



Authors hold the copyright in their work automatically from the moment their original expression is fixed in tangible form. Copyright is a valuable asset, providing exclusive control over the copying, distribution, performance and display of a work as well as over derivative works. As such it calls for careful management. When publishing a work, the author will sign an agreement with the publisher; that agreement will define which rights the author will continue to hold and which rights are transferred to the publisher.

Who is an author?

For the purposes of copyright law, an author is a person who creates original expression. Such expression includes text, photographs, artwork and a host of other creative works; the standard for originality is actually quite low. In many cases the issue of authorship is quite simple; the creator of the expression is the author and holds the copyright from the moment of creation. More complicated issues arise when a work is created by an employee for her employer or where there are multiple authors.

In cases where a work is “made for hire” by an employee, the employer may be considered the “author” from the start (in the U.S. for example, where copyright can be held by a corporate entity) or may hold a license to use the work without the author’s permission. Most traditional scholarly works, like books or journal articles, are not considered works made for hire, but new kinds of creations (such as online classes) may be. Whenever there is a doubt about work for hire, the best course is to form an agreement with the employer in advance.

Joint authors should also agree in advance about the use of the works they create, since each joint author may be able to exercise the exclusive rights of copyright without permission from the others. To be a joint author, each individual must contribute original expression to the work; people who are listed as authors out of courtesy, especially in academic work, will not be joint authors in the copyright sense unless they contributed such expression.

Copyright and contract law

Copyright provides the default rules regarding the ownership and use of creative works. These rules can be changed by private agreements—contracts—between specific parties. Publication agreements, which are a type of contract, may alter the rights of the author regarding copying, distribution, and even the preparation of derivative works based on the original. For example, if the distribution right is transfer entirely to a publisher, the author will not be free to republish the work on a web site or elsewhere without the original publisher’s permission.

Transfer of rights

The normal publication process usually involves a transfer of rights from the author to the publisher. In many cases the entire bundle of rights in copyright is transferred; sometimes this transfer is called an “assignment.” These publication contracts that transfer rights also usually give some rights back to the author. Attention to what rights have been retained is extremely important in knowing what an author can continue to do with his or her own work.

It is not always necessary to transfer the entire set of rights in copyright in order to publish a work. Some publishers use a “license to publish” agreement instead of a full transfer of rights. This means that authors retain any rights that are not explicitly licensed to the publisher. Even when publishers initially demand a transfer of rights, many have already-prepared “license to publish” agreements available if the author requests it.

Regardless of which type of contract is used, it is very important that authors read the agreement carefully; if a license to publish is drawn very broadly it may restrict the author’s rights just as much as a transfer would.

Where things go wrong

The publication process fails to serve the needs of an inattentive author. In order to manage their copyright asset throughout the process it is vital that authors read and understand the agreements that they sign. Authors should think about both current needs and future uses of their works and be certain that they retain rights sufficient to accommodate those needs.

Copyright provides the default rules regarding the ownership and use of creative works. These rules can be changed by private agreements - contracts - between parties.

Protecting what matters

Some of the values most important to academic authors—attribution and preserving the integrity of their works—are not encompassed by U.S. copyright law, although they are given legal protection in those countries whose copyright laws incorporate the so-called “moral rights” tradition. Even in countries that do not recognize these moral rights authors can use the publication agreement to include provisions that preserve these fundamental academic interests. Other important considerations for academic authors include future professional and educational uses of the work in question.

The publication process fails to serve the needs of an inattentive author

Considering future uses

While it is impossible to fully define the future uses that will be important to any specific author, there are several broad categories that should be always be considered. Educational uses are one obvious example; most academic authors will want to be able to distribute their own work to their students, either in print or online, without asking permission from the publisher. Professional use may be varied and can include conference presentations based on the work and the collection of previously-published articles in a monograph or dissertation. New technologies also offer the opportunity for web posting of articles or “self-archiving” in online institutional or disciplinary repositories, an opportunity that is often accounted for in journal publication agreements. Publication contracts often permit authors to retain some rights in each of these categories, and authors can negotiate to retain others that they feel are important.

Finally, authors should be careful about contractual terms that restrict their ability to create “derivative works,” since scholarship is an inevitably cumulative process and many of the new uses made possible by technological developments will constitute derivatives. In this regard, “non-compete” clauses, while not included in all publication agreements, are particularly risky for academic authors because they may limit an author’s ability to create new works in the same field.

Negotiating

As should be clear from the foregoing discussion, careful reading and negotiation of the agreement terms should be a normal part of publication process.

Several institutions and higher education organization have drafted contract “addenda” that authors can use to be certain that they retain specified use rights regardless of the language of the publishers standard contract. These addenda are simply attached to the agreement when it is returned to the publisher and they enumerate rights that the author retains.

Even in cases where a publisher will not accept a contract addendum (as sometimes happens), it may still be possible to negotiate the agreement terms and the addendum can still be useful. Publishers have, on occasion, amended their publication agreement to include rights listed in an addendum even when they have declined to incorporate the document itself. In these situations, addenda can help authors consider which rights are most important for them to retain and clarify to the publisher the things that are most important for authors that should be considered as part of their standard agreements.

Some publishers are beginning to use online “click through” agreements in place of paper publication agreements. As part of an online submission process authors may be asked to agree to terms that will govern the publication; these terms are as determinative of an author’s rights as are more traditional contracts. In these situations, authors may need to take additional steps such as contacting the journal editors directly prior to submission in order to retain desired rights.

The most important first step

The most important first step for academic authors is to save all documents that they sign or otherwise consent to as part of the publication process. Even if an author chooses not to negotiate his or her agreement at the time of publication, future opportunities may arise and it will be vital, in order to take advantage of those opportunities, to know what rights the author has retained.

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