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THE COPYRIGHT ACT OF 1976 AND LAW REVIEWS

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THE COPYRIGHT ACT OF 1976
AND LAW REVIEWS

I. INTRODUCTION

[W]e must take care to guard against two extremes equally prejudicial: the one, that men of ability who have employed their time for the service of the community may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.1

Many writers of law review articles and publishers of law review journals are unaware of the significance of the Copyright Act of 1976.2 This stems from the misconception that scholarly writers and publishers are unaffected by copyright problems. The status of copyright in law review writing should be of vital concern to these parties. The scope of this article is threefold. First, it will determine the ownership rights in a law review article under the 1976 Act. Second, it will examine the possibilities for contractual modification. Finally it will explore the limitations on copyright ownership.

Copyright is a limited right in the author, for a limited time, for the benefit of both the author and the public.3 It exists in original works of authorship fixed in any tangible medium of expression, but does not extend to ideas or concepts.4 Prior to the Copyright Act of 1976, the United States had a dual system of copyright protection. The federal copyright statute covered published works, and state common law covered unpublished works.5 The previous

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Entered in the Nathan Burkan Memorial Competition
3. The authority of Congress to enact copyright legislation is granted by the Constitution, which provides that, "The Congress shall have Power ... to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. U.S. CONST. art. I, § 8.
5. CAMBRIDGE RESEARCH INSTITUTE, OMNIBUS COPYRIGHT REVISION COMPARATIVE ANALYSIS OF THE ISSUES 6 (1973) [hereinafter cited as OMNIBUS Copyright Revision].
federal statute, the United States Copyright Act of 1909, was outdated shortly after it was enacted because inventions such as television, movies, records, photocopying, and computers were not expressly provided for in that Act.

In addition to accommodating technological advances, the 1976 Act establishes federal preemption. Under the new law there is just one system of copyright protection, the federal system, along with other significant changes such as clarification of collective work copyright, statutory expression of the fair use doctrine, continuation of the work made for hire concept, and broader provisions on copyright notice and registration, affect law reviews and writers.


7. In 1955 the United States Copyright Office initiated a program to research revision of the law. Thirty-five studies, designed to review the problems of copyright law objectively and to present the major issues involved, as well as alternatives for their resolution, were completed. These studies left no doubt that major revision of the law was needed. The tremendous technological explosion in recent years had to be dealt with. After twenty-one years of studies, congressional hearings, and draft bills, the 1976 Act was passed. O'Mahoney, Foreword to U.S. COPYRIGHT OFFICE, COPYRIGHT LAW REVISION STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, 86TH CONG., 1ST. SESS., COPYRIGHT LAW REVISION at iii (Comm. Print 1960) [hereinafter cited as REVISION STUDY]; OMNIBUS COPYRIGHT REVISION, supra note 5, at 21, COPYRIGHT OFFICE, LIBRARY OF CONGRESS, COPYRIGHT REVISION BILL BECOMES LAW: MOST PROVISIONS TO TAKE EFFECT JAN. 1, 1978 (1978).


9. The 1976 Act covers both published and unpublished works. By eliminating state common law copyright, the concept of publication has lost its former importance of distinguishing federal and state protection. This concept was considered a serious defect in the prior copyright law. It caused confusion because courts applied different definitions of publication.

Federal preemption also promotes national uniformity which is one of the purposes of the copyright clause in the Constitution. U.S. CONST. art. I, § 8. It also furthers the constitutional purpose of limiting the rights of authors, since common law protection was perpetual. S. REP No. 473, 94th Cong., 1st Sess. § 301, at 113 (1975) [hereinafter cited as Senate Report], reprinted in 13 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (G. Grossman, ed. 1977).

10. See notes 33-35 infra and accompanying text.

11. Law reviews are organized in several different forms—corporation, unincorporated association, and as non-entity school group. For convenience, this article makes no distinction among the forms. See generally Carpenter, The Student
Considerations of financial gain, coupled with the author's desire to achieve recognition for his or her writing,\textsuperscript{12} show the need for an awareness of copyright law. Even though law review writing is of a scholarly nature, the possibility of financial gain is present. Articles can win significant amounts of money in essay contests. They can be used in continuing legal education classes, in law school classes, or incorporated in legal textbooks. It is also possible that law review articles will one day be included in computer research systems.

The basic copyright problem in the law review context is whether the writer of the article or the publisher of the journal owns the copyright. There are no reported cases specifically on law review copyright ownership. Since a law review is a periodical, this issue may be analyzed by reference to cases involving other kinds of periodicals.

