

MEMORANDUM 98-24

May 18, 1998

To:	Deans of Member and Fee-Paid Schools
From:	Bari Burke
Subject:	Model Author/Journal Agreement

In 1996, in response to several requests, the Executive Committee appointed the Special Committee on Law Review Publishing Agreement and asked that committee to produce a model author-journal agreement that would serve as one reasonable model against which law professors could judge the agreements that they received from law journals. The special committee endeavored to produce an agreement that would be fair both to authors and to journals and that might result in some greater uniformity nationally.

The special committee has produced the attached agreement. The Chair of the committee drafted a cover, "Why a Model Author/Journal Agreement," which introduces the model agreement and explains the committee's process of crafting the agreement.

We would appreciate your distributing copies of this memo and attachment to members of your faculty.

The Association would like to take this occasion to thank for their hard and excellent work the members of the Special Committee: Professors Stephen R. Barnett (University of California, Berkeley, School of Law), Robert A. Gorman (University of Pennsylvania Law School), Marci A. Hamilton, Chair (Benjamin N. Cardozo School of Law, Yeshiva University), and Lloyd Weinreb (Harvard Law School).

Attachment

Why a Model Author/Journal Agreement? Marci A. Hamilton¹

Any law professor who has published in more than one journal knows that there is precious little uniformity among agreements between the law reviews and their authors. For the noncopyright scholar, each agreement offers a new set of quandaries. Copyright law professors frequently find themselves advising their colleagues on whether to sign a publication agreement, or a particular provision of an agreement.

The following model agreement was crafted by four copyright law professors, Professors Stephen Barnett, Robert Gorman, Lloyd Weinreb, and myself, for the purpose of providing a reasonable agreement that could be used as a measure against which to judge other agreements. Working as a Special Committee of the AALS, we labored to craft an agreement that is fair to both sides and that takes into account the central concerns of both sides. We do not offer the agreement as the only reasonable alternative, but rather as one possibility that the parties would do well to take into account.

Before we turned to the task of drafting the agreement, we put-together a file of agreements from a large number of law reviews. The range of agreements was astonishing. While some insisted on a work-made-for-hire arrangement between the parties, i.e., the journal became the "author" for copyright purposes, others only obtained from the author the right to publish the article in the hard copy version of the journal.

We knew that the range of agreements could not be attributed to the fact that each journal had widely divergent interests from the others. Rather, this was a natural chaos, arising from the fact that law reviews are run by students who cannot devote their full energies to the agreement that accompanies the really hard work, the article, and that agreements may be drafted by any of a number of groups, including law professors, general counsels to the law schools, general counsels to the universities, local practitioners, or by the students themselves, perhaps using samples from other law reviews. The range seemed unnecessarily broad to us, and called for a model agreement that might bring some uniformity to this area.

Having viewed this vast range of agreements, we were also persuaded that there is a range of reasonable agreements and there are some that are patently unacceptable, because they shift too much power in the direction of the journal or the author.

To be perfectly frank, this was not an easy agreement to write. In this era of lightning quick alterations in content delivery, retrieval, and collection, I am certain that there will be copyright professors who take us or the agreement to task for one item or another. The agreement does reflect, however, some core shared presuppositions of those on the committee that we would hope to see in any author/journal agreement. They include:

1. It is unacceptable to ask an author to agree that the work will be a work made for hire. By agreeing to a work-made-for-hire agreement, the author not only loses control of the work in every circumstance, he ceases to be the "author" for purposes of the copyright statute. No journal requires this level of control over a work, and no author should agree to relinquish this level of control over his creative works.

The academic community and the marketplace of ideas are enriched when the author retains some rights to exploit the work. Without work-made-for-hire, there are two entities exploiting the work in different forms, and they are entities with sufficiently different agendas and contacts to push the work into different forms more efficiently.

2. It is unacceptable for an author to engage in competing publications of the work during the first one or two years of the journal's publication. This principle arises not out of the copyright law, but rather out of a sense of fairness.
3. In order to avoid future disputes, both sides need to think very carefully about where the work might land beyond the journal's hard copy publication, such as edited books, the author's or the journal's websites, in classroom materials, and on data retrieval services (both legal and nonlegal). The information era has made it significantly more likely that a work can and will appear in other forms, and both parties need to prepare for that possibility, if not inevitability.
4. The overall function of student-edited law journals is to provide education for both the student editors and the readers. The law schools that house and commonly subsidize such journals have the purpose of uncovering and disseminating knowledge. Unlike the case of a trade publication seeking to make a profit, it is appropriate that most material in law journals be available to the author, and to others in nonprofit institutions, for use in the classroom and other instructional settings.

