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SAFEGUARDING “THE PRECIOUS”: COUNSEL ON LAW JOURNAL PUBLICATION AGREEMENTS IN DIGITAL TIMES

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I. INTRODUCTION

Heaping scholarship fills the academic print and online press about where legal scholars should publish¹ and how to have one’s paper accepted for publication.² But there is scarce writing about the contractual

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1. Recent statistical studies, some with tables of ratings, include Alfred L. Brophy’s *The Signaling Value of Law Reviews: An Exploration of Citations and Prestige*, 36 FLA. ST. U. L. REV. 229 (2009), available at <http://www.law.fsu.edu/journals/lawreview/downloads/362/brophy.pdf> (hereinafter *Brophy 2009*); Alfred L. Brophy, *The Emerging Importance of Law Review Rankings for Law School Rankings 2003-07* (The University of Alabama Sch. of Law Working Paper No. 08-05, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896313; and Ronen Perry’s *The Relative Value of American Law Reviews: Refinement and Implementation*, 39 CONN. L. REV. 1, 35 (2006). Rankings obsessions continue unabated, evidenced, for example, by Professor Brian Leiter’s 2009 Condorcet Internet Voting Service experiment to determine readers’ choices for highest-quality law journals, suggesting to which journals optimally the scholar might submit. See Brian Leiter, *Which are the Highest Quality Legal Journals?*, Brien Leiter’s Law School Reports, (March 12, 2009, 8:25 AM), <http://leiterlawschool.typepad.com/leiter/2009/03/which-are-the-highest-quality-legal-journals.html>. The signal locus for law journal quality comparisons is John Doyle’s data-driven site at Washington & Lee University. See John Doyle, *Law Journals: Submissions and Ranking*, WASHINGTON & LEE U. SCH. OF LAW, <http://law.lib.wlu.edu/lj/> (last visited Feb. 26, 2011).

2. See e.g., Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those With All the Power – Student Editors*, 59 S.C.L. REV. 175 (2007), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1004&context=leah_christensen (addressing “trading up” and “expedited requests” and the minutiae of journal-placement tactics). This is a frequent subject on the popular law academic blog, *The Faculty Lounge*, see the topic “Scholarship Strategy.” Jacqueline Lipton, *Trading Up or Falling by the Wayside?*, THE FACULTY LOUNGE (Aug. 26, 2009, 8:15 PM),

relationship between the law journal and the author of an accepted paper.³ Perhaps that business relationship is unworthy of much attention from most scholars. Maybe the nuts and bolts of the publication agreement are broadly misconstrued or ignored by the author seduced by having her paper offered publication.⁴ Reasons for the void aside, this paper serves four purposes. It introduces the new legal scholar to evaluating and revising the publication agreement from a pragmatist's perspective.⁵ It informs student editors how publication agreements accomplish a journal's objectives based upon the current status of copyright law about electronic reproduction of compiled works. For some editors, the publication agreement is the first contract they have ever "marked up" or tried to understand. This paper suggests forthcoming trends in "representation" of scholarly writings, how they will be retrieved and delivered to future customers, and the implications of those trends for future publication agreements. An appendix proposes forward-looking text. Finally, this paper proposes how practitioners, students and professors may contemplate contract drafting and negotiation.

<http://www.thefacultylounge.org/2009/08/trading-up-or-falling-by-the-wayside.html>. The posting about authors "trading up" by Jacqueline Lipton dated August 26, 2009, on The Faculty Lounge illustrates academic interest in that process. *Id.* "Gaming" the placement process is discussed in Nancy Levit, *Scholarship Advice for New Law Professors in the Electronic Age*, 16 WIDENER L.J. 947, 978-79 (2007); *Brophy 2009*, *supra* note 1, at 230. A solid treatment of generating legal scholarship from the author's perspective is EUGENE VOLOKH, *ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES AND SEMINAR PAPERS* (Foundation Press 2010 ed.).

3. See, e.g., Timothy K. Armstrong, *An Introduction to Publication Agreements for Authors* (May 13, 2009), http://blogs.law.harvard.edu/infolaw/files/2009/05/authors_publishing_intro-tka1.pdf (devoted entirely to copyright ownership issues from the perspectives of authors and journals); Benjamin J. Keele, *Copyright Provisions in Law Journal Publication Agreements*, 102 LAW LIBR. J. 269 (2010) (copyright issues from the law librarian and open-access advocate perspectives). COPYRIGHTEXPERIENCES, http://commons.umlaw.net/index.php?title=Main_Page (last updated Dec. 2010) (CopyrightExperiences Wiki, accessed nearly 35,000 times, is a forum where legal writers describe their copyright experiences and law journals describe their policies). This article intends in part to update the information imparted there.

4. BePress's website for ExpressO suggests that neglect or indifference is the likely explanation; a page on the site indicates that only sixteen percent of the authors using that service request changes to a journal's publishing agreements, see *Submission Strategies*, BEPRESS, <http://law.bepress.com/expresso/2007/four.html> (last visited Feb. 26, 2011). ExpressO also reports that the large majority of authors say they receive some favorable response to proposed changes. See *id.* Dorothea Salo suggests that authors shy away from confrontation over the publication agreement given the impact publishers have upon scholarly careers. See Dorothea Salo, *Who Owns Our Work?*, SERIALS, Jul, 2010, at 191-195.

5. See Appendix B for definitions.

II. OPEN ACCESS AS A TURNING POINT IN LEGAL PUBLISHING

A. OPEN ACCESS DEFINITIONS AND PURPOSE⁶

The 2002 Budapest Open Access Initiative described open access to scholarly research as “free availability on the public internet” of published works by all with access to the Internet and the right of authors to be properly cited and acknowledged.⁷ In 2003, the Bethesda and Berlin protocols define open access as an environment where authors consent to allow readers to search, use and cite works, subject only to proper attribution of authorship.⁸

Open access affords authors a worldwide audience larger than that of any subscription-based journal, no matter how prestigious or popular it may be,⁹ which likely increases the visibility and impact of their works. Open access provides researchers barrier-free access to the literature they need for their studies, unconstrained by library (or other repository) budgets. Consequently, open access increases scholarship’s convenience, scope, and retrieval power. Open access also affords access to software available to assist readers in conducting research using free

6. There are many fine resources on open access in legal publishing, *see, e.g.*, Timothy K. Armstrong, *Crowdsourcing and Open Access: Collaborative Techniques for Disseminating Legal Materials and Scholarship*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 591 (2010) (text at n. 5-67); Stephanie L. Plotin, *Legal Scholarship, Electronic Publishing and Open Access: Transformation or Steadfast Stagnation?* 101 L. LIBR. J. 31 (2009); Olufunmilayo B. Arewa, *Open Access in a Closed Universe*, 10 LEWIS & CLARK L. REV. 797 (2006); Michael W. Carroll, *The Movement for Open Access Law*, 10 LEWIS & CLARK L. REV. 741, 756 (2006).

7. *See* BUDAPEST OPEN ACCESS INITIATIVE, <http://www.soros.org/openaccess/read.shtml> (last visited Feb. 26, 2011).

8. *See* Peter Suber, *Bethesda Statement on Open Access Publishing* (June 20, 2003), <http://www.earlham.edu/~peters/fos/bethesda.htm>; and MAX PLANCK SOCIETY, BERLIN DECLARATION ON OPEN ACCESS TO KNOWLEDGE IN THE SCIENCES AND HUMANITIES (2003), *available at* http://oa.mpg.de/files/2010/04/berlin_declaration.pdf. These statements followed gatherings of proponents of removing permission and price barriers impeding open access to scholarship of all kinds. Peter Suber discusses the permutations of barrier elimination to access. *See* Peter Suber, *Gratis and Libre Open Access*, SPARC OPEN ACCESS NEWSLETTER, (Aug. 2008), <http://www.arl.org/sparc/publications/articles/gratisandlibre.shtml>.

9. The HARVARD LAW REVIEW, arguably the most prestigious American law journal and the one with the most paper volume subscribers, sells approximately 7,500 subscriptions. *See* Paul L. Caron, *Law Review Circulation Down 62%*, TAXPROF BLOG (Feb. 2, 2009), http://taxprof.typepad.com/taxprof_blog/2009/02/law-review-circulation-down-62.html (2009 entry on subscription numbers). This author works in an office complex occupied by over 1,000 attorneys equipped with ubiquitous, high-speed Internet access via a T3 line. The odds are stacked, in this environment, against *HLR*’s being the primary source used by the vast majority of legal scholars, citation counts and subscribers notwithstanding – until the scholarly community learns of the journal’s free on-line accessibility.

software to enable full-text searching, indexing, mining, summarizing, linking, “mash-ups” and other data processing and analysis options.

Thus, open access makes journals’ (and their publishers) articles more visible, searchable, retrievable and, accordingly, useful. Ironically, when a journal adopts open access status, its greater visibility potentially may attract submissions, readership and citations. When a subscription-based journal provides open access to some of its content (*e.g.*, selected articles in each issue, or all archived issues beyond a certain date), it exploits its increased visibility for publicity (with subscription and citation increases). If a journal permits open access through post-print archiving, authors should prefer it to journals that do not promote such archiving. While law journals and their aggregator “partners” have opposing revenue streams concerns, directing them to decry open access, the totality of their interests do not compel resistance to open access.

Moreover, open access affords everyday citizens portals to peer-reviewed and other scholarly research (much of which, if at all available, is inconveniently accessible in public library settings) enabling access to research findings often funded with their tax dollars.

