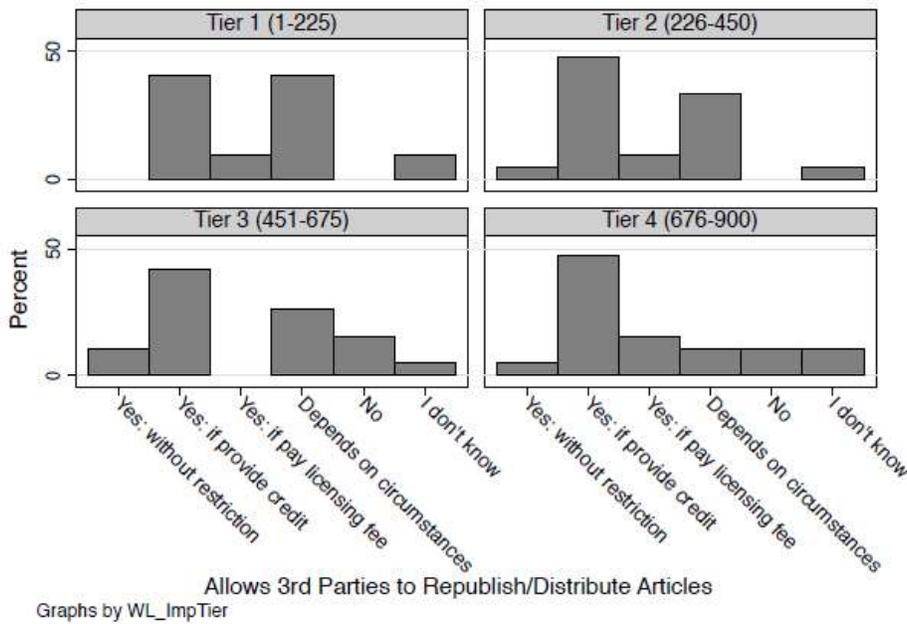


Figure 13: Replication of a Sentence Practices by Content Type

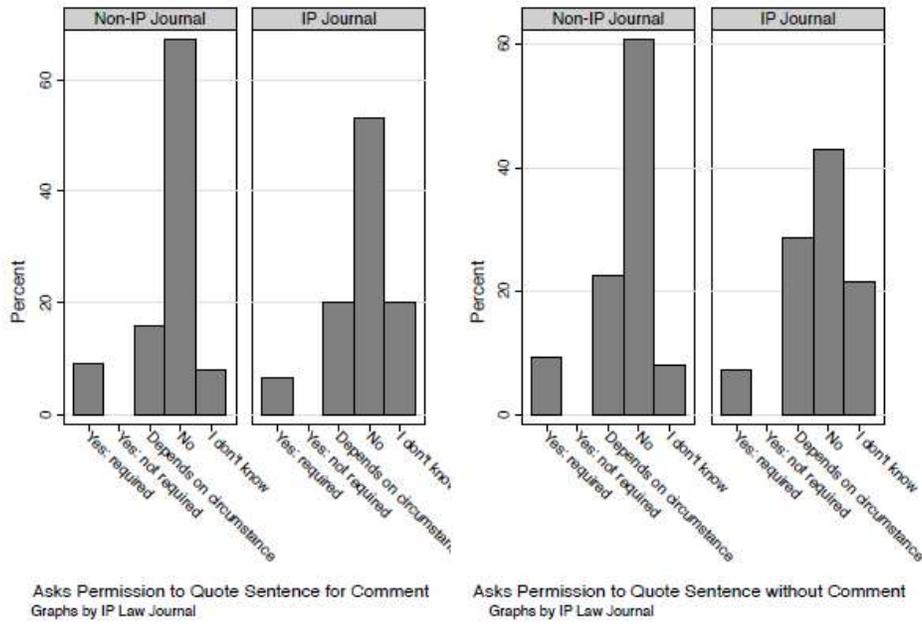


Figure 14: Replication of a Sentence Practices by Impact Factor Tier

