

Publish *and* Perish? Protecting Your Copyrights from Your Publisher¹

Recently, I received an irate phone call from my father, a professor of comparative literature at UCLA. A university press had decided to publish a collection of his articles written over his distinguished 50-year career and had asked him to clear the rights for those articles. The original publisher of one of those articles, another university press, demanded that he pay \$200 for the right to include the article in the new book. My father was incensed that he had to pay to republish his own article. “How could this possibly be?” he asked me—his son the copyright lawyer.

I told him that as soon as the ink flowed out of his pen onto the paper when he was writing the article (or as soon as he typed it into his iMac), he had a copyright in the article. Because of changes in the law, he no longer needed to place a copyright notice on the article or register it with the U.S. Copyright Office, although there were both practical and legal advantages for him to do so.

I stressed that copyright law protected only his expression in the article, not the facts or ideas. Because of my father’s background in philosophy, this statement took us off on an interesting tangent on distinguishing ideas from expression and whether facts were created or discovered. I explained how courts wrestled with these metaphysical issues, but I observed that his case clearly involved expression because it concerned the literal text of his article.

My father nonetheless wanted to stay on the issue a moment longer. He observed that if someone copied his ideas without proper attribution, that person would be guilty of plagiarism. I agreed but noted that plagiarism is different from copyright infringement.

¹ This article appeared in the ASCB (American Society for Cell Biology) Newsletter, Volume 31, Number 5, May 2008. p. 15 <http://www.ascb.org/index.cfm?navid=75>.

Plagiarism is an ethical violation enforced by an academic institution or a professional society. In contrast, copyright infringement is a matter of federal law, enforced in the federal courts. In certain cases the plagiarism also infringed copyright, but they were distinct concepts.

My father then asked whether UCLA had a role to play in protecting his copyright. I said that he was lucky that UCLA didn't take the position that it owned the copyright in the article. "But I wrote it," my father insisted. "It's my creation!" I responded that when an employee creates a work in the scope of his employment, the employer owns the copyright, not the employee. The scholarly publications of university faculty, however, traditionally have been treated differently. Because the university does not control what the professor writes—and indeed, technically, cannot require him to write at all—copyright law usually does not treat scholarly publications as "works made for hire" owned by the university. Moreover, many universities have intellectual property policies that clearly allocate to faculty the copyright in their scholarly publications.

I added that if the author worked for a research institution (as opposed to a university), the institution might own the copyright in the article. But if the author works for a U.S. government entity, such as a national laboratory, there would be no copyright at all: Work prepared by a U.S. government employee as part of his or her official duties has no copyright. Also, some universities take the position that if the work is produced under a research grant administered by the university, then the university—not the author—owns the copyright.

My father noted that he had not written the article under a grant administered by the university, nor was he an employee of the federal government. "So how can the

university press demand payment for me to republish my own article?” I answered that when he had published the article the first time, he must have assigned the copyright to the university press or given it an exclusive license. “I don’t remember doing that,” my father said. I replied that most publishers, after they accept an article for publication, ask the author to sign an agreement allowing them to publish the article. The agreement often includes an assignment of copyright or an exclusive license. My father acknowledged that he usually does sign agreements with publishers but that he doesn’t pay attention to the details because no money is involved.

He then asked, “If I want to publish an article, do I have to give away all my rights?” I responded that terms of publication were negotiable. As in any negotiation, the more the publisher wanted to publish the author’s article, the more leverage the author would have and the more rights he or she could retain. As a leader in his field, my father should be able to drive a pretty hard bargain. He should always seek to retain the right to republish the article in a different market, such as a publication aimed at a different country; to post the article on a personal or departmental website; to provide copies to students and colleagues; and to prepare derivative works, such as translations or expanded versions. If possible, he should try to retain the copyright, licensing to the publisher the minimum rights it needs, such as the right of first publication.

My father said that he didn’t want to involve a lawyer (i.e., me) every time he wanted to publish an article. I replied that he didn’t have to. The rights he was trying to retain were pretty basic, and he could typically negotiate with the publisher by email. Moreover, resources are available online to help faculty members negotiate with publishers. For example, the SPARC Author Addendum is a legal instrument that

modifies the publisher's agreement and allows the scholar to retain key rights (www.arl.org/sparc/author/addendum).

“But what if the publisher refuses to negotiate?” my father queried. I advised him that he had two options. First, he could agree to the publisher's terms and transfer his rights. Or he could find a different publisher. I mentioned the growing number of open-access publishers. Such publishers typically ask the author only for a nonexclusive license to publish, permit public access at no cost, and allow readers to make noncommercial uses so long as they provide attribution to the author and publisher. I explained that open-access publishing was a new business model enabled by the low cost of Internet distribution.

I told my father that as a general matter, there was not much he could do about the copyrights he had already transferred over the years to various publishers.² Going forward, however, he could exercise better control over his copyrights in his new scholarly works. “After all, it's your copyright,” I said. “You, and not your publisher, should determine how you and your readers can use these works in the future.”

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²Thirty-five years after an author transfers a copyright, he or she has a five-year window in which to terminate the transfer.