B. OPEN ACCESS DEVELOPMENTS AFFECTING LEGAL SCHOLARS AND JOURNAL EDITORS

For nearly all of the twentieth century, formal print publication was the only avenue to content dissemination, credit for the primacy of ideas and prestige.¹⁰ To be sure, the legal academic domain’s advance toward open access was motivated partially by runaway access fees and unaffordable print journal subscription prices in the 1990s, which rose at four times the rate of inflation in the United States.¹¹ Perhaps a nobler purpose was at work also. Professor Dan Hunter, in 2005, called upon the community of legal scholars to embrace the principle of open access.¹² Professor Michael Carroll argued, in 2006, for the crucial nature of open access to legal scholarship as well as the documents produced by courts, legislatures, and other authorities. Professor Carroll wrote: “Access to law matters. . .access to legal scholarship matters too,” speaking of a *duty* to maximize the accessibility and impact of scholarship and, for authors, a “*duty* to make his or her work available to the general (or, for the time-being, Internet-accessible) public.”¹³ The legal profession responded mildly to this call to action; the Durham Statement on Open

10. Salo, *supra* note 4.

11. Peter Suber, *Open Access Overview*, <http://www.earlham.edu/~peters/fos/overview.htm> (last updated Nov. 6, 2010); see LAWLIBDIRARCHIVES, <http://lists.washlaw.edu/mailman/private/lawlibdir/> (last visited Feb. 26, 2011) (discussion group on law journal subscriptions). Suber’s work in analyzing this movement is outstanding.

12. See Dan Hunter, *Walled Gardens*, 62 WASH. & LEE L. REV. 607, 612-13 (2005).

13. Carroll, *supra* note 6, at 756.

Access to Legal Scholarship of February, 2009, was signed by sixty law librarians and other legal educators pledging to grant unimpaired access to Internet users.¹⁴ In the meantime, institutions and the private sector proceed with archiving and free access operations.

Scholarly consortia are setting an example for open access domains. The New England Law Library Consortium [NELLCO] Legal Scholarship Repository “provides a free and persistent point of access for working papers, reports, lecture series, workshop presentations and other scholarship created by faculty at NELLCO member schools.”¹⁵ NELLCO is “[p]owered by Berkeley Electronic Press technology, the aim of the NELLCO Legal Scholarship Repository is to improve dissemination and visibility of a variety of scholarly materials.”¹⁶ The Social Science Research Network (SSRN) “is devoted to the rapid worldwide dissemination of social science research” through several “specialized research networks.”¹⁷ According to the site, “[t]he SSRN eLibrary consists of two parts: an Abstract Database, containing abstracts for over 336,600 scholarly working papers and forthcoming papers and an Electronic Paper Collection currently containing over 272,800 downloadable full text documents in Adobe Acrobat pdf format.”¹⁸ SSRN allows readers to “communicate directly with authors and other subscribers concerning their own and others’ research.”¹⁹

The second category of actors is law schools that individually create “repositories” posted on the Internet in either of two venues. One is the website of the law school (e.g., Harvard and Duke Law Schools²⁰); while

14. The Durham Statement on Open Access to Legal Scholarship calls for American law schools to stop publishing their journals in print format and to rely instead on electronic publication, with an institutional commitment to maintain these electronic versions available in “stable, open, digital formats.” Richard A. Danner, *The Durham Statement on Open Access One Year Later: Preservation and Access to Legal Scholarship*, (Duke University Sch. of Law Working Paper, June 15, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628622. The Statement addresses primarily: 1) open access publication of law school-published electronic journals; and 2) an end to print publication of law journals. *Id.*

15. NELLCO LEGAL SCHOLARSHIP REPOSITORY, <http://www.nellco.org/index.cfm/pageId/519> (Apr. 30, 2011).

16. *Id.*

17. SOCIAL SCIENCE RESEARCH NETWORK, <http://www.ssrn.com/> (last visited Apr. 30, 2011).

18. *Id.*

19. *Id.*

20. Harvard Law School’s repository is part of the Digital Access to Scholarship at Harvard Website. See *Digital Access to Scholarship at Harvard*, HARVARD LAW SCHOOL, <http://dash.harvard.edu/handle/1/7> (last visited Feb. 26, 2011); see also *Duke Law Scholarship Repository*, DUKE LAW SCHOOL, <http://scholarship.law.duke.edu/> (last visited Feb. 26, 2011). For a critique of open access legal repositories’ limitations, see Timothy K. Armstrong, *Rich Texts: Wikisource as an Open Access Repository for Law and the Humanities*,

the second features full faculty repositories hosted by SSRN or Digital Commons.²¹

C. HOW “OPEN” IS PUBLIC ACCESS?

Open access is not synonymous with free access. Social Science Research Network is likely the largest “repository” of scholarship in the social sciences (including law), but everything on that site is not available for search, capture and review. SSRN has licensing relationships with most academic publishers²² allowing SSRN to publish abstracts, while users access the published paper in the majority of cases without charge. The SSRN Web page on Publisher Rights²³ recites: “Some of the materials posted to SSRN are provided by publishers, who typically retain copyright to the posted materials. There is a charge to download some of these materials.” SSRN’s policy for fee-paid paper downloading is that the user charge cannot exceed the lowest price charged by the publisher for paper downloads elsewhere. Even a “preferred rate” means that use of scholarship in legal journals to a large degree excludes those who cannot afford access. One effort to soften the for-profit barrier to public engagement is found on Google Scholar.²⁴ This search engine traces works that, while available primarily to paid subscribers of electronic publishers, are reproduced as PDF or Microsoft Word documents on open access websites or in repositories,²⁵ including personal websites of authors or academic institutions where the authors are employed or publish works in institutional publications.

The second roadblock to open access is consumer reading capacity. For a significant number of Americans, access is barred. Forty-three percent of Americans, according to a 2003 survey, cannot read the scholar’s article from front to back; while another sizeable group can read the words with little comprehension.²⁶ Open access is illusory, from these Americans’ perspectives. Even after open access has achieved crit-

§2.3 (University of Cincinnati College of Law Research Paper No. 10-09, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1566148.

21. *See, e.g., New Mexico School of Law Research Papers Series*, SOCIAL SCIENCE RESEARCH NETWORK, http://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalbrowse&journal_id=1628812 (last visited Mar. 11, 2011).

22. *See Browse SSRN’s Partners in Publishing*, SOCIAL SCIENCE RESEARCH NETWORK, <http://papers.ssrn.com/sol3/DisplayPipPublishers.cfm> (last visited Mar. 11, 2011).

23. *See Frequently Asked Questions*, SOCIAL SCIENCE RESEARCH NETWORK, http://www.ssrn.com/update/general/ssrn_fa.html (last visited Mar. 11, 2011).

24. *See* GOOGLE SCHOLAR, <http://scholar.google.com/> (last visited Mar. 11, 2011).

25. For example, an August 27, 2010 search on Google Scholar on “Antonin Scalia” retrieved many works by the Justice; three of the first four search “hits” were to books or articles freely available on dulaw.net, blogs.com and illinois.edu.

26. *See National Assessment of Adult Literacy*, NATIONAL CENTER FOR EDUCATION STATISTICS (2003), http://nces.ed.gov/naal/kf_demographics.asp.

ical mass, multiple access barriers will vary by political geography. Filtering and censorship barriers persist where schools, businesses and governments want to limit what their citizens and constituents can view.²⁷ Language barriers stymie use where most online literature appears in just one language and knowledge of the selected tongue is unavailable until machine translation becomes more robust.²⁸ Disabilities access barriers will remain,²⁹ as will connectivity barriers. In the latter case, the “digital divide” keeps billions of people, including tens of thousands of would-be scholars, offline.³⁰

While open access lowers the subscription cost-barrier to participating in the “life of the mind,” this democratizing effect is not limited to increasing the number of people who have access to useful scholarly work. Open access also increases the readership for good work written by little-known authors or published in obscure journals. A scholar writing in a specialty field usually begins her research with keyword searches in Westlaw or Lexis-Nexis, or on LexOpus, SSRN or Hein Online, to track down relevant materials on her topic. On the first pass, the scholar reviews everything pertinent in the legal (or other subject’s) literature. Open access exposes her to myriad sources, thanks to replication of print materials in electronic-accessible formats, including compilations of journal articles.³¹ The availability of access, therefore, is paramount, raising the visibility of the role of the proprietary aggregator. While proprietary aggregators do not philosophically oppose open access, according to their position statements, they stridently resist loss

27. See, e.g., Clive Thompson, *Google’s China Problem (and China’s Google Problem)*, N.Y. TIMES, Apr. 23, 2006, available at <http://www.nytimes.com/2006/04/23/magazine/23google.html> (describing China’s Internet censorship policies and practices); HENRY REICHMAN, CENSORSHIP AND SELECTION: ISSUES AND ANSWERS FOR SCHOOLS 38-42 (3d ed. 2001) (describing the choices confronting schools about Web access).

28. See Bruno A. Oudet, *Multilingualism on the Internet*, SCIENTIFIC AMERICAN 77-78 (1997), available at <http://faculty.ed.umuc.edu/~jmatthew/articles/internet.html>.

29. See, e.g., CONSUMER EXPERT GROUP, CONSUMER EXPERT GROUP REPORT INTO THE USE OF THE INTERNET BY DISABLED PEOPLE: BARRIERS AND SOLUTIONS 29 (2009), available at <http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/publications/CEGreport-internet-and-disabled-access2009.pdf>. The use of Completely Automated Public Turing “challenge,” which requires the user to replicate the “security code” that appears as distorted letters, numbers or a combination thereof that a user must be able to identify on the screen, is a huge barrier to disabled persons’ use of the Internet. *Id.* CAPTCHAs are becoming more, not less, common on websites. *Id.*

30. See, e.g., MARK WARSCHAUER TECHNOLOGY AND SOCIAL INCLUSION: RETHINKING THE DIGITAL DIVIDE 49-69 (2004) (analyzing access to the Internet among developed and developing nations from perspective of information and communication technologies and infrastructure); Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age*, 20 CARDOZO ARTS & ENT. L.J. 1-52 (2002).

31. The following section of this article describes current boundaries of proprietary aggregators’ rights to replicate the author’s work in electronic collections.

of income streams.³² Proprietary aggregators fear that anything short of outright ownership of copyright – combined with their right to restrict access to the authors’ final work of legal scholarship - inevitably will lead to their demise.³³

III. A PRIMER ON SUBSCRIPTION - BASED PUBLISHERS’ COPYRIGHT AUTHORITY

This section digests only recent jurisprudence in copyright law affecting reproducing electronically certain images from earlier, print-*version* journals where an author’s work first has appeared, implicating 17 U.S.C. §201(c). The decisions explain why a law journal must protect its licensing prerogatives during the print publication process. Exposition of basic copyright concepts for the general orientation of new scholars and editors are in order.