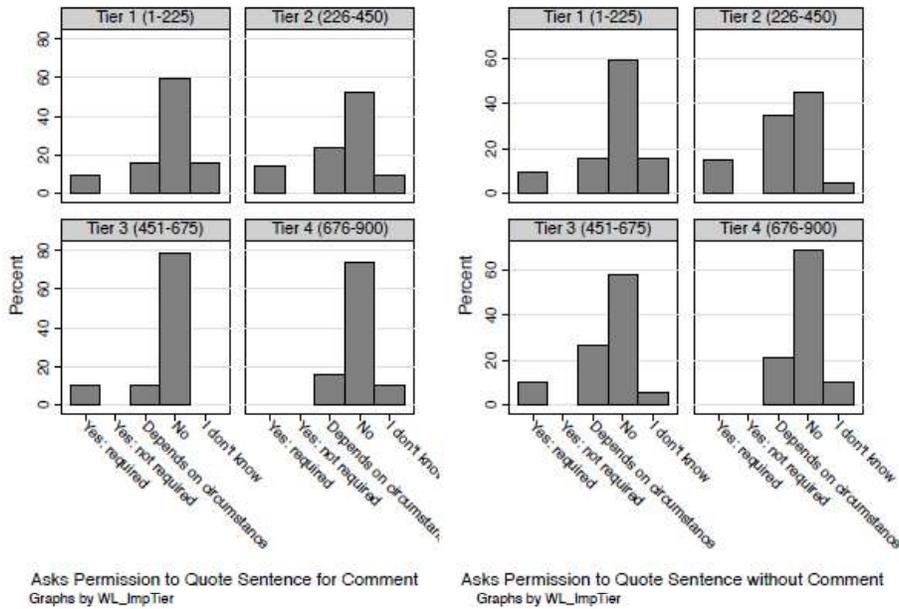


Figure 15: Replication of a Sentence Practices by Content Type

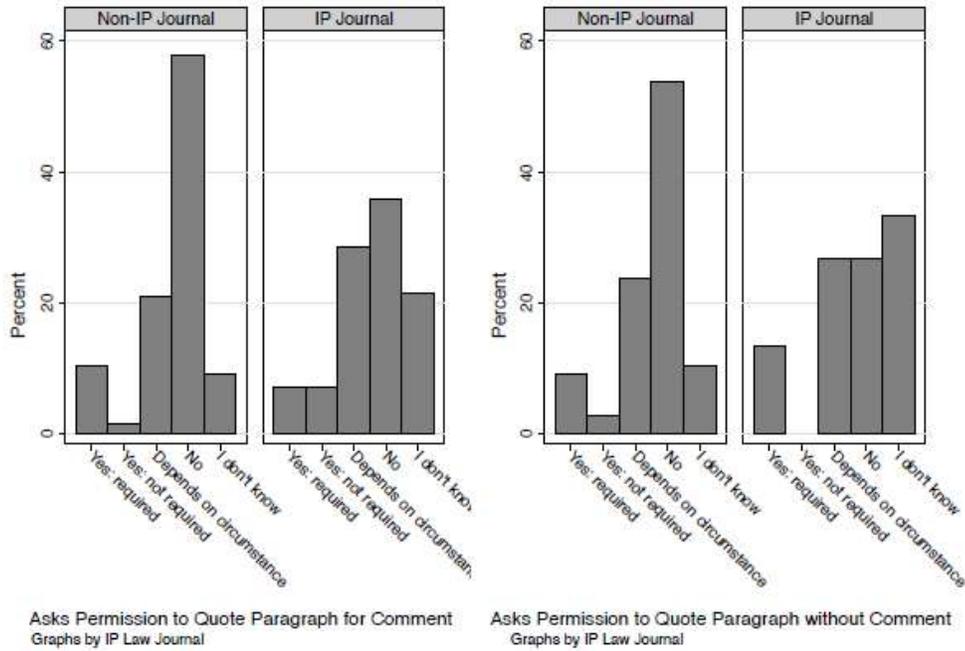


Figure 16: Replication of a Paragraph Practices by Impact Factor Tier

