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EDITORIAL

Principles of the *JCEL* Publication Agreement: Stakeholders, Copyright, and Policy Positions

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Every academic, scholarly, or professional journal should have a publication agreement for contributing authors to sign – but only if the agreement is good. A well-considered agreement is a chance to create an improved relationship among authors, publishers, and readers. By contrast, a bad agreement can do real damage. The Editorial Board of the *Journal of Copyright for Education and Librarianship* (“*JCEL*”) deliberated thoroughly the details of the agreement it offers to contributing authors, with the quest of putting into practice our principles about the relationship of copyright and scholarly works, in service to our community of stakeholders.

This article is intended to capture and document the Board’s reflections on the *JCEL* agreement with two leading objectives: To explain to contributing authors the meaning and significance of various provisions in the agreement, and to serve as a motivation and resource for editors of other journals as they engage in a fresh examination of their agreements. This article offers a bit of explanatory background and a hint of some of the internal give and take that led to the final version. Although our publication agreement should be regularly reexamined, with future changes to meet changing needs, the principles underlying the current draft should remain steady.

Handshakes and Formal Agreements

Nothing in the law requires that authors and publishers have a formal agreement.¹ Indeed, many articles are published on little more than a literal or figurative handshake. An author might submit a paper by email, and an editor might reply that it will appear in the next issue. Sure, the parties have reached some form of tacit agreement, but certainly nothing formal or detailed. The intent of the parties is clear, and everyone is likely happy when a good article appears in print. One has to wonder: Why disturb such bliss with an obtuse legal instrument?

¹ A written and signed instrument is required for a transfer of ownership of a copyright or any of the rights in the copyright. But a license is sufficient for publication of the article, and a non-exclusive license does not have to be in writing. U.S. Copyright Act, 17 U.S.C. § 204 (2016).

Sometimes simple is good. Moreover, a “handshake” agreement can default to functional basics of copyright and ownership. Yet most often a detailed and formal written agreement can best serve the stakeholders by introducing concepts and terms that would otherwise never be part of the deal. Once choosing to venture into the rigors of a formal document, different drafters will also seldom make identical choices about issues to include and the positions to assume in the publication agreement. The result is a potentially vast permutation of terms. The multitudes of journals in existence today employ a wide range of publication agreements, varying greatly in length, terms, and details. Drafting an agreement can become complicated.

Agreements and Stakeholders

As the Editorial Board of *JCEL* considered the terms for its publication agreement, we had robust discussions about the concepts to include in the contract and the position we would take. In our collective vision, the notion of a “good contract” clearly became one that served the best interests of three groups of major stakeholders: the publisher, the author, and the general public intended to benefit from the journal. Each provision of any publication agreement can manifest a choice of how editors serve their stakeholders. Some choices are better for the authors, and some are better for the publisher. Some are better for members of the public who will read and use the journal. The *JCEL* agreement is no different. The terms of our agreement reflect positions that *JCEL* has adopted in serving its stakeholders.

The interests of the stakeholders may be diverse but their fundamental concerns can be summarized succinctly. To start, the publisher needs to secure sufficient rights from the author to be able to publish the work in platforms available now and in the future. Publishers should assure indefinite access to the full journal, and many publishers have active initiatives for preservation of the articles and journal issues. The publisher also needs assurance that the author has rights in the finished work and has secured whatever permissions are necessary for the inclusion of third-party content. For the author, the immediate interest is to see the article published, and future interests include the right to reuse the article in full or to recast and remix the content into new publications and projects. The reading public also has strong interests at stake. At a minimum, a researcher needs assurance that the finished work may be accessible, preferably on an open and unrestricted platform. The public also wants some limited assurance of the ability to use the work in future activities, starting with making copies for study and teaching.