Copyright is a form of protecting intellectual property within packaging – the creative “expression” of the author’s idea. Any idea, absent its physical manifestation, is unsuited to copyright protection.³⁴ Once an idea is reduced to a tangible medium of expression,³⁵ it is protectable as intellectual property, affording an author the right to copyright her article or book. Copyright law is federal in the United States, codified in Title 17 of the United States Code.³⁶ The owner of the copyright may alienate all or certain rights among her batch of rights to use the work by either an outright conveyance (frequently known as an assignment or a

32. Salo, *supra* note 4; see THE INT’L ASS’N OF SCIENTIFIC, TECHNICAL AND MED. PUBLISHERS, THE ASS’N OF AM. PUBLISHERS & THE ASS’N OF LEARNED AND PROF’L SOC’Y. PUBLISHERS, AUTHOR AND PUBLISHER RIGHTS FOR ACADEMIC USE: AN APPROPRIATE BALANCE (2007) available at http://www.stm-assoc.org/2007_05_01_Author_Publisher_Rights_for_Academic_Uses.pdf (suggesting that a better policy than mandating access to the final version of an article is to have authors post “pre-prints,” raising the question whether the aggregators’ priority was trying to preserve the traditional business model of journal publishing. The question was answered by this statement: “Publishers should be able to determine when and how the official publication record occurs, and to derive the revenue benefit from the publication and open posting of the official record (the final published article), and its further distribution and access in recognition of the value of the services they provide.”).

33. Salo, *supra* note 4; see Suber, *supra* note 11 (arguing that the proprietary aggregators’ business model depends on scarcity of resources; further, that for digital texts in a scholarly world linked by the Internet, scarcity is always manufactured).

34. 17 U.S.C. §102(b) (2010).

35. 17 U.S.C. §102(a) (2010).

36. Copyright Act of 1976, Pub L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 101 et seq. (1994)). The Digital Millennium Copyright Act is a part of the Copyright Act. See 17 U.S.C. §1200 et. seq (2010). Despite its name, that portion of the Act has no application to this article, unless an author makes a video game of her work, hosts it on the Internet to play for a fee, and discovers hackers overriding access firewalls. See 17 U.S.C. §1200 et. Seq. (2010).

transfer) or by licensing a portion or all of such rights,³⁷ whether for a fixed duration or for the full term of the copyright,³⁸ to another person. An assignment of the copyright means the author has lost all control over the work to the transferee, unless her agreement with the transferee reserves in advance certain forms of author exploitation of the work thereafter.³⁹ Full assignment means that the author will have to seek consent of the publisher for re-use of the work in lectures, for incorporation in further exposition in longer writings or to post the work on one's personal website.⁴⁰

Federal cases have supplied guidance to authors, journals and proprietary aggregators of images of works contained in collections (that is, the journal issue or volume) of materials, limiting the control of proprietary aggregators to reproduce those works in "compilations" of imaged journal pages without obligation to compensate their creators. Recent opinions interpreting 17 U.S.C. §201(c) in the context of collective works were delivered by two federal Circuit Courts of Appeal following *New York Times Co., Inc. v. Tasini*.⁴¹ In *Tasini*, the United States Supreme Court offered a framework in which database conversion of collective printed works falls within the ambit of the rights transferred by the cre-

37. 17 U.S.C. §203(a) (addressing a "transfer" or "license of rights"); see 17 U.S.C. §204(a) (2010) (a transfer of ownership or an exclusive license must be made in writing to be effective); but see *Landsted Homes, Inc. v. Sherman*, 305 F. Supp. 2d 976 (W.D. Wis. 2002) (holding that since no transfer of copyright ownership occurs with a nonexclusive license, in that sole instance, an oral license agreement is enforceable).

38. 17 U.S.C. §302(a) (the term consists of the life of the author plus 70 years following the death of an individual author); see Peter B. Hirtle, *Copyright Term and the Public Domain in the United States*, CORNELL COPYRIGHT INFORMATION CENTER, <http://copyright.cornell.edu/resources/docs/copyrightterm.pdf> (last updated Jan. 3, 2011). Copyright owners seeking to recapture their rights are protected by a "reevaluation mechanism" found in the Copyright Act that allows authors (and their heirs) to terminate contracts 35 years after the date of first publication or 40 years after the original contract date (constituting a five year termination "window"). The termination right trumps all written agreements. This prerogative of authors, also known as "termination" or "recapture" rights, is applicable to copyright agreements executed after January 1, 1978. See 17 U.S.C. §203(a) (2010). One might conclude that putting text into a publication agreement noting the author's § 203(a) right to terminate might be prudent; but inserting such a clause is both unnecessary ("trumps written agreements") and likely to create confusion without offsetting benefit.

39. See 17 U.S.C. §106 (2010) ("the owner of copyright under this title has the exclusive rights" to reproduce the work, prepare derivative works from the original work, etc.); see also subsection IV (1), *infra*.

40. See *Assignment*, UW COPYRIGHT CONNECTION, http://depts.washington.edu/uwcopy/Creating_Copyright/Managing_Rights/Assignment.php (last visited Mar. 21, 2011); Amy Blum & Sharon E. Farb, *Don't I Own My Own Work? Negotiating to Keep Your Copyright, Intellectual Property in the Digital Age: The Rights Stuff for Publishing and Teaching* (Feb. 7, 2008), available at www.library.ucla.edu/images/FacultyAuthorsRights.ppt; Salo, *supra* n. 4, at 6.

41. *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

ative contributors in assigning their copyrights.⁴²

In *Tasini*, publishers argued that their electronic databases are simply revisions akin to revised editions of encyclopedias, dictionaries, textbooks or updated editions of a single newspaper and, therefore, did not infringe upon the rights of freelance contributors whose works were reproduced in certain online databases accessible for a fee.⁴³ Author Jonathan Tasini and his co-plaintiffs argued that the databases actually constituted a “new collective work” that cannot incorporate – even if literally reproduced – freelance works without the creators’ prior permissions.⁴⁴ In sum, while the Court specifically rejected an analogy offered by publishers that electronic databases challenged as infringing were no different than microfilm and microfiche reproductions of works in bulk, the Court contrasted microforms to the appearance of articles in online databases as “disconnected from their original context.”⁴⁵

After the Supreme Court’s *Tasini* opinion, the Eleventh Circuit reheard the case of *Greenberg v. National Geographic Society* it first decided in 2001. The Court of Appeals held that so long as the compilation effectively replicated the original printed work, the freelancing creators of its original components already had received fair compensation for republishing their works in the society’s digital compendium.⁴⁶ The decision of the Eleventh Circuit in this case essentially mirrored the Second Circuit Court’s decision of *Faulkner v. National Geographic Enterprises* involving the same facts and legal principles.⁴⁷

42. *Id.*

43. *Id.* at 498.

44. *Id.* at 499.

45. *Id.* at 501.

46. *Greenberg v. Nat’l Geographic Soc’y*, 533 F.3d 1244 (11th Cir. 2008), *cert denied*, 129 S.Ct. 727 (2008). This is a true simplification of an extensive trial and appellate history of the *Greenberg* litigation. In brief, several freelance photographers, as well as some writers, sued the National Geographic Society (“NGS”) for copyright infringement because some of their works are included in a CD-ROM produced by the NGS. *Id.* The CD-ROM contains photo-scanned images of the entire print version of the National Geographic magazine from 1888 to 1996 in a searchable format. *Id.* The district court found that the NGS publication on CD-ROM is permissible under the Copyright Act, but in 2001, the U.S. Court of Appeals for the Eleventh Circuit reversed and ruled against the NGS. *Id.* The NGS appealed to the U.S. Supreme Court, which declined to hear the appeal, impliedly having ruled on the issue in June, 2001, in *New York Times v. Tasini*. *Id.* The Eleventh Circuit remanded the case back to the district court with instructions to enter judgment against NGS. *Id.* NGS appealed again to the Eleventh Circuit, which led to its ruling in *Greenberg III*. *Id.* The U.S. Supreme Court declined to accept certiorari in *Greenberg III* in December 2008. *Id.*

47. *Faulkner v. Nat’l Geographic Enter.*, 409 F.3d 26 (2d Cir. 2005). *Faulkner* marks the first direct application of the “original context” rule for electronic reproductions under § 201(c) that the United States Supreme Court established in *Tasani*. Two excellent treatments of these federal circuit court decisions are found in student notes, see Jason Koransky, *Magazine Publishers Exhale: Exploiting Collective Works After Greenberg*, 9 J.

In summary, while digital compendia of journal print versions are permitted without breaching copyright agreements with authors, this secures little (from their perspective) for aggregators in an age where technological “breakthroughs” occur within increasingly short time intervals.⁴⁸ This explains two tendencies. The first is that transfer of copyright (or minimally, co-ownership of copyright) is so strongly sought by proprietary aggregators that law journals “delivering” their print volumes together with outright assignments of author copyright receive a premium from the proprietary aggregators.⁴⁹ Secondly, publishing agreements from law journals tend to favor publishers’ interests to the extent possible. By doing so, in a dispute with an author, a licensee likely will prevail if it proves that a new distribution channel could have been foreseen by the assignor/licensor at the date of executing the assignment/license – that is, if the language of the agreement arguably includes a format within the purview of the assignment or license.⁵⁰ The assignee or licensee fares best when the agreement recites that it may publish “by any method,” “in any medium,” or words with like effects.⁵¹

MARSHALL REV. INTELL. PROP. L. 161 (2009); Allison Hundstad, *Faulkner v. National Geographic’s Effect on Author’s Rights in Electronic Transfer*, 13 RICH. J.L. & TECH 8 (2006), available at <http://jolt.richmond.edu/v13i2/article8.pdf>.

48. For instance, the advantage of subscriber-based servicers due to search engine retrieval capability is eroding. The American Bar Association’s Legal Resource Technology Center, Free Full-Text Online Law Review/Law Journal Search Engine claims to do text searches of more than 350 law journals (the site claims that results may vary), see *Legal Technology Resource Center*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/free_journal_search.html (last visited Mar. 2, 2011). But see Sarah Glassmeyer, *Getting to Durham Compliance*, SARAHGLASSMEYER(DOT)COM (Apr. 26, 2010), <http://sarahglassmeyer.com/?p=442> (commenting that online journals are becoming “PDF dumping grounds” with no access points in the form of metadata or otherwise aiding accessibility).