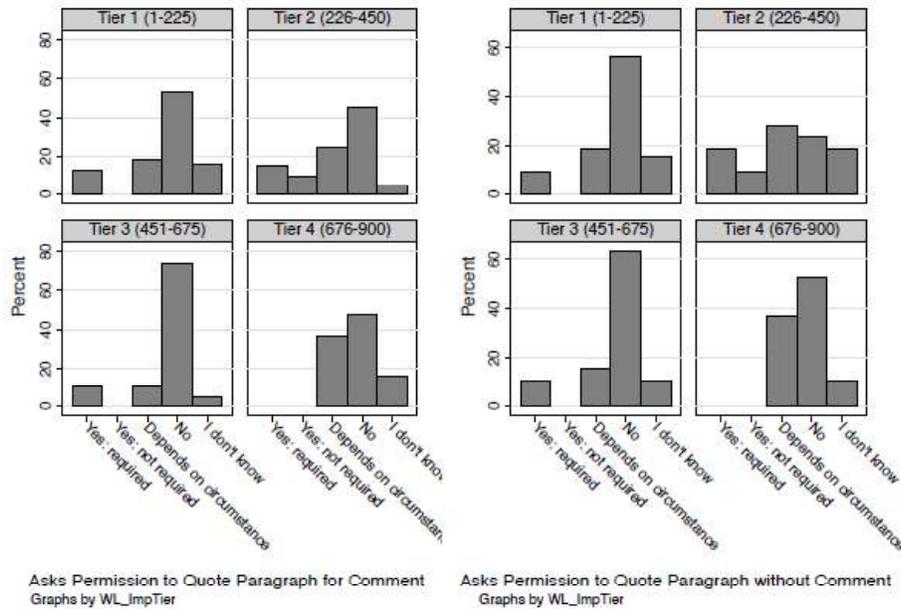


Figure 17: Republican of an Entire Poem Practices by Content Type

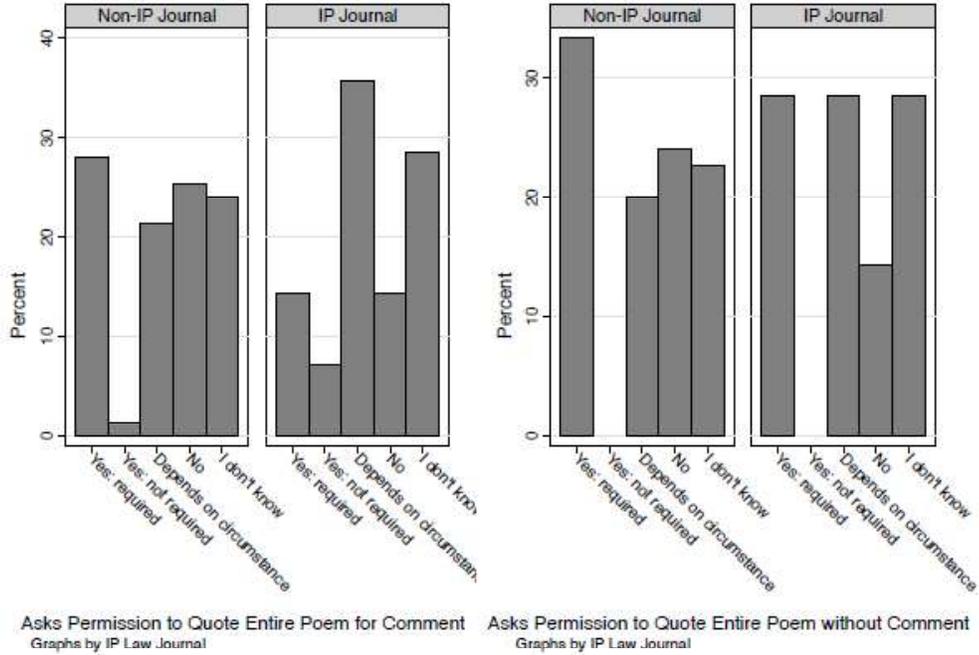


Figure 18: Republican of an Entire Poem Practices by Impact Factor Tier

