

Rights of, and Wrongs about, Journal Publishing: The Truth about Copyright Transfer

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Publishing technical magazines, like *AM&P*, and journals involves a bargain between author and publisher—some give and take on each side of the equation.

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Publishing technical magazines, like *AM&P*, and journals involves a bargain between author and publisher—some give and take on each side of the equation. Authors offer new ideas and original work product. Publishers offer peer review, editorial advice and direction, validation and credibility, and exposure to an appropriate audience. At the center of this transaction is an allocation of intellectual property rights that, though well settled through the

history of journal publishing, is not widely or well understood by practitioners and established or aspiring authors.

The first step in getting a better grasp of the customary journal publishing deal is to understand the range of rights that are potentially associated with the to-be-published work product; that is, copyrights, trade secret rights, and patent rights—and the significant differences among them.

Copyrights

Copyright is a form of protection provided to the authors of original works of expression, including notably journal articles and books. However, copyright protection extends only to the original expression and does not encompass the article title; nor does it encompass the ideas or facts disclosed in the article (only the original way in which they were expressed). In some cases, where an idea is susceptible of only a narrow range of expression, even the expression will be deemed “merged” with the idea and incapable in that event of copyright protection.

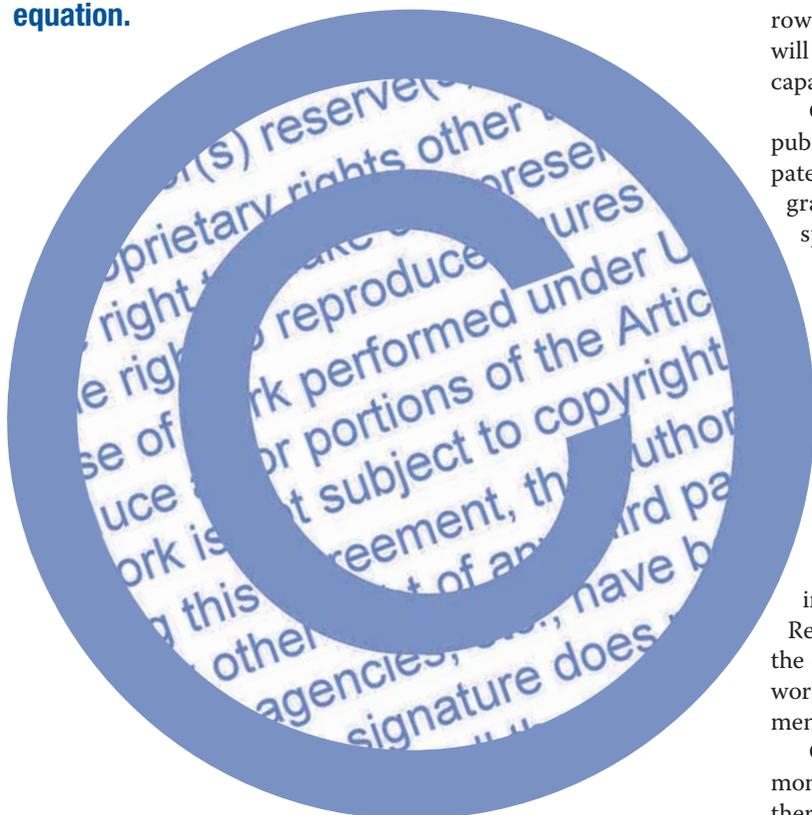
Copyright protection is available to both published and unpublished works and, unlike patent rights, is not territorial (a copyright granted in one country will generally be respected in other countries by virtue of a number of international conventions and treaties).

U.S. copyright law generally gives the copyright owner a bundle of exclusive rights, including the right to:

- Reproduce the copyrighted work
- Prepare derivative works
- Distribute copies of the work
- Publicly perform or display the work

Unauthorized exploitation of any of these rights (subject to certain exceptions, including fair use) constitutes infringement. Remedies include seizure and destruction of the offending goods and, for timely registered works, damages of up to \$150,000 per infringement, and recovery of costs and attorney's fees.

Copyright protection is automatic from the moment the work is created in fixed form—neither registration nor notice is required for protection (though there are substantial benefits to both). The copyrights in a work immediately be-



come the property of the human author(s) who created it; although, in the case of works made for hire, the employer and not the employee is presumptively considered the author. In the case of co-authored works, the co-authors are joint owners of the copyrights in the work, each with an undivided pro-rata ownership interest in the entire work. Any individual co-author can exploit or grant nonexclusive rights in the work, but it takes all of the co-authors to transfer ownership or grant exclusive rights.