49. Professor Stephen Lindholm, posting on The Lessig 2.0 blog maintained by Stanford Professor Lawrence Lessig, states that “Westlaw and Lexis are offering higher royalties for acquiring the author’s copyright.” See Lawrence Lessig, *never again*, LESSIG (Mar. 15, 2005, 2:29 PM), http://www.lessig.org/blog/2005/03/never_again.html.

50. See Andrew Berger, *New Uses of Old Works: May a Licensee Exploit Previously Licensed Content Without the Consent of the Copyright Owner?* 79 B.N.A. PAT. TRADEMARK & COPYRIGHT J. 607, 609 (Mar. 19, 2010), available at <http://www.ipinbrief.com/new-uses-of-old-works/>.

51. *Id.* The West Services, Inc. form agreement in 2009 secures to the publisher “the right of reproduction in all forms and media now and in the future, whether now known or hereafter developed,” see Copyright Transfer Form, West Services, Inc. (2009) (on file with author).

IV. TYPES OF CONVEYANCE OF RIGHTS AGREEMENTS AND AUTHOR NEGOTIATION TIPS

A. ASSIGNMENT OF RIGHTS MECHANISMS AND COMMENTARY

Author publication forms in use likely number in the dozens among student-edited journals; however, the following half dozen types catalog those today's author likely will encounter following an offer to publish her paper. These types are arranged in descending order of favorability to the journal, considering the journal board's belief that it must aid journal aggregators and article-database vendors in their devotion to intellectual property ownership securing their revenue streams.

1. *The All-in Copyright Transfer Form:*

Under this form, the journal requires the author to surrender all ownership of the copyright to the journal.⁵² This request, in law journal circles, has little support in logic, and Professor Armstrong dismisses such a provision as needless.⁵³ Proprietary aggregators should not require proof that the author has been divested of all rights in the work as a condition of its reproducing the work electronically.⁵⁴ The author encountering this form of agreement politely should challenge the journal to explain why this outright, life-of-copyright transfer of rights is needed. Unless the journal features its own electronic publishing subscription service,⁵⁵ no explanation supported otherwise than by journal economics

52. See Copyright Transfer Form, West Services, Inc., *supra* note 51 ("You hereby assign to West Services, Inc. the entire copyright in and to the manuscript named above (the Work) throughout the world in all forms and media" This provision prevents authors from taking actions most authors would consider natural expressions of their scholarly pursuits). See text, *supra* note 36; cf. Reinhardt v. Wal-Mart Stores, Inc., 547 F. Supp. 2d 346, 354-55 (S.D.N.Y. 2008) (licensing text, where court interpreted phrase "all forms now or hereafter known" to expansively convey rights to licensee, incorporating "futuristic" technologies like digital downloads).

53. Armstrong, *supra* note 3.

54. For reports that Lexis and Westlaw pay a higher royalty rate for journals who obtain outright copyright assignments from authors, see Lessig, *supra* note 49; these seem both unverifiable (because the electronic publishers seem unlikely to reveal the facts) and, as royalties are paid in bulk, accounting for royalty percentages is unwieldy without a copy of the aggregator's contract with the journal. In an e-mail from Scott Augustin, Communications Director, Westlaw to author, (August 9, 2010 02:30 PM) (on file with author), Augustin states the "terms and conditions of our contracts are confidential." The author interprets this to mean that Westlaw "level of royalties" arrangements are proprietary.

55. In this regard, the author signed a publishing agreement for a Thomson Reuters/West journal to be originally published on Westlaw; the contract required outright transfer by the author of the copyright. When the article was posted on Westlaw's proprietary Internet site, however, the legend read "Copyright © 2010 Thomson Reuters/West; Michael N. Widener". Whether this expresses Westlaw's intention to share the copyright jointly or to indicate some other arrangement is unclear. Since the author "credit" appears immediately above the cited copyright statement, one plausible interpretation is that "Michael N.

is forthcoming. Consider in this case the author's dilemma in trying to get permission for any future use of the work in a book, continuing legal education materials, or other applications. The editorial board for her work has graduated, the journal's faculty sponsor at the time of original publication has departed, and there is no one knowledgeable at the journal authorized to approve future use of the work or extracts of it is available. The Dean or Associate Deans of a law school are unlikely to engage in a fact-finding mission to cooperate with the author. Unless the agreements are electronically stored and conveniently accessed, they will be challenged finding the executed publication agreement. This copyright assignment requirement is unmerited, so the policy of demanding assignment of copyright should be discontinued. If an outright transfer of the copyright is the *sine qua non* of a "publishing deal," then the author must negotiate a non-exclusive license allowing her to use the work for the author's essential purposes,⁵⁶ or an alternative arrangement where the work enters the public domain after an "embargo" term.⁵⁷

2. *The Undefined Rights Transfer Form:*

In this form, one finds repeated expressions of "exclusive rights" to certain journal uses, with no further explanation about the scope of the license agreement.⁵⁸ Do the rights "exclusively granted" include those that allow the journal to pursue the work's later republication, compilation and so forth? A literal reading may suggest other rights that are transferable later. Yet there is only one opportunity for an author to transfer outright her copyright. The applicable analogy is selling one's former residence a second time. Alternatively, if the expression grants

Widener" indicates jointly-held rights in the copyright. Does the copyright statement in the published article supersede the agreement expressed by this author and West Services Inc. in their publication agreement? Does it evidence the aggregator's waiver of its exclusive rights?

56. See Section IV (B) *infra*.

57. Professor Stephen Lindholm claims to have an agreement with the corporate legal department at Lexis allowing him to place a notice in the "author footnotes" releasing the article "to the public domain" five years after the date of first publication, see Lessig, *supra* note 49; effectively, this creates an exploding exclusive license for the law journal which publishes his paper and transfers its rights to Lexis, however couched as a copyright assignment.

58. The author abandoned his effort to negotiate the text of a publication agreement with an eastern law school when the board (and sponsor) expressed frustration at making any modifications beyond those contained in sciencecommons.org's author's Addendum template. As a result, the law journal's form agreement contains multiple references to "exclusive rights," but never says who owns the copyright. Likely, ownership of the copyright does not actually matter to the journal so long as it can capture all revenue streams that customarily are the province of the journal. If that is the case, then the journal should not object to expressly stating the author maintains the copyright, subject to the journal's expressly licensed prerogatives.

an exclusive *license*, whether that exclusivity period is timeless or periodic is unclear. Clarification of what is intended in the agreement - including who owns the copyright - will avoid an angry future misunderstanding over the parties' respective right to use, or license others to use, the work.

3. *The Joint Copyright Ownership (Shared Control) Form:*

This model's intention is to allow the parties some latitude in future dissemination of the work, so either party can license re-use of the work without seeking the other's consent to do so.⁵⁹ This is accomplished by stating that the author and journal shall be joint owners and that each shall have the right to grant nonexclusive licenses, except during an "embargo" period, when the journal may license electronic publication of the article and retain sole possession of all payments or royalties from such licensing.⁶⁰ The author and the journal must explicitly agree that the copyright ownership is joint and several.⁶¹ However, if the parties' mutual intentions are vague, a proprietary aggregator seeking an exclusive license to reproduce the work will demand that the journal obtain joint consent to that licensing from the author.

4. *The Perpetual Duration, Exclusive License Grant Form:*

While not as draconian as the absolute transfer of the author's copyright, this form leaves the author with no rights to exploit the work unless the agreement specifies what the author can do to disseminate her work further. If the journal of the author's pleasure insists on this type of assignment of rights in perpetuity, the author is advised to negotiate a provision that, for so long as the author gives the appropriate "first publication" journal credits, the journal may not unreasonably withhold or

59. Author, Copyright & Publishing Agreement between the author and the University of Kentucky College of Law's Kentucky Journal of Equine, Agriculture and Natural Law (KJEANRL) (2009) (on file with author) [hereinafter Author, Copyright & Publishing Agreement]. The author accomplished this arrangement with the board of the *Kentucky Journal of Equine, Agriculture and Natural Resources Law* (KJEANRL) in 2009; the joint copyright publication agreement is in possession of the author. See also, Mark A. Lemley, available at *Example of a Joint Ownership Agreement*, COPYRIGHTEXPERIENCES, http://commons.umlaw.net/index.php?title=Example_of_a_joint_ownership_agreement (last modified Aug. 27, 2007).

60. Lemley, *supra* note 59.

61. The joint and several language must provide for the acknowledgement that neither the Author nor the Journal shall require the consent of the other party to grant nonexclusive licenses or personally to post the work, unless otherwise specifically limited in the Agreement; this avoids confusion about consent required to license, see *Davis v. Blige*, 419 F.Supp.2d 493 (S.D.N.Y. 2005), *vacated* 505 F.3d 90, 101 (2d Cir. 2007), and *cert. den.* 129 S.Ct. 117 (2008) (holding that the grant of exclusive license requires consent of each joint copyright owner; but any owner individually can convey non-exclusive license rights).

condition consent to the author's placement of all or a portion of her work elsewhere, so long as she does not romance a revenue source customarily pursued by the journal.

5. *The Exploding Exclusive License Form:*

In this version, typically the author grants the journal for a fixed period an exclusive license to print the work and to re-license (sub-license) the copyright. At the end of this term, sometimes known as an "embargo period," the journal's exclusive rights are lost, unless the work sooner has been published. This has become a common author request in law journal publication agreements.⁶² Arranging a non-controversial provision requires indicating the beginning point of the time measurement, either on the signing of the publication agreement or the date of original print publication of the work.⁶³ Including this term in the publishing agreement allows a writer to "pull the plug" if some calamity puts the law journal far behind in its schedule⁶⁴ or the parties are stalemated over whether the work constitutes a "publishable" piece. Of course, the author should extend the term of the license if satisfactory progress has been made on a work's editing (especially if the work must be heavily edited to become publishable); where the editors have engaged in a sustained effort toward publication, scholarly etiquette requires this result.

