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Balancing Copyright Privileges in Law Journal Publication Agreements:

An Empirical Study\*

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**Abstract**

This study examines forty-nine law journal publication agreements and finds that a minority of journals ask authors to transfer copyright. Most journals also permit author to self-archive articles with some conditions. The study recommends journals make their agreements publicly available and use licenses instead of copyright transfers.

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## **Introduction**

Authors, law journal editors, and librarians must always consider copyright law when dealing with scholarly articles. Generally, copyright issues relating to an article are handled through a publication agreement between the law journal and author. Since journal editors develop agreements, authors negotiate modifications, and law librarians advise and educate about copyright, all three parties have an interest in the terms under which articles are published. I will then make some recommendations for making publication agreements friendlier to open access.

This study examines a sample of U.S. law journals' publication agreements and develops some empirical sense of what copyright practices are most prevalent in law journals. From this information, editors can make more informed decisions about modifying their agreements, authors can more carefully weigh publication terms when choosing publication venues, and librarians can assist the other two parties in establishing a healthy balance between journal and author rights. The distribution of copyright privileges can also be analyzed the extent to which publication agreements permit, or even encourage, open access to legal scholarship. I will then make some recommendations for making publication agreements friendlier to open access.

## Why Publication Agreements Matter

Publication agreements between journals and authors generally govern each party's ability to use articles in the future, so they are an extremely important factor in the movement to make legal scholarship open access, that is, for scholarly articles to be available to the general public online, without charge, and with minimal legal restrictions.<sup>1</sup> Open access can be achieved either through journals that, as a matter of policy, make their contents freely available online, or the through authors archiving their own works in institutional, disciplinary, or personal digital repositories.<sup>2</sup> Since publication agreements bind both the journal and author's use of an article, agreements can either facilitate or hinder open access.

Open access emerged from the confluence of two trends in scholarly publishing: increasing prices for journal subscriptions and growing prevalence of digital dissemination of scholarship.<sup>3</sup> Generally speaking, subscriptions for law journals have never been as high as most other academic periodicals (most law

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

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

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

journals are edited by unpaid students, and most legal scholars do not require expensive lab equipment or huge sample populations for their work),<sup>4</sup> but the rise of online vendors like Westlaw, LexisNexis and HeinOnline has made most legal scholarship available in subscription databases to which the general public does not have access.. Law students and professors expect articles to be accessible online, and the general public can also benefit greatly from such access,<sup>5</sup> but this public good is reduced when access to articles is subject to subscription fees. Assuming, as I think, that open access to most law journal articles is desirable, do most publication agreements support or inhibit this goal?<sup>6</sup>

A concrete example of publication agreements constraining open access was Dan Hunter's experience with the *California Law Review*. In 2003, the journal, to which Hunter had signed publication agreements that transferred copyright in his articles, had ordered draft articles removed from the Social Science Research Network (SSRN), a major archive of draft law articles.<sup>7</sup> Due to his publication agreements with the journal, he had lost control of his academic work, and the journal, protecting its royalties from subscription databases (a

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4 Plotin, *supra* note 1, at 34, ¶ 8.

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

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

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

major source of funding), had worked against open access to scholarship. After Hunter's protests, the *California Law Review* changed its copyright policies, but the episode illustrates the power distributed by publication agreements.

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

### **Trends Towards Author Rights and Open Access**

In the past, like many academic journals, law journals often required authors to transfer all their copyright privileges, giving them exclusive control over articles. Lawrence Solum noted that this exclusive control was an obstacle to open access, either because the publishers wished to preserve a revenue stream or because the transaction costs of obtaining permissions discouraged potential users.<sup>8</sup> Recognizing that complete copyright transfers granted journals more

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

power than was necessary to efficiently publish their content, an American Association of Law Schools committee produced a model publication agreement.<sup>9</sup> The chair of the committee, Marci Hamilton, explained the process behind the model agreement by listing four premises underlying the agreement's provisions: articles should never be works-for-hire, depriving scholars of any copyright interest; authors should not publish the same work in competing venues within one or two years after first publication; provision should be made for disseminating articles to other audiences and in other forms; and student-edited law journals' educational mission means articles should be available for non-commercial use.<sup>10</sup>

The AALS agreement gives an exclusive license to the journal for one year, after which the license is non-exclusive for both the journal and author. Although drafted when the open access movement was just beginning to influence the dissemination of legal research, the agreement was prescient in providing that authors may self-archive online (although it is unclear if third-party sites are under the author's "effective control" as required by the agreement), provided the original publication is acknowledged. The agreement is also permissive of

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9 American Association of Law Schools, Memorandum 98-24, May 18, 1998, <http://www.aals.org/deansmemos/98-24.html> (last visited August 24, 2009).