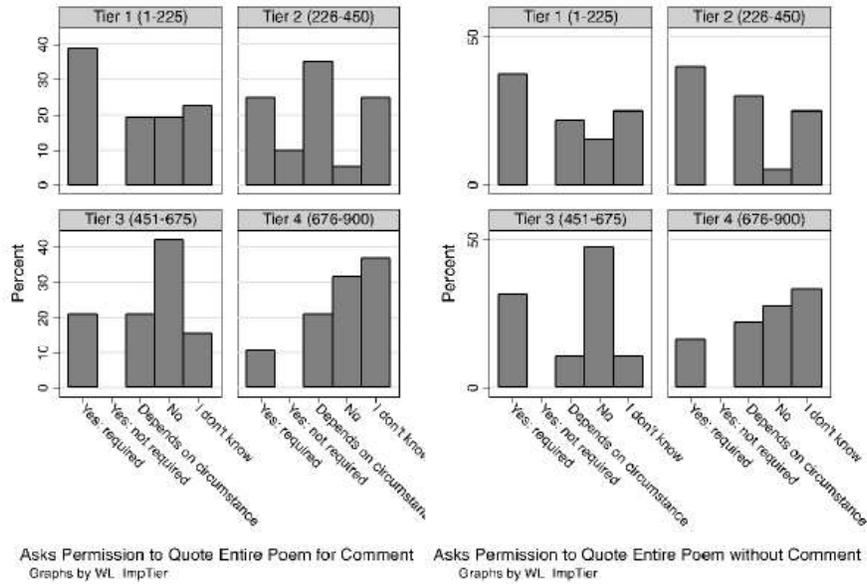


Figure 19: Replication of an Entire Letter Practices by Content Type

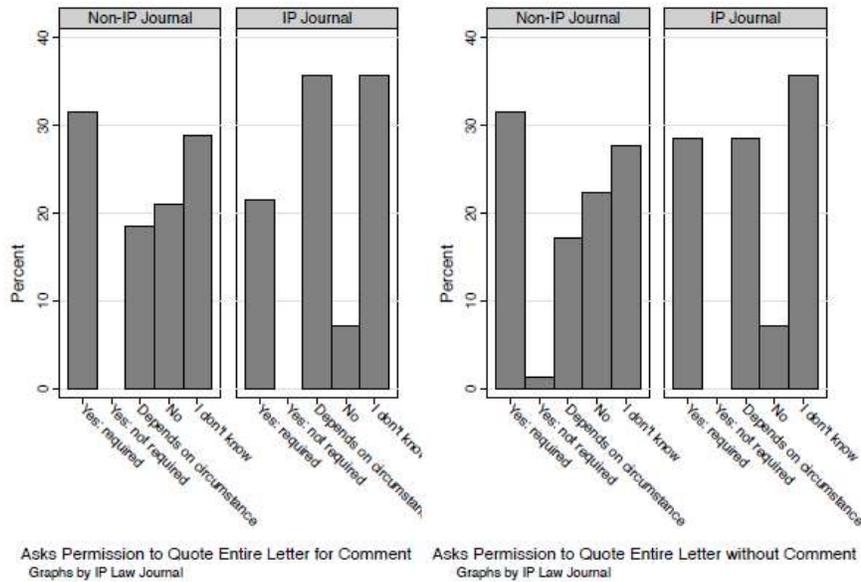


Figure 20: Replication of an Entire Letter Practices by Impact Factor Tier