6. *The Non-exclusive License of Indeterminate Duration Form:*

This form serves the author no purpose; indeed, the agreement might fail for lack of consideration flowing to the journal. Without some period during which the journal may rely on the author's intentions to publish with it, no board ought to invest energy in the paper's editing. Demanding such treatment suggests either an author's naiveté or her intention to "trade up" to an offer from a more prestigious journal. A journal's right to license electronic reproduction and distribution rights to Lexis, Westlaw, HeinOnline, JSTOR and other proprietary aggregators is usually contained in standard copyright license agreements de-

62. See Benjamin J. Keele, *Copyright Provisions in Law Journal Publication Agreements*, 102 *Law Libr. J.* 269, 276 (2010) ("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").

63. Duration selection in such an "exploding" clause requires some sensitivity to the reality of editorial staff's intact period of functioning (usually ten or eleven months under one board) and to "down time" in transition impacting editorial engagement with the author's work.

64. Editorial boards should appreciate that grossly delayed publication of a work potentially impacts a tenure or compensation decision affecting issues for a scholar, so publishing in a reasonably timely manner matters greatly to some authors.

livered⁶⁵ to prospective authors when acceptance of an article is eminent.⁶⁶

The law journal needs to warrant (accurately) its right to sublicense so the digitization and posting of the full volume of each year's journal is under the control of the proprietary aggregator. Negotiating a publication agreement that grants illusory rights disadvantages all parties. Professor Armstrong correctly analyzes copyrighted versus licensed publication relationships, but the journal must deliver its collected volume of scholarship to the proprietary aggregator. There is enough case law⁶⁷ confusing the right to reproduce an individual work within a digitized compilation to frighten any law student-editor and faculty sponsors of law journals. Authors should share the copyright ownership, jointly and severally with the journal if necessary, to secure an article's placement. Authors may carve out opportunities for posting, archiving and reproducing the work while leaving wide, royalty-harvesting latitude to the journal.

B. COMPOSING THE REASONABLE ASSIGNMENT OF RIGHTS AND OTHER PUBLICATION ISSUES

The key to the successful negotiation and documentation of a contract is to know three things. The first is what your vital interests are – what do you truly need to gain from the publishing relationship.⁶⁸ The second is to understand the vital interests of the other party to the publication transaction.⁶⁹ The third is what interests initially identified as vital to your goals are fundamentally 'exchangeable' for concessions of equivalent value from the other side. The assessment of the respective vital interests of the publication agreement's parties begins with the author.⁷⁰

65. The license agreements sometimes are downloadable from the website of the law journal.

66. See Arewa, *supra* note 6, at 809.

67. See *supra* text accompanying notes 41-47.

68. See, e.g., Sally Morris, *Journal Authors' Rights: Perception and Reality*, PUBLISHING RESEARCH CONSORTIUM 6-9 (2009), available at <http://www.publishingresearch.net/documents/JournalAuthorsRights.pdf> (ranking authors' desires about how to use and disseminate their work).

69. Recall that upstream from the journal and the law school is the proprietary aggregator; that relationship yields the journal valuable revenue and visibility (leading to greater author visibility and citation counts).

70. The University of Chicago has compiled a comprehensive question-and-answer form responding to common inquires for the publishing author to consider in choosing whether to publish in the University's journals, see *Guidelines For Journal Authors' Rights*, CHICAGO JOURNALS, <http://www.journals.uchicago.edu/page/pasp/rights.html> (last visited Mar. 2, 2011).

In the majority of instances, the legal scholar is using her work to gain attention to her ideas. Why? Either she seeks a position (or promotion) from an employer or enhancement of her reputation. Increase in the scholar's exposure that will lead either to increased authority within her organization, or to an appointment that will influence decision-makers to increase further her authority or compensation.⁷¹ Strength of her ideas, exposed in her disseminated writings, is the principal vehicle to achieve her goals. These basic needs should be respected by the journal and the aggregator. The broadest dissemination of the work is the lynchpin to the scholar's quest for increased attention, and is a significant driver for open access to scholarly works.

Ancillary to broad dissemination of scholarly ideas are three matters. First is the need for the author's work to be published in a timely manner, since often the legal scholar's tenure or other form of recognition by her employer⁷² is linked to successful publication within a prescribed time frame. Second is the author's need for useful editor-ship; in other words, the author needs for the edited work to achieve a high standard of quality, improved by the editorial process. Third is the need to place the work in other "publication contexts," free from the requirement to chase down journal officials to obtain permission for a work's web-posting and other forms of reproduction. Also, vital to the author's reputation is the author's need to rewrite and revise the work. Times change, and a sudden and substantial amendment to the law or public policy, or later revelation of theretofore unknown facts, may require the author to "correct the record" by modifying the work in its Internet presence.⁷³

An author requires these few controls, regardless of the maneuvering of copyright transfer and "licensing back": First, control over the work's inclusion in open access networks like those maintained by NELLCO, the Berkeley Electronic Press and the Social Science Research

71. See, e.g., Genevieve P. Rosloff, *Some Rights Reserved: Finding the Space Between All Rights Reserved and the Public Domain*, 33 COLUM. J.L. & ARTS 37 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1437762 (addressing authors' motivations). This author is persuaded by the progression that citation? enhanced reputation? tenure/chair? compensation gains.

72. Alfred Brophy indicates some law schools pay bonuses to faculty for placement of works in the top-ranked law journals. See Brophy, *supra* note 1, at 230.

73. See, e.g., Michael N. Widener, *Bridging the Gulf: Using Mediated, Consensus-Based Regulation to Reconcile Competing Public Policy Agendas in Disaster Mitigation*, 74 ALB. L. REV. 101 (2011), available at <http://www.bffb.com/images/BridgingtheGulf08-27-10.pdf> (written prior to the conclusion of various scientific studies on spill impacts or the forthcoming report of the National Commission on the Deepwater Horizon and Offshore Drilling, post-publication disclosures of facts concerning the spill and its containment led to the author's revising the article on his online archives, see http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654388).

Network.⁷⁴ Second, control over reprinting portions of the work in treatises and CLE materials created by the original author or edited by third persons. Third, control over incorporating portions (or all) of the work into chapters of monographs (or other print or non-print media) authored (or edited) by its original author(s).⁷⁵ Fourth, control over including one's work in one's electronic "bibliography," in whatever technology form that assumes in the age of personal, digitized archives.⁷⁶

Few other issues of control are truly vital for the author, once control of an article's future availability in open-access environments is secured. Additional matters an author ought to keep in mind in the license agreement's review include wariness of agreements of no fixed duration. Some journals want to keep their licenses from the date they accept a work for publication until the end of time, even though there is but one harvest time. Authors of law scholarship complain that it sometimes

74. Some law journals are bound to resist this request for control for awhile and they know who they are. Several law journals routinely request that authors "pull" their posting of articles from open access networks at the time of publication. This request is reasonable in the instance of an on-line published journal, which is rendered somewhat redundant if the author posts a pre-print, post-publication, in an open access source together with change annotations. Even so, the Indiana Law Journal-Supplement, an on-line publication, allowed an article to remain posted on SSRN.com, see Jason C. Miller, *Community as a Redistricting Principle: Consulting Media Markets in Drawing District Lines*, 5 INDIANA L.J. SUPP. (2010), http://ilj.law.indiana.edu/articles/86/86_JMiller.pdf. Perhaps open access is a paramount value of this journal's board.

75. Admittedly, where the article has multiple authors, particularly those with different institutional affiliations, the journal's board may require help understanding issues triggered by different authorial purposes.

76. Personal – even institutional – archiving can produce author headaches. The terms "pre-print" and "post-print" mean different things to different journals and publishers. One usage of the term "pre-print" describes the first draft of the article, predating editor input or even an author's contact with a publisher. This use is common among academics, especially when engaged in a peer-review process. Another use of the term "pre-print" describes the finished article, reviewed and amended, accepted for publication prior to being type-set or formatted by the publisher. This use is more common among publishers for whom the final and significant stage of modification to an article arranges the material for print. Non-uniform usage foments confusion and affects the interpretation of an author's publication agreement. The key is differentiating publication-as-public distribution from publication-as-formally-certified-scholarly-communication. Publishers need to clarify terms impacting archiving versions of a work. For example, are *pre-prints* the version of the paper before, and *post-prints* the version of the paper after, the editorial process, with revisions by the author having been made? If so, then in terms of content, *post-prints* are the article substantially as published. In the context of formatting, however, this *post-print* version might not indicate the *published* article, since publishers often reserve for themselves styles of type-setting and formatting. If the journal intends for the author not to use the publisher-generated .pdf file but to create her own .pdf version for submission to a repository or personal archive, that needs to appear in the publication agreement. Some publishers insist that authors use the publisher-generated .pdf; perhaps these publishers want their product viewed in a format best representing their quality of work or particular "look."

takes years for one's piece to reach print.⁷⁷ To encourage alacrity of publication of the work, authors should seek to limit an exclusive license to a fixed but reasonable term.⁷⁸

Many publishing agreements recite that the contract obligations (to publish and to sublicense publications) terminate if the parties reach an impasse on the character of a piece as publishable material. This term should be routinely added if absent. A complaint about student editorial boards is that the collective impact of its editing process is to diminish the significance of the piece from its originally-submitted state. The complaint is valid sometimes; less so on occasions when Gollum loses all perspective.⁷⁹ Yet, as Professor Armstrong notes, "you own what you write."⁸⁰ The reasonable journal's board must acknowledge limits on its editorial prerogatives.⁸¹ Authors, in turn, must avoid remembrance by former editors thirty years after placement - in case they would like another work published by the same journal⁸² or treatise publisher with an institutional memory.

77. See, e.g., Isaac Arnsdorf, *Yale Law Journal Ties for Top Ranking*, YALE DAILY NEWS, Feb. 19, 2008, available at <http://www.yaledailynews.com/news/university-news/2008/02/19/yale-law-journal-ties-for-top-ranking/> ("Law reviews are slow — a two-year delay is not unheard of," said Glenn Reynolds, a law professor at the University of Tennessee who started one of the first legal blogs, Instapundit, in 2001. "It's the 21st century. Why wait a year?"). This complaint is refrained on most legal academy blog sites. Journals, especially those not highly ranked among those that are print-based, will fall victim to reputable online law journals as the former acquire a reputation for delaying publication dates.