Would that we could have offered a one-paragraph agreement that would satisfy most needs. That we found impossible to do. Instead, we offer the following, which embraces as many reasonably likely eventualities as we could imagine (and some unlikely ones, like litigation) and which attempts to achieve a meaningful and fair balance of power between author and journal.

Model Author/Journal Agreement
AALS Special Committee
Professors Barnett, Gorman, Hamilton (chair), and Weinreb

The following is an agreement between _____, hereinafter referred to as the Author, and _____, hereinafter referred to as the Journal, and governs _____ (title of work, which may be an article, essay, comment, book review, or other writing or graphic work created by the Author), hereinafter referred to as the Work.

1. Author's Grant of Rights

- a. Except as provided in Paragraphs 1(c) and 2(b), the Author grants to the Journal the rights to reproduce and distribute the Work in the Journal, in facsimile reprints or microforms, as a contribution to a collection published by the Journal, and by means of an Internet or Intranet site over which the Journal exercises effective control, and also by means of a third-party online legal information provider, such as, but not limited to, LEXIS-NEXIS and Westlaw.
- b. The Journal's rights provided in Paragraph 1(a) shall be exclusive for a period beginning when this Agreement is executed and ending one (1) year after

publication of the Work in the Journal or two (2) years after execution of this Agreement, whichever is shorter, and shall be nonexclusive thereafter.

- c. The Journal's right 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 translator, which is not to be unreasonably withheld.
 - d. After the Work has been published in the Journal, the Journal shall have the right, after notification of the Author, to authorize another party to reproduce and distribute the Work in the forms specified in Paragraph 1 (a).
 - e. The Author grants the above rights without claim of royalties or 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. To reproduce and distribute the Work, and to authorize others to reproduce and distribute the Work, in any format, to students for classroom use, at or below cost;
 - ii. To include the Work, in whole or part, in another work of which the Author is the sole or joint 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 sooner than one (1) year after publication of the Work or two (2) years after execution of this Agreement, whichever is sooner, and provided further that such 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 Work, in whole or in part, on an Internet or Intranet site over which the Author has effective control provided that such 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.
- 3. Publication by Others**
- a. Unless the Author notifies the Journal in writing otherwise, the issue of the Journal in which the Work appears shall include a notice stating that the Work may be reproduced and distributed, in whole or in part, by nonprofit institutions for educational purposes including distribution to students, provided that the copies are distributed at or below cost and identify the Author, the Journal, the volume, the number of the first page, and the year of the Work's publication.
 - b. The Journal shall have the right to authorize another party to reproduce and distribute the Work in a form other than those specified in Paragraph 1(a), provided that such reproduction identifies the Author, the Journal, the volume, the number of the first page, and the year of the Work's publication in the Journal, and provided further that the Author has been notified by the Journal of its intent to authorize such reproduction and distribution not less than thirty (30) days prior to the grant of such authorization and the Author has not within thirty (30) days after being notified given the Journal written notice of the Author's objection to such reproduction and distribution.

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 (joint) 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 as follows: _____

 - iii. The Work does not infringe the copyright or property right of another; and
 - iv. The Work does not contain matter that is defamatory, violates another's civil right, right of privacy, right of publicity, or other legal right, or is otherwise unlawful.
- 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 the warranties herein, the Author shall be promptly notified. The Author shall have the right to participate in the Journal's response to and defenses against such 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 cost and expenses reasonably incurred by the Journal in defending against 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 rights 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 be applied first toward the Journal's reasonable costs and expenses incurred in the proceedings, and the balance shall be divided equally between the Author and the Journal.

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 both the Author and the Journal.
- b. Promptly after publication, the Journal shall give the Author, without charge _____ offprint copies of the Work and, if requested by the Author, additional copies at a cost to be determined.

7. Final Agreement

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.

Author._____ **Date.**_____

Journal._____ **Date.**_____

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