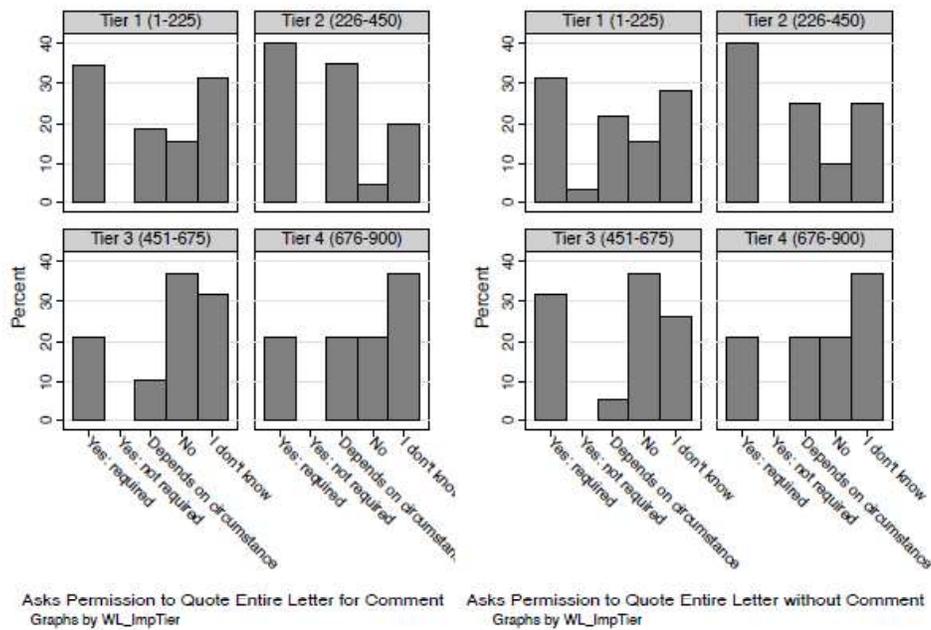


Figure 21: Republication of an Entire Article Practices by Content Type

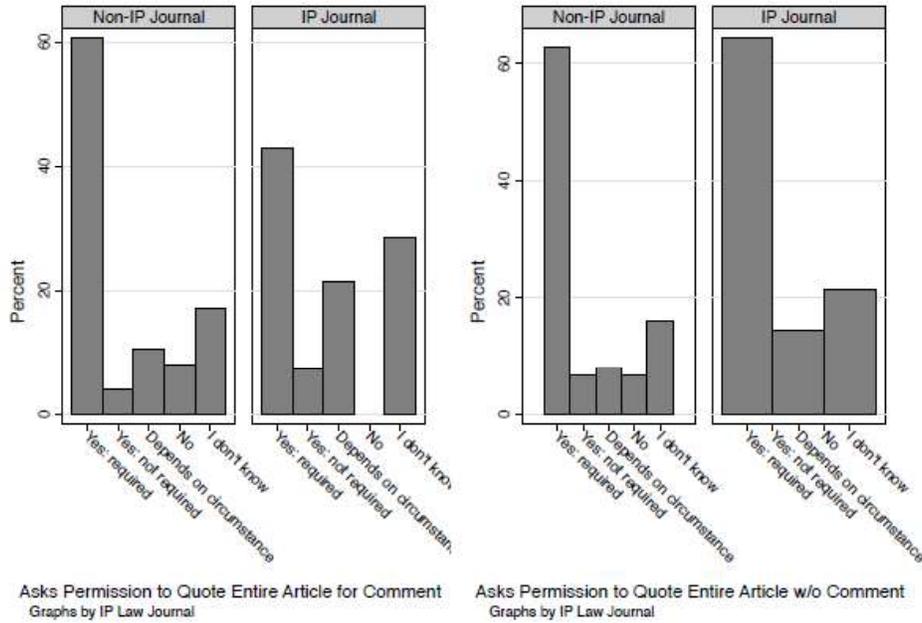


Figure 22: Republication of an Entire Article Practices by Impact Factor Tier