78. See, e.g., *supra* text accompanying note 55 (accounting for editorial board transition); an exclusive license of fewer than 12 months duration seems too aggressive except, perhaps, in the circumstance where a symposium issue is in publication.

79. My editorial board was accosted by an eminent attorney whose highly esoteric (read: incomprehensible in places) essay on letter of credit law had been solicited for publication. Informed that "not one single word" of his piece was to be modified, we had to choose between losing a valuable contribution to the issue and losing the issue's readers in the ooze of verbal viscosity. When we returned the manuscript, gently but purposefully edited, with a cover letter to the eminent authority lamenting that the journal would be unable to include his essay in its forthcoming letter of credit symposium issue, rapprochement ensued. Gollum is transformed by his obsession with the One Ring ("the Precious") forged in the fires of Mount Doom, Mordor. See *The Lord of the Rings: The Two Towers* (New Line Cinema 2002).

80. See Armstrong, *supra* note 3.

81. Author, Copyright & Publishing Agreement, *supra* text accompanying note 59. The author's agreement with KJEANRL provides that the article "shall not be published without approval by both the Author and the Editorial Board," and that the journal "shall not have the right to alter the substance of the Article after its print publication without the prior written permission of the Author." See para. 6(a) of Appendix A.

82. Journal boards change annually; less frequently, however, do faculty sponsors and (especially) secretaries to the editorial board leave the school. The secretary encounters, and recalls, everyone.

The vital interests of journals begin with needing basic uniformity in current publication agreements. Without uniformity, editorial boards divert resources to ascertaining the rights of authors better devoted to article selection and editing for print. Journals must secure revenue streams from proprietary aggregators supporting the journals' survival. This requires journals to assure secondary publishers and aggregators that they hold the right to sublicense the work for subscriber access, together with some "embargo period" on open access, increasing the likelihood of continued subscription to the proprietary aggregators' service. Securing the author's promise of a reasonable level of her return effort during the editorial process is vital to maintaining production schedules. (Oddly, most legal scholar publication agreements secure no such promises of cooperation from authors.) Finally, journals desire future recognition of their role in the publication process through citing to the journal (as original publisher) in subsequent versions of the whole or portions of the work.

C. FORM AGREEMENTS PROMOTING OPEN ACCESS

The open access era has birthed model publishing agreements and "addenda" intending to promote authors' rights. Sources of these model forms and template license provisions include organizations such as Creative Commons⁸³ and Scientific Commons⁸⁴ (together with the Association of Research Libraries); academic institutions, particularly through offices that deal with "scholarly communications"⁸⁵; and individual scholars.⁸⁶ Specific to legal scholarship, the Association of American Law Schools in 1998 devised a brief model publication agreement⁸⁷ aimed at maximizing academic open access publication choice. Opportu-

83. *About the Licenses*, CREATIVE COMMONS, <http://creativecommons.org/about/licenses> (last visited Mar. 2, 2011) (discussing six varieties of Creative Commons licenses); see also *Attribution-NonCommercial-ShareAlike 3.0 Unported*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by-nc-sa/3.0/legalcode> (last visited Mar. 2, 2011) (discussing the text of one license species); Rosloff, *supra* note 71.

84. *Author's Addendum*, SCIENCE COMMONS, <http://sciencecommons.org/resources/faq/authorsaddendum> (last visited Mar. 14, 2011).

85. See, e.g., *Model Publication Agreement*, UNIVERSITY OF CALIFORNIA OFFICE OF SCHOLARLY COMMUNICATION, <http://osc.universityofcalifornia.edu/manage/model-amendment.pdf> (last visited Mar. 14, 2011); *Amend a Publishing Agreement*, HARVARD UNIVERSITY LIBRARY OFFICE FOR SCHOLARLY COMMUNICATION, <http://osc.hul.harvard.edu/authors/amend> (last visited Mar. 14, 2011) (including frequently asked questions); Kevin Smith, *Scholarly Communications @ Duke*, DUKE UNIVERSITY LIBRARIES, <http://library.duke.edu/blogs/scholcomm/> (last visited Mar. 14, 2011).

86. See, e.g., Mark A. Lemley, *Model Copyright Agreements*, COPYRIGHTEXPERIENCES, http://commons.umlaw.net/index.php?title=Model_copyright_agreements (last modified Sept. 29, 2007).

87. See Bari Burke, *Memo 98-24*, THE ASSOCIATION OF AMERICAN LAW SCHOOLS (May 18, 1998), available at <http://www.aals.org/deansmemo/98-24.html>.

nities and constraints inherent in five of the popular form author addenda are deftly described in Peter Hirtle's survey article.⁸⁸

V. A FORECAST FOR FUTURE PROPRIETARY AGGREGATION

The future of open access architecture in a time of rapid-paced innovation in human – computer interfaces is indeed unpredictable, but before long it likely will be unrecognizable from today's journal author's perspective. Three trends in technology development and Web consumer use of scholarship sources may render existing copyright law governing compilations of multiple authors' works obsolete. But courts must rule on facts, not hypothetical circumstances.⁸⁹ Perhaps these briefly-described trends will converge in technology devices and reading patterns unrecognizable today. Perhaps imaging of written materials to promote research and scholarship endeavor will eviscerate today's publishing agreements. The persisting dilemma will be how to allow all stakeholders – authors, journals, and article database purveyors – what they need without creating a zero-sum “loser.”

A. HOW WE READ AND RECALL MATERIAL, OR, AT LEAST, WHERE WE LAST ENCOUNTERED IT

One research endeavor in the tech sector is to understand how today's readers save and re-use “encountered” information. Researchers study the reader's serendipitous and incidental contact with information that, at the moment of its encounter, is “unnecessary” to the reader, but is perceived to be worth revisiting later.⁹⁰ Increased dependency on revisitation environments causes reading increasingly to become “shal-

88. See Peter B. Hirtle, *Author Addenda: An Examination of Five Alternatives*, 12 D-LIB MAGAZINE (Nov. 2006), <http://www.dlib.org/dlib/november06/hirtle/11hirtle.html>. Hirtle's 2006 article is admirable for its scope of analysis; yet in digital time, it is partially outdated, as Hirtle's comments refer to the initial versions of many of these works (1.0 Addendum), superseded since his paper's publication. *Id.* His observations about the significance of certain addenda provisions, and the limitations in omitting certain terms from these addenda, remain noteworthy. *Id.* See also Suber, *supra* note 8 (addressing author addenda and the online “addendum engine” that fills in a form with author input, and finding particular favor with the Committee on Institutional Cooperation's author addendum).

89. Adjudicatory tradition mandates the existence of a justiciable controversy. See, e.g., *Berg v. Hirschy*, 136 P.3d 1182, 1184 (Or.Ct.App. 2006) (“A justiciable controversy must involve present facts, not future events or hypothetical issues. [citation omitted] Where the rights of the plaintiff are contingent on the happening of some event that cannot be forecast and that may never take place, the dispute is not justiciable.”).

90. See, e.g., Catherine C. Marshall, *Reading and Interactivity in the Digital Library: Creating an Experience that Transcends Paper*, in DIGITAL LIBRARY DEVELOPMENT: THE VIEW FROM KANAZAWA 127-145 (Deanna Marcum & Gerald George, eds. 2005), available at <http://www.csdlib.tamu.edu/~marshall/KIT-CLIR-revised.pdf>.

low,” decreasing reader attention spans and increasing the reader’s tendency to locate quickly salient points within a longer document.⁹¹ Reading in depth is postponed when the reader knows how to locate the material later.⁹² These tendencies lead electronic reading tools’ researchers to emphasize the ease of interactive navigation, convenient storage of a reader’s “clippings” and his ability to share works with others.⁹³ One anticipated service is a portable personal library containing all works that the reader has read and written, complete with records of where that material is stored.⁹⁴

B. FINDING SCHOLARSHIP USEFUL TO THE INQUIRER

Management information systems and computer science engineers are researching the use of automatic textual analyses and general purpose search analyses using Web – based interfaces like Java.⁹⁵ Internet personal “spiders” dynamically take selected starting home pages of a user (selected URLs or domain names) and search for the most closely-related home pages available on the Web based on links and keyword indexes.⁹⁶ Intelligent personal agents take the user’s request and perform a real-time, customized search; the agent operates autonomously and undertakes searches based on tailored instructions without ongoing human supervision.⁹⁷

C. FACILITATING READING AND DELIVERY OF WRITTEN CONTENT

Engineers are developing hardware technologies that repackage conventional Internet “journalistic” formats, enhancing Web page readability and absorption of presentations of data.⁹⁸ Reading on the computer

91. See, e.g. *id.* at 1.

92. See, e.g. *id.* at 1.

93. See, e.g., Marshall, *supra* note 90, at 1; SCRIBD, <http://www.scribd.com> (last visited Mar. 2, 2011). Scribd.com is one social publishing and reading website that permits sharing books and documents today.

94. See Marshall, *supra* note 90, at 13; Catherine C. Marshall & Sara Bly, *Saving and Using Encountered Information: Implications for Electronic Periodicals*, PROCEEDINGS OF CHI’05 THE CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS, (Apr. 2005) at 111, 118, available at <http://www.csdl.tamu.edu/~marshall/p440-marshall.pdf>.

95. Hsinchun Chen, Yi-Ming Chung, Marshall Ramsey and Christopher C. Yang, *An Intelligent Personal Spider (Agent) for Dynamic Internet/Intranet Searching*, 23 DECISION SUPPORT SYSTEMS, 41-58 (1998).

96. *Id.* at 7, 16,22.

97. *Id.* at 9.