Copyright and the Stakeholders

Many of these fundamental needs and desires of the stakeholders play themselves out in the arena of copyright law. Even without a formal agreement, copyright law can set some of the rules. The law establishes ownership, and it authorizes the copyright owner to make decisions about publication. In addition to the author’s rights, copyright law authorizes members of the public to make limited uses of the copyrighted work under fair use or under exception. With no written agreement, the parties default to such legal basics. A written agreement is an opportunity to break from the defaults and to clarify and modify many of the rules, and that break can be for the better or for the worse. Thus, one more fundamental rule of drafting a publication agreement: Do no harm. As members of the Editorial Board, we set out to try to do good with our publication agreement.

Copyright Ownership

Who holds the copyright in the journal article? A basic legal rule in most instances is that the person who wrote the article holds the copyright.² We had no hesitation in resolving at the outset that the copyright should remain with each individual author. Section 1 of the *JCEL* agreement is a license from the author to publishers, with no reference to a transfer of copyright. Just to emphasize that point, Section 4 of the agreement offers this explicit reassurance: “Nothing in this agreement constitutes a transfer of the copyright by the Author, and the copyright in the Work is subject to the rights granted by this agreement.” The agreement does include a provision where the author warrants ownership of the copyright, and the agreement otherwise leaves the copyright with the author.³

Many other publication agreements have the author transfer the copyright to the publisher, but rarely does a publisher need the copyright in full. Instead, the *JCEL* agreement effects a sharing of rights to better serve the interests of different stakeholders. Section 1 of the agreement grants to the publisher only certain specified rights to publish the article. The fundamental interest of the publisher is to publish the work now and have the flexibility to publish the work in the future in different formats. A publisher of academic articles seldom needs more. The author, by contrast, has an interest in making future uses of the article. In the typical academic context, the author wants to build on the article in future scholarship and to expand on the research in future publications. It therefore makes best sense for the author to retain the copyright. The author of a *JCEL* article grants only a license of certain sufficient rights to the publisher and hold all other future uses.⁴

Republication of the Article

May the author publish this article elsewhere? Because the author holds the copyright, and grants only limited right to the publisher, the answer to the question is “yes,” with conditions. Some publishers would be concerned that another publisher could place the same article in another journal and effectively compete with *JCEL*. The *JCEL* Board members are not troubled by that prospect. Our main interest as a publisher is to produce a high quality journal that will benefit readers. If the content is of sufficient quality that it can be placed elsewhere and reach more readers, that outcome could be in the best interests of all stakeholders.

We did place a few conditions, notably to credit *JCEL* as the first publisher of the article. Section 2 of the agreement has the details. For example, the author confirms that he or she will not publish the article elsewhere prior to its publication in *JCEL*. Further, if the author desires to take the same article or a revision of the article and place it with another journal, the author may

² U.S. Copyright Act, 17 U.S.C. § 201(a) (2016).

³ The question of ownership can get more complicated. For example, many scholarly articles are jointly authored. A signature by one author may be legally sufficient for a non-exclusive license, but all authors must sign the agreement if it is a transfer or an exclusive license. Another common situation is that the article is a “work made for hire” or the copyright otherwise belongs to someone other than the person who actually wrote the piece. The warranty of ownership in the agreement is a reminder to the parties to clear any questions about ownership.

⁴ As an important legal side note, the language of Section 1 granting the license to the publisher, does not state whether it is exclusive or non-exclusive. Under copyright law, because it is not explicitly an exclusive grant of rights, it is therefore by default a non-exclusive grant.

do so after waiting a period of one year following publication in *JCEL*. The later publication must include a reference back to *JCEL* as the original publisher of the work.⁵

Just as we wanted to allow authors to make a later publication of a similar work, we were also well aware that *JCEL* could receive a proposed article that might already have been published elsewhere. Section 5 of the agreement includes a fairly standard warranty by the author stating that the work has not been previously published, unless explicitly disclosed the author. The goal here is information. If, for example, the author discloses that the work had been published in another journal, that information would give the *JCEL* editors an opportunity to inquire whether the author retained rights and if it is appropriate or lawful to republish the work in *JCEL*. On the other hand, if an author reports that some of the content of the article was previously published in a blog posting, the editors of *JCEL* would likely have modest concerns and soon move forward with publication. The goal with this provision of the agreement is not rigid rights and control, but is instead disclosure of information so the author and editors can make informed decisions.