10 *Id.*

educational, non-commercial reproduction of articles, making it much easier for teachers to legally distribute material for class reading.

In 2005, the Open Access Law Program, a joint venture of Creative Commons and Science Commons, issued an Open Access Law Model Publication Agreement.<sup>11</sup> While the AALS agreement emphasized permitting educational uses, the Open Access agreement focuses on self-archiving, explicitly stating that posting drafts online does not constitute prior publication and committing the journal to give the author a digital copy of the published article. Creative Commons licenses, which did not exist at the time the AALS agreement was drafted, are included as options for journals to allow and authors to select. The Open Access Law Project also developed four principles that journals can publicly adopt. The principles call for journals to require no more than a temporary exclusive license and permit authors to use Creative Commons licenses, attribution of original publication (unless the first journal does not require it), providing digital copies of articles to authors for self-archiving, and, if the journal is not adopting the open access model agreement, making the agreement consistent with the other principles and posting it online.<sup>12</sup>

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11 Science Commons, Open Access Law: Publication Agreement, <http://sciencecommons.org/projects/publishing/oalaw/oalawpublication/> (last visited August 24, 2009).

12 Science Commons, Open Access Law: Principles, <http://sciencecommons.org/projects/publishing/oalaw/principles/> (last visited August 28, 2009).



It is difficult to quantify the influence of these model agreements because many journals use the model agreements as templates and modify them to suit their particular needs. As I read publication agreements for this study, I noticed that many provisions bore a strong resemblance to their model counterparts, so it is clear that these model agreements have had some effect on journals' copyright policies. The AALS agreement was developed before the Open Access agreement and had the backing of a major legal education organization, so it is not surprising that many more journal agreements had adopted or borrowed from the AALS model. Only two of the agreements examined in this study expressly provided for Creative Commons licenses. While non-exclusive licenses would not prevent an author from attaching a Creative Commons license, the lack of specific provision indicates that most journal editors have not yet considered these licenses common enough to warrant express mention in their publication agreements.

Authors also have the option of attempting to negotiate different copyright provisions before signing the publication agreement. The Scholarly Publishing and Academic Resources Coalition (SPARC) has developed a publication addendum that supersedes contrary copyright agreement provisions to ensure that authors can self-archive, make derivative works, and reproduce for non-commercial purposes as long as the original publication is credited.<sup>13</sup> Some law

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<sup>13</sup> Scholarly Publishing and Academic Resources Coalition, Addendum to Publication Agreement, [http://www.arl.org/sparc/bm~doc/Access-Reuse\\_Addendum.pdf](http://www.arl.org/sparc/bm~doc/Access-Reuse_Addendum.pdf) (last visited August 29, 2009).

journals have accepted the SPARC addendum,<sup>14</sup> and several journal editors responding to my requests for publication agreements noted that they often negotiate with authors on copyright terms. Legal scholars and librarians have become more aware of the importance of retaining crucial copyright privileges over their articles, and tools have been created to help preserve authors' rights. But how many law journals have embraced the trend toward author rights and open access?

Several authors have examined the extent of law journals' shift from copyright transfers to non-exclusive rights. Richard Danner notes that the popularity of SSRN and Berkeley Electronic Press's repositories indicates that journals "are comfortable with a culture that both allows and encourages authors to assume some of the responsibility for disseminating their works." This observation comes with a caveat, though: "It is difficult to know how many journals actually allow broad self-posting in their author publication agreements."<sup>15</sup> Carol Parker, in her article on self-archiving in open access institutional repositories, claims that as awareness of open access increases among authors and editors, "a growing number of law journal editors are reviewing

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

15 Danner, *supra* note 2, at 383.

journal publication agreements to ensure that they do not needlessly demand exclusive rights, even for a limited period of time.”<sup>16</sup>