98. See, e.g., Chen-Hsiang Yu & Robert C. Miller, *Enhancing Web Page Readability for Non-native Readers*, CHI’10 PROCEEDINGS OF THE 28TH INTERNATIONAL CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS, 2523, 2530 (Apr. 2010) (using a “Jenga format,” software engineers are able to extract paragraphs from the current viewing page, apply regular expressions to separate the sentences of each paragraph, and add new HTML ele-

screen is simplified by first automatically detecting and de-emphasizing distracting elements appearing on the Web page. Next, the program summarizes content by making key paragraphs of text stand out for quick review by the reader while changing the paragraph formatting for ease of scanning. All these features increase reader comprehension without decreasing reading speed.⁹⁹

While today's educators may despise the concept, future legal scholars may conduct research, and write works, by reviewing "streaming text clippings" or reformatted-for-scanning versions of digitized primary-source legal, historical and other social science materials and published works.¹⁰⁰ Scholars may publish in peculiar formats, producing, for example, works without pages. A scholar may never read, front to back, a single article from a law journal. Author Nicholas Carr laments that humans continuously engaged with the Internet literally rewire their neural synapses, skipping from topic to topic and task to task rather than focusing on a single goal or thought, while inrushing new insights and facts fill e-mail inboxes and swarm users via Twitter or Facebook, further reinforcing such behaviors.¹⁰¹ Carr fears that readers will lose the opportunity to build the lasting connections in their minds that enables them to frame the world differently or to derive solutions to complex problems.¹⁰² The dynamic environment of technology paradigm shifts mandates that publication agreements will be limited in their utility unless they seek to articulate the parties' respective rights in new contexts for reproducing and disseminating scholarly works.

ments around the main sentence to distinguish it from the secondary sentences, effectively "digesting" the main point of any paragraph).

99. *Id.* at 2530-31.

100. *See, e.g.*, NICHOLAS CARR, *THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS* 135-36 (2010); *see also* Steve Mann, James Fung, Chris Aimone, Anurag Schgal and Daniel Chen, *Designing Eye Tap Digital Eyeglasses for Continuous Lifelong Capture and Sharing Personal Experiences*, PROCEEDINGS OF ALT.CHI2005 (2005), available at <http://eyetap.org/papers/docs/Eyetap.pdf.html>. Eye Tap technology enables the recording of everything ever viewed or read by the wearer of the digital eyeglass technology by causing the human eye to become a camera and display within the cornea. *Id.* If retrievable, viewed images of written works would be compiled into the personal library that Ms. Marshall postulates.

101. *See* CARR, *supra* note 100, at 91, 117, 132. Google Instant, a search process that "updates" the user's results with each successive letter typed into the search engine's inquiry box, illustrates the fluidity of steaming data the user must process in real time; Google refers to this innovation as "constantly evolving results." *See* Amit Singhal, *Competition in an Instant*, WALL ST. J., Sept. 17, 2010 at A19.

102. *See* CARR, *supra* note 100, at 122-26, 146-48, 214-16; *but see* Armstrong, *supra* note 6 (crowd-sourcing, in which millions on the Web collaborate to derive solutions to complex problems [outsourced by posers of the problems via the Internet], may substitute for the individual's capacity to filter ideas to accomplish work, especially in the realm of creating "informational goods").

VI. TOWARD NEW MODELS OF PUBLICATION AGREEMENTS

The Association of American Law Schools 1998 model publication agreement predated the iPhone, most Internet applications for PDAs, the iPad, Kindle and several other now-familiar technologies. Its form, while still somewhat useful today, anticipated none of the trends described in the preceding section. A learned society's or institution's addendum for authors cannot be thrown on like a windbreaker to soften the impact of a journal's twentieth century-generated publication agreement. Absent the author's or journal board's careful forethought, today's typical journal publication agreement is static in purpose and inflexible in application. Acting as if any addendum addressing open access serves the author's purposes ignores the varying preferences of each publisher (and aggregator) and varying levels of sophistication of the parties about the intentions expressed in their publication agreements.¹⁰³

Publication addenda minimally should contain a "check the box" field where there is a clear indication of the character of rights being transferred. Who retains the copyright, or who possesses an exclusive, temporal license - and for how long? Addenda should be forward-looking, anticipating that future technologies will capture and represent written works in ways not anticipated today. When change occurs, the issue for negotiation and documentation remains how much the author controls reproductions of her work, so long as she does not functionally copy the current visualization modality employed by the proprietary content-delivery provider.¹⁰⁴ Addenda should contain certain boilerplate provisions, especially clauses affirming that time is essential,¹⁰⁵ that venue lies in the domicile of both the law journal and the author (fairer because interstate activity is involved); and that disputes shall be resolved by a med-arb process¹⁰⁶ speeding resolution of controversy more flexibly and affordably than injunctive proceedings.¹⁰⁷

103. This author advocates an annual review of content by the "form addenda" purveyors, and a biennial (or more frequent) conference of stakeholder groups with tech developers introducing services shaping future patterns of reading the written word.

104. See Appendix A, §2 (b)(iv).

105. This boilerplate phrase means that the party receiving performance is not obligated to discharge his obligations unless the performing party proceeds with the alacrity implied from a reasonable interpretation of the contract. Otherwise stated, when time is not of the essence, courts generally permit parties to perform their obligations within a reasonable time. Reasons of tenure consideration and of publication schedules should induce each party to a publication agreement to require this provision's insertion.

106. Med-arb is jargon for mediation, followed closely by arbitration if the mediation is unsuccessful, typically conducted by the same party selected by the foes to conduct the mediation.

107. Cf. *Cambridge University Press, et al. v. Becker*, No. 1:08-cv-10425-ODE (N.D. Ga. Sept. 30, 2010) (proprietary publishers' copyright suit over university policy on reserves, entering the third year of its litigation run).

Starting with certain provisions within the AALS's form agreement, this author offers a model publication agreement (with a few annotations) that considers the rapid transformation of imaging, document searching, and consumer absorption of written material in the millennium of digital archiving, along with other issues mentioned in this paper. That form, with notes, appears as Appendix A.

VII. CONCLUDING OBSERVATIONS

The author – journal publication agreement is a contract, and, like all contracts except adhesion contracts, it is negotiable.¹⁰⁸ Sorrow awaits the party demanding “take it or leave it” contract terms.¹⁰⁹ Validated intellectually by having her work accepted for publication, a euphoric author may sign the copyright transfer or license agreement without considering its contents. Or perhaps the author despairs of successfully negotiating with a journal holding the power to decline publication. This author's experience has been that journals accede to requested reasonable modifications to their publication contracts¹¹⁰ and sometimes will consider executing the author's preferred form of publication agreement or addendum.

While no one can predict accurately which direction scholarly publication will take in a time of radical technological transformation, we can assume this: as younger scholars move into legal publishing, their seasoned online social behaviors will drive toward new directions in scholarly communications. These directions will feature developments in increased speed of information production and reticulation among law-grounded disciplines. The impatience of persons accustomed to ubiquitous connection to our global electronic networks will fuel a perceived urgency for “improved” text search, delivery, and storage modes.¹¹¹ Technological evolutions will not change the essential principals of publishing contract formation, however.

Two ingredients ensure the successful consummation of a written contract: clarity of expression and the good faith intentions of each

108. If the journal is a top-tier journal, the author may want to run his proposed modifications past the resident leading contracts expert to test the virtues of the author's demands. Authors need to keep copyright issues in perspective.

109. See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1174, 1245 (1983), in which the author posits that courts should not be deterred from “refusing to enforce form terms by the imbalance created in the particular transaction before them,” based on sound reason and ample legal authority.

110. The author's experience with journals' staffs is that they seem willing to make reasonable concessions and, truthfully, are less defensive than many practitioners. The author has found editors typically eager to cooperate, as time permits.

111. See, e.g., Armstrong, *supra* note 20 (addressing the superior capabilities of “wikis” such as Wikisource).

party.¹¹² Authors and journals each are urged to acknowledge their respective vital interests (and to respect, to the degree sensible, those of the other party) along with the expectations of proprietary aggregators, and to express precisely what each requires to fulfill those needs in their publication agreements. An agreement today must, in any event, afford the journal sufficient intellectual property value for it to transfer rights to reproduce the work in proprietary digital archives – or in the latest “publication” forum awaiting scholars around the bend.

112. This is not an oblique reference to the implied covenant of good faith and fair dealing that exists in nearly every state’s common law jurisprudence today. Good faith and fair dealing as a contract doctrine arises in the performance of a contract but not in its negotiation and drafting stages, where effectively anything goes except, perhaps, conduct amounting to fraud inducing the contract’s delivery. *See, e.g., Budget Marketing, Inc. v. Centronics Corp.*, 927 F.2d 421, 426 (8th Cir. 1991) (even a written letter of intent expressly stating it is non-binding, “did not give rise to an implied agreement to negotiate in good faith”); RESTATEMENT (SECOND) OF CONTRACTS §205 (1981) (good faith and fair dealing applies in contract realm “in its performance and enforcement”). In the author’s experience, however, when one party’s strategy is to make his “best deal” during pre-execution negotiations, intending in that process to renegotiate essential terms after the contract is executed, doom looms. Lawyers (practicing or not) should neither countenance nor participate in such conduct, *see, e.g.,* Gregory M. Duhl, *The Ethics of Contract Drafting*, 14 LEWIS & CLARK L. REV. 989, 1011 (2010) (ambiguous drafting, consciously undertaken, is dishonest and violates ABA Professional Responsibility Rule 8.4 – and undercuts the core function of contract law, to build trust).

APPENDIX A

FRANKLIN BUSINESS LAW QUARTERLY

AUTHOR AGREEMENT

The following is an agreement (this “Agreement”) between **MICHAEL N. WIDENER**, referred to as the “Author,” and the **FRANKLIN BUSINESS LAW QUARTERLY**, referred to as the “Journal,” and pertains to the article entitled “[TITLE],” referred to as the “Work.” In consideration of their promises, the Author and the Journal agree as follows:

1. Author’s Grant of Rights

- a. Except as provided in Paragraphs 1(c) and 2(b), the Author grants to the Journal a license to reproduce and distribute the Work in the Journal, in facsimile reprints or microforms, as a contribution to a collection of works published by the Journal, by means of an Internet or Intranet site over which the Journal exercises effective control, and by means of a third-party online legal information provider, such as, but not limited to, LEXIS-NEXIS, Westlaw, JSTOR, HEIN Online, the NELLCO Scholarship Repository, the Washington & Lee Law School Journal Database, and the Journal’s official Website.
- b. The Journal’s license provided in Paragraph 1(a) shall be (i) exclusive for a period beginning when this Agreement is executed and ending on the earlier of one (1) year after publication of the Work in the Journal or eighteen (18) months after execution of this Agreement, and (ii) nonexclusive thereafter.¹¹³
- c. The Journal’s license to reproduce the Work includes the right to prepare a translation in any language or to authorize the preparation of such a translation, but such right is subject to the Author’s approval of the translation, which is not to be unreasonably withheld or delayed.
- d. After the Work has been published in the Journal, the Journal shall have a non-exclusive license to authorize another party to reproduce and distribute the Work in the forms specified in Paragraph 1(a).