What else can the author do with his or her article? As a general proposition, the author is the copyright owner, and subject only to the defined rights granted to *JCEL*, the author generally can do anything with the article allowed under applicable law. The author has tremendous discretion. Further, Section 4 of the publication agreement makes explicit that the author retains a list of specific rights of use, including reproducing and distributing the work, posting the work to an institutional repository or on the author's website, and incorporating the article into a future work by the author. The agreement does not use the phrase "open access," but the publication agreement makes clear that the author may promote open access of the article by making it freely available online.

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Members of the Editorial Board are strong proponents of Creative Commons licenses for scholarly works, such as *JCEL* articles. We did, however, have an earnest debate about which of the several Creative Commons licenses would be appropriate. Some members of the Board wanted to grant the most open of the Creative Commons licenses, while others favored a few limits and conditions. Some members expressed no concern at all about whether even a commercial publisher or aggregator could download and charge licensing fees for the same content (any such commercial outlets for the journal would be in addition to the original *JCEL* online publication). Other members of the Board expressed concerns that individual authors may

⁵ We did recognize one ironic result of these provisions: If the article is published with a generous Creative Commons license, the restrictions imposed on the author by the publication agreement could be greater than the restrictions faced by a member of the public. Indeed, publication agreements can get complicated, and they may be imperfect.

⁶ The various license options from Creative Commons are summarized at <https://creativecommons.org/licenses/>.

not want commercial uses or may not want anyone to revise or make derivatives of their scholarly writings.

In the end, we decided to encourage authors to use a most flexible Creative Commons CC-BY license which allows commercial and non-commercial reuse of the articles, subject only to giving proper attribution. Recognizing that some authors may have a different outlook, the *JCEL* publication agreement includes an opportunity for the author to choose one of the other Creative Commons licenses. Our expectation, as a result, is that each article will include a statement that the copyright is retained by the author, and that it is subject to the specific Creative Commons license chosen by the author.

Third-Party Content and Rights of Use

Almost every scholarly article includes at least some piece of third-party content, and the publication agreement should address how the author and publisher will make appropriate uses. Third-party content can range from the most typical short quotations to substantial reproductions of art and music. Whenever including works created or owned by third parties, the author and publisher often have responsibilities. The legal responsibilities can include evaluating fair use and securing needed permissions. Ethical responsibilities can demand full citations to promote intellectual honesty and reduce risks of plagiarism.

Section 5 of the agreement contemplates the inclusion of third-party content. This section includes, for example, a warranty that: “To the best of the Author’s knowledge, the Work does not infringe the copyright or other intellectual property or literary rights of another.” The same section includes similar language about privacy and other legal rights of third parties. Section 5 also provides that where the author has included in the article any text, images, or other content that is the property or work of another person, such content must be appropriately identified or otherwise listed in the publication agreement. Ideally, all third-party content will be identified by appropriate citations in the draft article. The agreement ultimately solicits full information from the author, allowing the editors to determine how best to proceed.⁷

Section 6 of the agreement gets to the process for clearing rights. Initially, the publication puts the burden on the author to determine whether permission is necessary. We place that responsibility first on the author for two main reasons. The first reason is practical. The author is often in the best position to identify and evaluate the works in question. The second reason is to get the author involved in the copyright considerations. This is, after all, a journal about copyright law. Even if it were a journal about biology or sociology, we are of the philosophy that authors need to understand at least the basics of copyright and make a preliminary evaluation of the copyright implications of their own scholarly endeavors.