The first findings on law journals' copyright policies, published before Danner and Parker's writings, were not optimistic. In 2004, Hunter surveyed the 176 main law reviews of American Bar Association (ABA)-accredited law schools. From the 65 journals that disclosed their policies on self-archiving responses, Hunter found that thirty had no set policy or went on a case-by-case basis, twenty-six permitted self-archiving in some form, and nine prohibited self-archiving.<sup>17</sup> Hunter suggested that journals, especially the top ranked ones, feared that open access archiving would adversely affect their royalties from database providers. Even some of the journals that permitted self-archiving imposed conditions on the author's posting, such as requiring embargo periods, removal of drafts after publication, or not using the published, definitive version.<sup>18</sup> On the whole, Hunter wrote, “the fact remains that that the majority of law reviews that responded to the survey do not allow open-access archiving, have yet to develop a policy on archiving, or claim to allow archiving but only in a way that effectively negates the public benefit of open-access archiving.”<sup>19</sup>

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<sup>16</sup> Parker, *supra* note 14, at 471.

<sup>17</sup> Hunter, *supra* note 7, at 629.

<sup>18</sup> *Id.* at 630-31.

<sup>19</sup> *Id.* at 631.

A more recent study gives some reason to be more optimistic about journals' policies. Plotin examined the copyright policies (often contained in publication agreements) of the top twenty law journals in ISI Journal Citation Reports. She found that “while traditional law reviews may contain copyright restrictions for future uses, many have become open-access journals” and that several journals only required nonexclusive licenses from authors, thereby permitting authors to self-archive their articles.<sup>20</sup> Perhaps the arguments for open access and authors' rights have more widely influenced law journals since Hunter's study.

## **Examination of Agreements**

### Methodology

While this study has some similarities with Hunter and Plotin's, each looked at different samples of journals. Hunter used surveys from the main law journal of every ABA-accredited law school. Plotin looked at the copyright and open access policies of the twenty most-cited journals according to the ISI Journal Citation Reports. This study examines the actual publication agreements from law journals. Using the Washington and Lee law journal rankings,<sup>21</sup> I made a list of the top 150 ranked U.S. law journals, regardless of whether the journals were

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<sup>20</sup> Plotin, *supra* note 1, at 50, ¶50.

general or specialized, student-edited or peer-reviewed. In August 2009, I visited each journal's website and looked for a copy of its publication agreement. I did not exhaustively search each website, but checked the two sections most likely to contain an agreement: the "About Us" and "Submissions" sections. If I found an agreement, I downloaded it and did not contact the journal. If I could not find an agreement, I emailed the journal at the address listed on its website. (Percentages are only given to the first decimal place, so they may not add up to one hundred percent.)

Of the 150 journals, eight (5.3 percent) had agreements available on their websites, forty-one journals (27.3 percent) responded with their agreements, two (1.3 percent) said their agreements were in the process of being revised, and three (2 percent) declined to provide their agreements, stating that they were only given to authors. One journal indicated that it did not ask authors to sign a publication agreement. So, I was able to obtain information about publication agreements for fifty-five (36.6 percent) of the top 150 journals in the U.S., and actual agreements from forty-nine journals, or 32.6 percent of the sample.

Of the forty-nine journals for which I obtained agreements, forty-six (87.7 percent) were student-edited; the other six were peer-reviewed. Thirty-one (63.2

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21 Washington and Lee University School of Law, Law Journals: Submissions and Rankings, <http://lawlib.wlu.edu/LJ/> (last visited August 24, 2009). The rankings are based on citation counts. The methodology is explained at Law Journals: Submissions and Rankings—Explanation, <http://lawlib.wlu.edu/LJ/method.asp> (last visited August 24, 2009).

percent) were general law journals while eighteen were specialized. The distribution of journal rankings was fairly even. Fifteen (30.6 percent) journals were in the top third (ranks 1-50) of the Washington and Lee rankings, nineteen (38.7 percent) were ranked 51-100, and fourteen (28.5 percent) were ranked 101-150.

I examined each publication agreement and noted whether it asked for a transfer of copyright, an exclusive license, or a non-exclusive license; the term of the exclusive license (all copyright transfers and non-exclusive licenses were for the duration of copyright); what terms the agreement had regarding self-archiving (authorized, embargoed, original attributed required, or permission required). I also recorded whether, according to the Washington and Lee rankings, a journal was general, specialized, student-edited, or peer-reviewed.

### Findings

The findings regarding what type of license the publication agreements request are presented in Table 1, and agreements' provisions on self-archiving are summarized in Table 2.