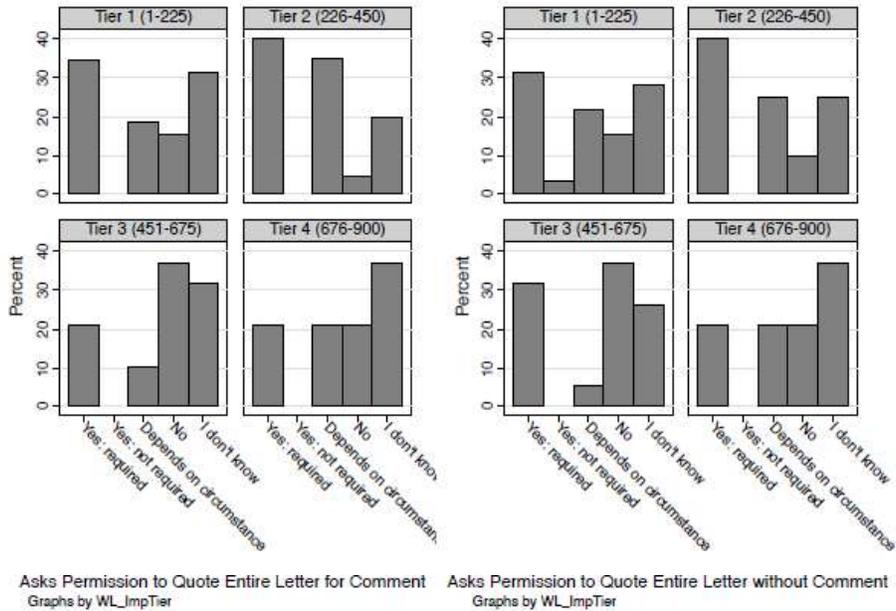
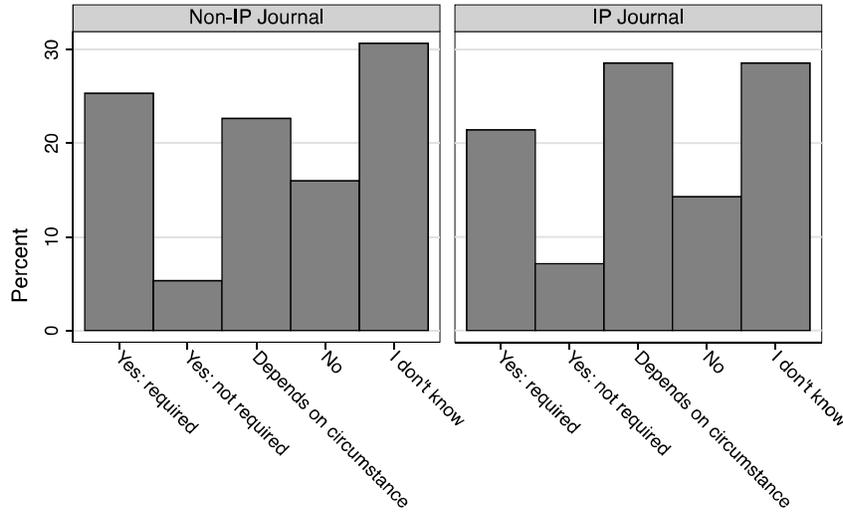
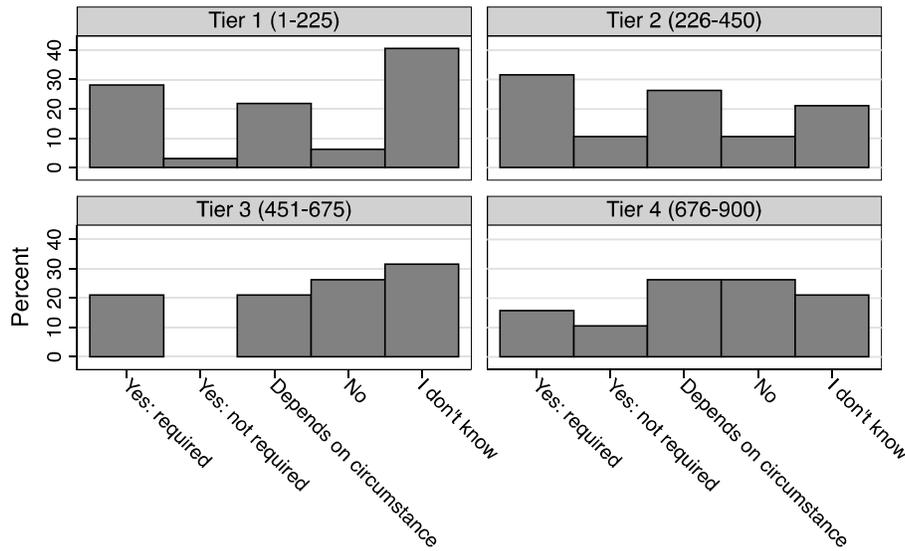


Figure 23: Permission Practices to Republish an Image from Public Litigation by Content Type