Section 6 identifies four principal routes for the lawful use of third-party content: fair use, public domain, Creative Commons or other open license, and permission from the rightsholder. We wanted the agreement to be somewhat informative and instructive, but we struggled with the

⁷ Recall the earlier examination of any previous publication of the article. On that point, and in this section about third-party content, the agreement is not setting up prohibitions, but is instead gathering information. The technique of calling for full disclosures from the author has the benefit of bringing authors into the process and enabling the editors to better determine how to move forward. The immediate objective of these provisions is information.

appropriate level of detail to provide. In the end, we chose to keep the details outside of the agreement. We expect to include helpful explanations and guidance on the *JCEL* website, where we can have the flexibility to update the information, and the explanations may not become construed as part of a legally binding agreement.

Permissions

With respect to permission from third-party rightsholders, our publication agreement specifies: “If either the Author or Publisher determines for any reason that permission is required to include any third-party work, the Author shall obtain written permission from the rightsholder.” A convention in the publication industry is to place the burden on the author to review and evaluate uses and to seek all needed permissions. A standard publication agreement caps the deal with an indemnification from the author, protecting the publisher against any losses from infringements.⁸ The author carries the full weight. We also recognized that some journals are taking a more flexible position that would trust the evaluations made by the author, and defer to the author’s judgment about permissions before moving toward publication.

In the end, we chose to rely on the authors to inform the editors of all third-party materials and to make a first evaluation of any need for permissions. Authors also have the task of securing the needed permissions. Rather than defer to the authors completely, we concluded that in our case the publisher also needs to have final say as to whether permission for a particular use is necessary. Our first reason is one that we have stated before: This is a journal about copyright law. We need to bring to our editorial job the skills and expertise that we have in copyright law. Our second reason is that as members of the Editorial Board, our decisions could affect the interests and potential liabilities of the institution hosting the journal; therefore, we concluded that we should act with an added touch of caution, respect, and gratitude for our university host.

Agreements as Policy Standards

The publication agreement adopted for *JCEL* or any other publisher is a series of choices, and thus is effectively a policy statement by the publisher. As the members of the Editorial Board, we made the choice to have a formal publication agreement in the first place. We made choices about which issues to include in the agreement. We made choices about our particular stance on each issue. We chose to defer some of those choices to the authors, such as the selection of the desirable or appropriate Creative Commons license.

Many of us on the Board have had the privilege of playing a role in developing different publication agreements for a wide range of journals and other publications. The final drafts are never the same, and each includes many distinctive touches. The shape and content of a publication agreement is the result of different forces, including the latest legal debates and the editors’ worldview. The final text of a publication agreement is invariably the outcome of compromises and wordsmithing by the individuals responsible for its drafting. The outcome of a thoughtful process, however, should be a good publication agreement, serving a mix of interests of diverse stakeholders.

⁸ Our publication agreement includes such an indemnification clause. In the end, we chose not to rely completely on the authors for clearances, but at various places in the agreement we chose to rely on the authors to come forward with information about third-party materials and more. Where a publisher relies on representations and insights from the author, an indemnification is appropriate.

Closing Bits of Advice

This particular agreement stirs a few final thoughts, specifically geared to the leading stakeholders. To the public, we say: *Watch for those Creative Commons licenses, understand what they allow, and enjoy their benefits.* To all future editors and publishers of *JCEL* we say: *Keep learning from experience, revise the agreement periodically, and take advantage of new opportunities to reach the broadest audience. Always keep primary attention on crafting the agreement to share rights and to serve interests of others.* To the authors of all contributed articles, these essentials: *Read the agreement carefully, and understand the fundamentals of copyright and the agreement as they relate to your scholarship. Before sending the agreement to the publisher, absolutely, positively keep a copy.* Authors should maintain permanent files of all of their works and keep copies of all agreements that they sign.⁹ A main point of this article is that the *agreement* defines the terms of use of your new publication. Therefore, it is the *agreement* that you and others will look to for many decades ahead in determining who has rights with respect to your scholarly article.

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