Table 1—License Categories

<b>Type of Journal</b>	<b>Copyright transfer</b>	<b>Exclusive License</b>	<b>Non-exclusive License</b>
<b>Student-edited</b>	6	16	21
<b>Peer-reviewed</b>	3	1	2
<b>Total</b>	9	17	23

Table 2—Self-archiving provisions

<b>Type of Journal</b>	<b>Self-archiving authorized after first publication</b>	<b>Self-archiving permitted after embargo period</b>	<b>Attribution of Original Publication Required</b>
<b>Student-edited</b>	36	4	39
<b>Peer-reviewed</b>	3	3	5
<b>Total</b>	39	7	44

Copyright transfer was the least common practice. Only nine journals (18.3 percent) asked authors for their copyright. Seventeen journals (34.6 percent)

requested an exclusive license of some sort. Most of the exclusive licenses were temporary. Of the seventeen, two (11.7 percent) were for six months, ten (58.8 percent) for one year, two (11.7 percent) for two years, and three (17.6 percent) had no set duration.

Nearly half (twenty-three, or 46.9 percent) of the publication agreements asked for a non-exclusive license. One journal took the unusual approach of giving authors a choice between transferring copyright and merely granting a non-exclusive license. Since that agreement would allow an author to choose a non-exclusive license, I categorized it as a non-exclusive agreement. This sample of agreements suggests that non-exclusive licenses may now be much more prevalent than copyright transfers, and somewhat more common than exclusive (mostly temporary) licenses. The sample could be biased in that journals willing to publish online or disclose their publication agreements may tend to require non-exclusive licenses.

In other academic discipline in which articles are peer-reviewed and published in journals managed by corporate publishing conglomerates and university presses, copyright transfers are more common. It would be interesting to see if peer-reviewed journals are more likely than student-edited journals to ask for copyright transfers, but I was able to collect only six agreements from peer-reviewed journals, three of which were from the same university press. Thus, it is



difficult to make significant comparisons between peer-reviewed and student-edited journals. Likewise, the forty-three student-edited journals dominate the sample, so it is not surprising that the proportions of licenses requested closely align with the entire sample, with six student-edited journals (13.9 percent) asking for a transfer of copyright, and twenty-one (48.8 percent) asking for non-exclusive licenses. Legal scholarship is still largely published by student-edited journals, but a larger sample with more peer-reviewed journals would help reveal any significant differences between student-edited and peer-reviewed journals' copyright agreements.

However, the sample of agreements indicates that most journals permit self-archiving, regardless of peer-review, or even copyright license requested. Forty-six (93.8 percent) of the journals permit self-archiving. Thirty-nine (79.5 percent) of the agreements reserved to the author the right to self-archive after publication in the journal, and seven (14.2 percent) imposed an embargo of one or two years. Three journals (6.1 percent) had agreements that required the author to obtain permission or were unclear about the author's right to post articles online.

Most agreements imposed some sort of condition on self-archiving. By far the most common condition was attribution of first publication to the journal. Only two journals that permitted self-archiving did not have this term in their publication agreements. Most surprising, and unique in the sample, was the

*Michigan Law Review*, which specifically indicated that attribution was not required in later publications of an article.<sup>22</sup> Another journal's agreement took a non-exclusive license, but was silent regarding self-archiving or attribution. Two journals required permission to self-archive, in which case one would imagine attribution would be a likely condition of the permission. One journal's agreement was ambiguous as to whether it required an exclusive or non-exclusive license and did not mention the author's rights, so a careful author would not know if she could self-archive or not.

Some journals take further steps to protect their brand. In addition to requiring original attribution, some journals ask authors to take down pre-publication drafts and replace them with the definitive version once it has been published. Presumably the motivation behind this policy is helping the journal put its best foot forward and avoid confusion between a rough draft and the cite-checked, edited definitive version. Some journals only permitted the final, published version to be self-archived. This policy contrasts strongly with the self-archiving policies of publishers in other disciplines, many of whom only allow archiving preprints (drafts before peer review) or postprints (drafts including revisions made in response to peer review, but not including the publisher's final editing and formatting).

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<sup>22</sup> Michigan Law Review, Typical Licensing Agreement, <http://www.michiganlawreview.org/submit/license.htm> (last visited August 30, 2009).