Trade secret rights

The law of trade secrets covers information generally, like proprietary processes and discoveries, provided that the information is indeed secret, that is has commercial value, and that the owner has taken reasonable steps to preserve its confidentiality. However, trade secret rights last only as long as the secret is preserved—once the cat is out of the bag, it cannot be put back. So publication is clearly antithetical to the preservation of trade secret rights in the processes and discoveries disclosed in a journal article, but those disclosures can continue to enjoy protection as trade secrets up to the point of publication. After that, continued protection will be dependent upon the success of a timely filed patent application.

Patent rights

A patent is a government grant to an “inventor” of a temporary monopoly to prevent others from producing, using, selling, or importing his/her invention offered, in exchange for disclosing the invention to the public. Patents cover devices, compositions of matter, or processes (utility patents) and also nonfunctional designs (design patents). To be patentable, the invention must be useful, novel, and not obvious to one skilled in the relevant art.

The patent right is a “national” right, and must be sought and secured on a country-by-country basis. In the U.S., patent protection generally lasts 20 years from the initial filing date and is not renewable.

The journal publishing bargain

The bargain between an article author and

a journal publisher is concerned only with the copyrights in the article. Long-standing custom and tradition in the field of journal publishing is that the journal publisher takes ownership of the copyrights, often, but not always, subject to some reservation in the author to repurpose the article (after first publication) or to use it in professional presentations and teaching. So, the journal publisher will control the reproduction, distribution, adaptation, or public display of the original expression comprising the work once it is accepted for publication.

But, the journal publisher makes no claim to any trade secret rights or patent rights associated with the ideas or inventions disclosed therein. The author, and his employer or institution, retain the unfettered right to practice or exploit the processes and discoveries disclosed therein and may continue to write and publish on the same topic (as long as any new work is not adapted or derived from the first published work without the journal publisher’s consent).

In part, publishers need to own the copyrights for financial reasons; that is, so they can manage commercialization of the work and earn a return sufficient to support continued publication of the journal. But they will also tell you that, in part, their ownership of the copyrights and exclusive (with limited exceptions) control of the works is necessary to facilitate maintenance of the rights:

- Publishers are best positioned and disciplined to handle registration of the copyrights in the articles contained in an issue of the journal which, though not essential to vesting of the copyrights, provides significantly enhanced remedies and advantages in enforcement.
- Publishers are best positioned to ensure the broadest dissemination and access of the works, through their established subscription and library bases.
- Publishers are best positioned to

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supervise blind peer review and validation.

- Publishers serve as a centralized repository for rights in co-authored works, which would otherwise be subject to default rules diffusing rights and control (possibly across multiple countries where citizenship of co-authors is diffuse).
- Publishers are best positioned to efficiently and professionally manage permissions requests.
- Publishers are best positioned to police infringements (only copyright ownership assures the right to police infringements in all jurisdictions).
- Publishers are best positioned to migrate the work to new platforms and adapt to changing media as communications technology evolves.
- Publishers are best positioned to create a historical public record of dated attribution and academic integrity—preserving the record of science.

Importantly, rest assured that transfer to the journal publisher of the copyrights in your work does not preclude:

- Reservation to the author of the right to exploit the work in ways that do not compromise the publisher's ability to control and protect the work; e.g., use within the author's institution for teaching or for institutional repositories, use by the author's employer, and use by the author in personal web pages and portfolios (you will likely have to purchase

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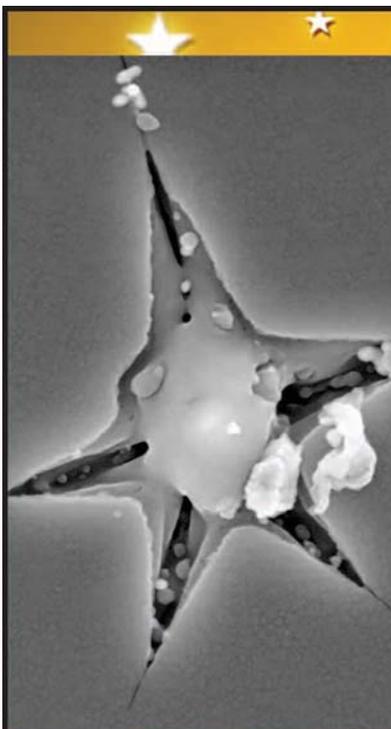
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