113. See *supra* Section IV(A)(5) for an illustration of the exploding exclusive license.

- e. The Author grants this license to the Journal without claim of royalties or any other compensation.

2. Author's Ownership of Copyright and Reservation of Rights

- a. The copyright in the Work shall remain with the Author.

- b. The Author retains the rights:

- i. In any format, to reproduce and distribute the Work, and to authorize others to reproduce and distribute the Work, to students for educational purposes;
- ii. To include the Work, in whole or part, in another work of which the Author is an author or editor, *provided* that in either circumstance the Author may not submit a work for publication that is substantially the same as the Work to another periodical, without the permission of the Journal, earlier than one (1) year after publication of the Work or eighteen (18) months after execution of this Agreement, whichever first shall occur, and *provided further* that the subsequent work identifies the Author, the Journal, the volume, the number of the first page, and the year of the Work's publication in the Journal.
- iii. To post the Work¹¹⁴, in whole or in part, on an Internet or Intranet site (a) over which the Author has effective control (such as a personal Website with digitized images), or (b) on a site maintained for individual authors such as those established by www.bepress.com/ir/ [Digital Commons] or SSRN), or (c) on a site (such as the repository of a law school in the manner of "Legal Studies/Research Paper Series") specific to the Author's academic or research institution; *provided*, that in any such event, such posting of the Work shall identify the Author, the Journal, the volume, the number of the first page, and the year of the Work's first publication in the Journal.
- iv. To incorporate or embed the Work, in whole or part, within any future Internet architecture facilitating public dissemination of content for "open access," so long as that architecture does not compete for revenue-generation

114. See *supra* note 76 for a discussion of the version of the Work to which this subparagraph pertains.

with a for-profit content provider with whom the Journal currently contracts for replication and content-provision of written works like the Work.¹¹⁵

3. Publication by Others

The Journal shall have the non-exclusive license to authorize another party to reproduce and distribute the Work in a form besides those specified in Paragraph 1(a), *provided that* (i) such reproduction identifies the Author, the Journal, the volume, the number of the Work's first page, and the year of the Work's publication in the Journal, (ii) the Author has been notified in writing by the Journal¹¹⁶ of its intent to authorize such reproduction and distribution not less than thirty (30) days prior to the grant of such authorization and (iii) the Author has not, within thirty (30) days after actual receipt of Journal's notice, notified the Journal of the Author's objection to the reproduction and distribution referenced in the notice.

4. Author's Warranties and Undertakings

- a. The Author warrants that to the best of the Author's knowledge:
 - i. The Author is the sole author of the Work and has the power to convey the rights granted in this Agreement;
 - ii. The Work has not previously been published, in whole or in part, except that it has been posted (and may be reposted) on [the Social Science Research Network Website (<http://ssrn.com/>)]¹¹⁷ [or the Berkeley Electronic Press Digital Commons Website [<http://www.bepress.com/ir/>]];

115. *See supra* text accompanying note 101.

116. Authors shall remain eligible for this "opportunity to object" only if they "opt in," by keeping the proprietary aggregators informed of their current email addresses, updating them annually through a registry to be established on each aggregator's website. Without an "opt in" system, notification is stymied and aggregator transaction costs are inappropriately increased.

117. SSRN's new initiative (announced October, 2010) to sell copies of PDFs posted by authors via a "Purchase Bound Hard Copy" service through SSRN's eLibrary creates at least some doubt whether this author warranty is accurate when made; alas, the facts will be unverifiable unless SSRN communicates with the author about sales of her article. Arguably, this service, if successful, renders SSRN a secondary publisher. *See* note 121 *infra*; therefore, this warranty must be modified by the author to exclude sales made via SSRN's purchase on demand platform.

iii. The Work does not infringe the copyright or property right of another; and

iv. The Work does not contain content that (a) is defamatory, or (b) violates the rights of privacy and of publicity or other legal right of another, or (c) is contrary to any law or public policy of the State.

b. If the Work reproduces any textual or graphic material that is the property of another for which permission is required, the Author shall, if requested by the Journal, obtain written consent to such reproduction.

5. Litigation

a. If a claim is asserted against the Journal as a result of the Author's alleged breach of this Agreement or his warranties, the Author shall be promptly notified. The Author shall have the right to participate in the Journal's response to and defenses against any claim, and the Journal shall not settle such claim without the Author's approval. If a settlement requires the Journal to make a money payment, or a money judgment is rendered against the Journal, the Author shall reimburse the Journal for the amount of such payment or judgment, and shall pay the costs and expenses reasonably incurred by the Journal in responding to the claim.

b. The Journal shall have the power, after giving notice to the Author, to initiate legal proceedings against persons or entities believed to be infringing the licensed rights hereby granted by the Author to the Journal. The Author agrees to cooperate reasonably in the institution and maintenance of such proceedings. Damages recovered in such proceedings shall first reimburse the Journal's costs and expenses actually incurred in the proceedings, and the balance (if any) shall first reimburse the Author's costs and expenses in assisting the Journal in the prosecution of the Journal's claim.

6. Editing and Printing

a. The Author authorizes the Journal to edit and revise the Work prior to publication in the Journal, but the Work shall not be published by the Journal unless it is acceptable in its final form to each of the Author and the Journal. After its print publication, the Journal shall not alter the Work's substance

without the prior written consent of the Author in each instance.¹¹⁸

- b. The Author agrees to harmonize all citations in the Work (to the best of his ability with the aid of the Journal's editors) to the rules found in the most recent edition of *The Bluebook: A Uniform System of Citation*; and the parties mutually agree to use commercially reasonable efforts to create a timely, first-class quality, publishable work.¹¹⁹
- c. Promptly upon any print publication, the Journal shall give the Author, without charge, 25 offprint copies of the printed Work and, if requested by the Author, additional copies at a per-copy cost to be determined by the Journal in its reasonable discretion. Promptly upon publication in any non-print medium, the Journal shall afford the Author cost-free access to the medium (by affording access codes or security passwords or "keys") such that the Work can be downloaded and then "uploaded" to the Author's personal archives or institutional-affiliate repository, as the case may be.¹²⁰

7. Sole Agreement, Modifications, Time Essential & Governing Law

This Agreement constitutes the sole agreement between the Author and the Journal with respect to the publication and copyright of the Work. Any modifications of or additions to the terms of this Agreement shall be in writing and signed by the parties. Time is of the essence in respect to each term of this Agreement. This Agreement shall be governed in its interpretation and enforcement by the laws of the State of Franklin (the "State").¹²¹

118. See *supra* text accompanying note 79.

119. See *supra* Section IV(B).

120. This provision will be subject to updating in light of future technological innovations, so that the Author may have continued access to any visual medium in which her work is "imaged."

121. See, e.g., Michael Toomey, *State of Franklin*, THE TENNESSEE ENCYCLOPEDIA OF HISTORY AND CULTURE, <http://tennesseeencyclopedia.net/entry.php?rec=509> (last visited Jan. 1, 2010) (organized as an independent "state" between 1784 and 1789, John Sevier, Governor; never admitted to the Union).

Author's Signature: _____

Author's Printed Name: Michael N. Widener

Date: _____, 201_

F.B.L.Q. Representative's Signature: _____

Representative's Printed Name: _____

Date: _____, 201_

APPENDIX B

ELECTRONIC PUBLISHING GLOSSARY

Note: This author selected these terms for consistency in this article, though others may be familiar with different definitions or terms describing certain publishing elements or actors.¹²²

- **Aggregator:** A service provider making available (often for profit) content, licensed by a group of publishers, provided in packages offered at set prices to libraries or other subscribers. An aggregator frequently adds value to the electronically archived packages by discovery technologies or other features. A “proprietary aggregator” essentially operates for profit.
- **Discovery technology:** Something that permits access to content to its audience (such as researchers) like a search engine or dynamic links to a work’s cited references.
- **Open access:** The condition of *gratis* availability of Internet sources of scholarly articles and accompanying objects such as research results, raw data (and metadata), source materials, digital representations of images and other scholarly multimedia items. Open access usually is achieved by a journal publisher making the works freely available, or by the author making the article available on a Website or via a repository.
- **Primary publisher:** The first agency that asserts editorial control over the work following the author’s completion of the work. In student – edited legal journals, the publisher is the law school or a board of trustees of a university.
- **Repository (aka digital repository, e-print repository):** A place where (1) an institution (like a law school or another research-oriented body, *e.g.*, the Hoover Institution or a learned association) chooses to collect its faculty’s/fellows’ or other members’ deposited works, data, images or other objects of scholarly endeavors, or (2) a scholarly community (including a “community of one,” meaning a lone academic doing self-depositing) or a discipline or research domain collects works, etc. oriented along the lines of a single discipline or related disciplines, where the target audience typically is other researchers and scholars in a narrower

122. Those most familiar with the age of electronic journals, these terms or definitions may seem ill-suited. Today, the author initially posts to a repository like SSRN, in the author’s personal archives or web page; in that event, the author literally is the primary publisher, while the law journal that “prints” the work in its pages or on its online journal site is the secondary publisher. SSRN, in this illustration, is the aggregator as well as the repository of the author’s personal archives. In the days when print dominated, a secondary publisher might be a bookstore or library.

field. Institutional repositories serve two functions for institutions, to aid the scholar in disseminating works and to have a “showcase” for the academic output of its members (and, in the sciences particularly, to demonstrate bang for the funding source buck).

- Secondary publisher: A “go-between”; typically this publisher is more of a “handler” of works and less an agent that asserts editorial control over the work.