

An Introduction to Publication Agreements for Authors

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You own what you write.¹ You do not have to do anything; your ownership rights attach automatically by operation of law.² Because you own your writings, you are the only one who may copy them or distribute them.³ That means that a publisher (such as a law review) needs your *permission* to publish your writings: if you didn't give your permission, the publisher would become liable for infringing your copyright when it printed your article.⁴ In general, your permission must be in writing.⁵

Enter the publication agreement. The publication agreement gives the publisher the written permission it needs to publish your work without infringing your copyright. You and the publisher might accomplish this in either of two ways.

Suppose you wish to live in my house. You and I might reach two sorts of agreements to make that happen. First, I could sell you my house. In that case, it would become *your house*: you could live in it, hold raucous parties, trash the place, resell it, or

do anything you wished. Second, I could rent you the house. It would still be *my house*, but you would have my permission to do whatever we agreed to in the lease.

Publication agreements are like that. You can *assign your copyright* in the work, which is like selling your house. Now it's not your work any more: it belongs to the publisher. Perhaps they will give *you* permission to continue using it in certain ways, but at the end of the day, they own it. Alternatively, you can *retain your copyright* in the work, but grant the publisher the *permissions* it needs to publish it (including the permission to, for example, include the work in the major electronic legal research databases). This alternative is like renting your home. It's still your work, but you and the publisher have agreed that they may use it in certain specified ways.

How do you know which sort of agreement the publisher is proposing? You must read it carefully. Here is an example of the first type (selling your house), taken from a recent agreement submitted to a UC professor (emphasis added):

Author retains the right to print, reprint, or republish the published article or portions thereof Author also retains the right to photocopy the published article or portions thereof for his or her own use in a classroom or CLE event setting. . . .

All other copyright interests are granted to the [name of law review], including but not limited to the right to print, reprint, publish, distribute, and allow limited classroom or CLE event photocopying of the published article Author hereby assigns all right, title and interest in the copyright of the manuscript to [name of law school].

Here is an example of the second type of agreement (renting your house). Again, the language is from an actual recent agreement submitted to a UC professor:

. . . the Author grants to the Publisher a royalty-free, worldwide nonexclusive license

*Assistant Professor of Law, University of Cincinnati College of Law, timothy.armstrong@uc.edu. Copyright © 2009, Timothy K. Armstrong. This work is licensed under the Creative Commons Attribution-Share Alike 3.0 United States license. To view a copy of this license, visit <http://creativecommons.org/licenses/by-sa/3.0/us/>, or send a letter to Creative Commons, 171 2nd Street, Suite 300, San Francisco, California, 94105, USA. This document does not provide legal advice.

¹See 17 U.S.C. §§ 102(a) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . includ[ing] . . . literary works”), 201(a) (“Copyright . . . vests initially in the author or authors of the work.”).

²*Id.* §§ 102(a), 408 (“registration is not a condition of copyright protection”). Although the United States once required authors to register their copyrights, they are no longer required (but are permitted) to do so. This change in the law was necessary to bring the United States into compliance with the Berne Convention, which provides (in Art. 5(2)) that “[t]he enjoyment and the exercise of these [copyright] rights shall not be subject to any formality[.]” There are still certain advantages to be gained by registering one’s copyright, however. See 17 U.S.C. §§ 411–412.

³See generally 17 U.S.C. § 106.

⁴See 17 U.S.C. § 501.

⁵See 17 U.S.C. §§ 201(d) (any copyright, or any of the parts of a copyright interest, may be conveyed, in whole or in part), 204(a) (in writing), 101 (specifying the “transfers” to which the writing requirement applies).

to publish, reproduce, display, distribute, and use the Article in any form . . . including but not limited to a nonexclusive license to publish the Article in an issue of [name of law review] **The Author retains ownership of all rights under copyright in the Article, and all rights not expressly granted in this Agreement.**

There are good reasons to **retain your copyright rather than assigning it to the publisher**. Why might you prefer this?

- *They don't need it.* Publishers can do all the things they might legitimately want to do with your work (publish it, put it on their web site, advertise it, submit it to the major databases, offer it to other authors for commentary, and the list could go on) without owning the copyright. You can grant all the permissions that are necessary to make their publication perfectly lawful. A variety of standard form agreements exist to accomplish this.
- *Flexibility.* You probably can't anticipate all the ways in which you might want to use (or reuse) your article in the future. Years from now, you may decide that you want to post it on SSRN, or convert it to a book chapter, or update it to account for subsequent legal developments. If you own the rights to the work, you can do all those things. If you assigned away your rights, you must negotiate with the original publisher (or, more likely, with a subsequent generation of law students for whom your concerns will not be a top priority). Perhaps they will grant you the permission to reuse their work (remember, if you assigned away your copyright, they own it) in the manner you wish. But, at a minimum, it introduces inconveniences that would not exist if you retained your copyright.

Why might a publisher resist allowing you to retain copyright in your work?

- *Ignorance.* A journal's student editors may never have taken Copyright Law. They may simply be relying on a "standard form" publication agreement handed down from times gone by. They may not understand that they can obtain all the necessary permissions without requiring you to give up ownership of your words. **Solution:** educate them. This is the easiest problem to fix.
- *They believe they're required to own it.* A subset of "ignorance," sometimes justified by reference to "university policy." **Solution:** ask to see the

referenced policy, which may actually not exist; if it does exist, look for exceptions or loopholes. Point out that the law gives the publisher (i.e., the university) independent rights in each issue of their journal anyway,⁶ and that they do not need to also own *your* rights in your article in order to publish it. Ask them to grant you back broad subsequent use rights in exchange for your transfer of the copyright. Sample agreements of this type are also available online.

- *Fear of competition.* The journal may be worried that you will draw viewers away from their web site by reposting the article content yourself (on SSRN, for example). They may want to require users who are looking for a copy of your article to obtain one directly from the journal. **Solution:** if they won't budge on this (how much is one additional incremental page view *really* worth to them, anyway?), offer attribution (you promise to recognize them as the original publisher and to link to their version of the paper if you repost it), or a period of exclusivity (you promise not to post the article elsewhere online for a defined period, say, six months from the date they publish it), or both.

To learn more:

- www.keepyourcopyrights.org. This site aims to educate creators about why they may want to retain copyright in their writings. It includes many examples of sample publication agreements ranked by how friendly they are toward authors.
- commons.uml.edu. The "Copyright Experiences wiki" collects legal academics' experiences with publication agreements with law journals and other publishers.
- sciencecommons.org/projects/publishing/oalaw/. The "Open Access law project," part of the Science Commons publishing organization, includes a set of resources to promote open access in legal publishing, including (1) a set of principles for law journals to adopt and a list of journals who have done so, (2) a list of authors who have pledged to publish only in open-access-friendly journals, and (3) a model publication agreement, the terms of which may be adapted to any work or journal.

⁶ See 17 U.S.C. § 103(b).