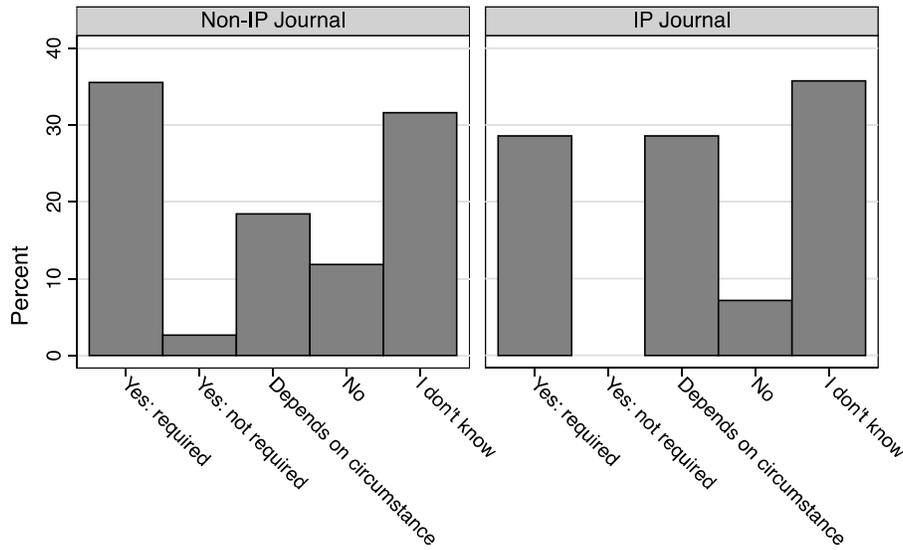
Asks Permission to Republish Img. from Public Litigation-Comment
 Graphs by IP Law Journal

Figure 24: Permission Practices to Republish an Image from Public Litigation by Impact Factor Tier



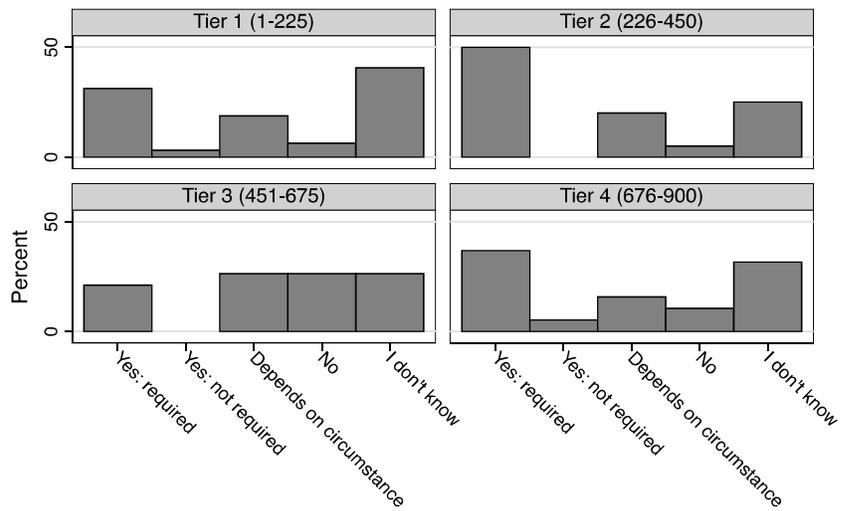
Asks Permission to Republish Img. from Public Litigation-Comment
 Graphs by WL_ImpTier

Figure 25: Permission Practices to Republish an Image from a Non-Public Litigation by Content Type



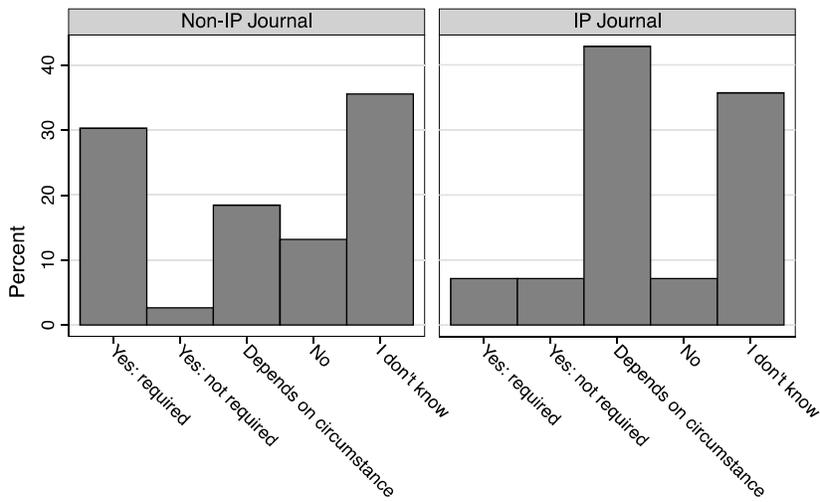
Asks Permission to Republish Img. from Non-public Litigation-Comment
 Graphs by IP Law Journal