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

Based on these agreements, it appears that journals are accepting author rights and moving from copyright transfers to non-exclusive licenses or exclusive licenses are that limited in scope and duration. Self-archiving has also become widely permitted. Even journals that required a copyright transfer permitted self-archiving; as of this writing, every publication agreement granted back to the author a set of rights, including self-archiving, some after an embargo. The practice of transferring copyright and then granting back a non-exclusive license to the author in the same publication agreement seems to somewhat reduce the practical difference between a copyright transfer with a license back and a carefully crafted exclusive or non-exclusive license. On the whole, most journal

publication agreement provide for a non-exclusive license (either immediately or after the exclusive license expires), and virtually all agreements permitted self-archiving at some point, with some conditions. This indicates that journals are becoming more accepting of author rights and the green road to open access. However, there is still some work to be done.

### **Recommendations**

Publication agreements can have long-lasting consequences for authors, journals, libraries, book editors, and readers, so when authors are considering which journals to publish in, the terms of publication agreements are relevant factors. Unfortunately, most of the agreements in this sample were not readily accessible. Only eight journals had agreements placed on their website in a sufficiently prominent place such that a busy author would have a realistic chance of finding them. The Open Access Law Principles call for journals, if they do not adopt the Open Access Law model agreement, to post their agreements online.<sup>23</sup>

In terms of access to publication agreements, most discouraging is some journals' stance that their publication agreements should not be fully public. Several journals stated that their policy is to only give their agreements to committed authors, and several more provided their agreements, but asked for

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<sup>23</sup> Science Commons, *supra* note 12.

assurances that the text of the agreements would not be published. Such policies are particularly troublesome because most authors submit manuscripts to multiple journals at once. Authors thus may have competing publication offers and knowing copyright terms could be valuable information. Often publication decisions are made very quickly, so even journal editors sending a publication agreement with an offer may not give authors enough time to make informed decisions.

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

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

The sample of agreements strongly indicates that authors expect certain rights to their articles, regardless of whether they transfer copyright. If a journal wants to have the right to publish an article in an issue, on its website, in any database and control permissions for reprinting articles in textbooks and anthologies, while also permitting the author to self-archive and reproduce for classroom use and later work (perhaps with some conditions), then copyright transfer is unnecessary. Properly worded exclusive or non-exclusive licenses can achieve the same objectives while also keeping with the author rights that might have been ignored.

Many journals have successfully adopted non-exclusive or limited exclusive licenses to allocate copyright privileges to authors. Journals that request copyright transfers should reevaluate whether copyright ownership is necessary to fulfill their publishing objectives. Likewise, many journals have found that permitting authors to self-archive their articles immediately after publication has not had a significant adverse affect on their revenue. In fact, encouraging open access raises journals' profile and the likelihood that their articles will be cited and reprinted. Limited embargoes to avoid direct competition clearly implicates journals' interest in publishing original scholarship and requiring original attribution acknowledges journals' editing contribution and eases citation for the reader.

Requiring authors to archive the definitive version also simplifies citation and increases articles' value to most readers who want the final version, but it also reduces authors' autonomy over their drafts. Perhaps during editing an author decides to remove a section and develop it into another article. She may want to leave the draft in SSRN to obtain comments about that section. Or maybe an author wishes to leave documentation of her scholarly thought process. The popularity of preprint archives like SSRN and bepress should also lead journals to adopt clear policies on archiving pre-publication drafts. Journals' interest in

ensuring that the definitive version is clearly marked may be served by asking authors to clearly mark archived drafts as unpublished instead of requesting their removal.

These recommendations are not entirely novel,<sup>24</sup> but the information gained from this examination of journal publication agreements indicates that they are well-grounded in journals' growing experience with open access and author rights. Many journals have adopted agreements that keep copyright and other valuable rights with authors. Journal editors bear primary responsibility for modifying their agreements to better balance journal and author rights, but authors can encourage journals with which they publish to use non-exclusive or limited exclusive licenses. Authors can also request modifications to agreements or attach addenda. Librarians should continue to educate authors about their options and advise editors to use agreements that distribute rights over legal scholarship that serve all parties, including the general public. The study also shows that many agreements permit self-archiving, so legal scholarship is fertile ground for librarians seeking to harvest articles for institutional and disciplinary repositories in that publication agreements are not generally an obstacle.

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<sup>24</sup> For proposals to make law journals more friendly to open access, see Danner, *supra* note 2, at 394-95; Hunter, *supra* note 7, at 638-39; Parker, *supra* note 14, at 471-72.