Figure 26: Permission Practices to Republish an Image from a Non-Public Litigation by Impact Factor Tier



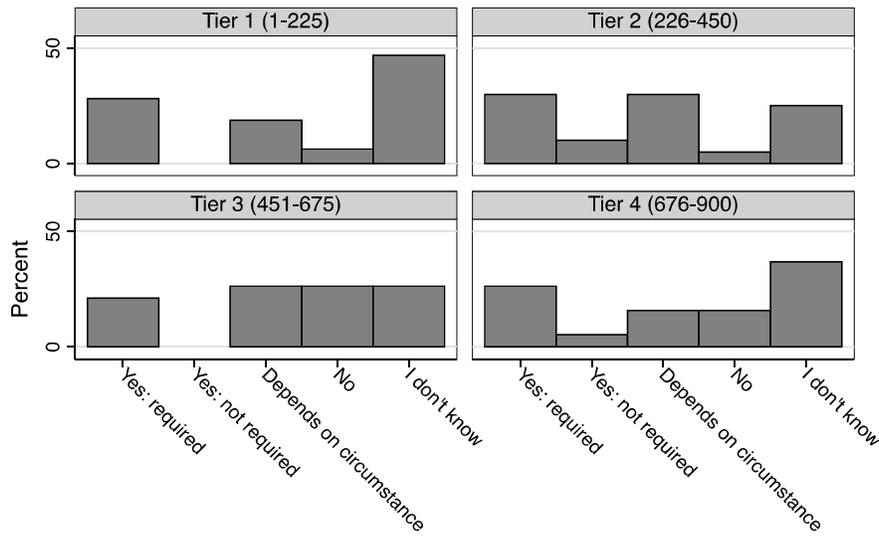
Asks Permission to Republish Img. from Non-public Litigation-Comment
 Graphs by WL_ImpTier

Figure 27: Permission Practices to Republish an Image that Was the Subject of Litigation by Content Type



Asks Permission to Republish Img. Subject of Litigation-Comment
 Graphs by IP Law Journal

Figure 28: Permission Practices to Republish an Image that Was the Subject of Litigation by Impact Factor Tier



Asks Permission to Republish Img. Subject of Litigation-Comment
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Figure 29: Permission Practices to Republish an Image for or without Comment by Content Type

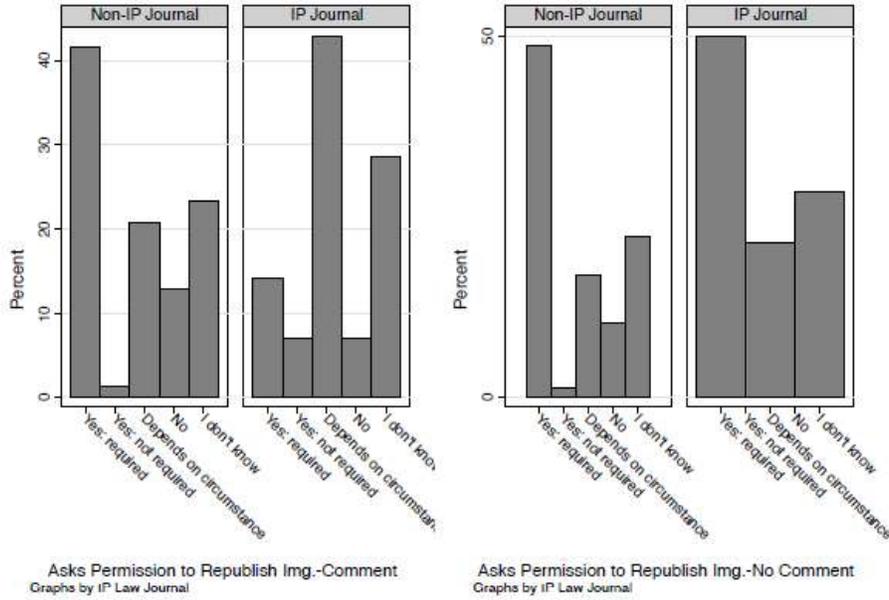


Figure 30: Permission Practices to Republish an Image for or without Comment by Content Type