II. COPYRIGHT OWNERSHIP IN A LAW REVIEW ARTICLE

A. Pre-1976 Act

Under the 1909 Act, a transfer of rights under a copyright was regarded as either an assignment or a license. The distinctions between an assignment and a license created uncertainty for both the contributor and publisher. An assignment transferred the total legal property and the assignee became the copyright proprietor.\textsuperscript{13} A license, however, was a lesser right than an assignment. An example of a license was a right of first publication, which did not transfer copyright ownership.\textsuperscript{14} There could only be one copyright proprietor, and only the proprietor could secure a valid copyright. In addition, assignments were subject to formal requirements, while licenses were not.\textsuperscript{15}

In the field of scholarly journalism, the common practice was to submit articles without any statement as to copyright grants or


\textsuperscript{12} See text accompanying note 64 infra. This is subject to the defense of fair use.

\textsuperscript{13} Henn, "Magazine Rights — A Division of Indivisible Copyright," 40 CORNELL L.Q. 411, 429 (1955).

\textsuperscript{14} OMNIBUS COPYRIGHT REVISION, supra note 5, at 162.

\textsuperscript{15} An assignment must be in writing, signed by the proprietor, and to be effective against any subsequent purchaser without notice, it must be recorded in the Copyright Office. Henn, supra note 13, at 439.
reservations. The absence of an express agreement opened the door for a court to misconstrue the intent of the parties as to copyright ownership. Given similar factual situations, some cases found the publisher to be an assignee, and hence, the copyright proprietor, while other cases found the publisher to be only a licensee, and the copyright remained in the contributor. If the copyright remained in the contributor, the court construed the silence of the parties to mean that the author did not intend to convey copyright privileges to the publisher.

To clarify their intent, writers and publishers used different contractual arrangements. The assignment back provision was the most common type of arrangement existing between contributors and publishers. Under this procedure, the writer assigned all rights to the publisher under the express condition that after the publisher registered the copyright in its name, it would reassign all rights to the writer. This roundabout method was both cumbersome and confusing. The reason for this procedure was that the publisher often insisted on securing the copyright in its own name. The publisher feared that if the copyright resided in the contributor, she or he might cut off the rights of the publisher by selling to a bona fide purchaser the same first publication rights sold to it. Because a magazine or journal was usually concerned only with the right of first publication, the assignment back provision protected both its and the contributor's interests.

Under the old law both publishers and contributors were faced with either the uncertainties inherent in the absence of a

17. In Dam v. Kirk La Shelle Co., 175 F. 902 (2d Cir. 1910), the contributor sent story to the publisher and later received check for it. There was no express agreement about the copyright ownership. The court found that the publisher had become an assignee, not mere licensee. In Alexander v. Irving Trust Co., 132 F Supp. 364 (S.D.N.Y.), aff'd, 228 F.2d 221 (2d Cir. 1955), cert. denied, 350 U.S. 996 (1956), an article was accepted for exclusive publication. In the absence of any proof to the contrary, the court presumed that the contributor transferred her work without any reservations and the journal became the proprietor. Id.
21. Catenm, supra note 19, at 337.
22. Id. Whether or not the publisher was the copyright proprietor, it would have breach of contract action against the writer. If the publisher was the proprietor, however, it would also have an infringement action against the user.
written contract, or the prospect of a cumbersome contractual arrangement. The assignment-license dichotomy lay at the root of this dilemma. The 1976 Act clarifies and improves this frequently confusing and unfair aspect of copyright law.

B. The 1976 Act

No longer need writers or publishers concern themselves with whether a court will misconstrue the writer's intent as giving a license or an assignment to the publisher. In the absence of an agreement, the Act by its own force creates a relationship between contributors and publishers. Various types of contractual modifications will be discussed later. First, the 1976 Act will be examined to determine how it allocates rights between the law review writer and publisher.

Copyright ownership in a law review article is determined by section 201 of the new Act. 23 Law review writing may be charac-

23. Ownership of Copyright

(a) Initial Ownership—Copyright in work protected under this title vests initially in the author or authors of the work. The authors of joint work are coowners of copyright in the work.

(b) Works Made for Hire—In the case of work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in written instrument signed by them, owns all of the rights comprised in the copyright.

(c) Contributions to Collective Works—Copyright in each separate contribution to collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

(d) Transfer of Ownership—

(1) The ownership of copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

(e) Involuntary Transfer—When an individual author ownership of copyright, or of any of the exclusive rights under copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to
terized as either a "work made for hire" or a contribution to a collective work." The two groups of writers which contribute to law reviews, students and professionals, must be dealt with separately.

Absent an express contract, it is unclear whether a student's writing should be considered a "work made for hire" or "contribution to a collective work." Therefore, both possibilities will be examined. If the student article is considered a "work made for hire, then section 201(b) provides that the employer—in this case, the law review—owns all the rights comprised in the copyright. The "work made for hire" definition indicates two ways this doctrine is significant. First, it is possible that the Act places the parties in this position. Second, the parties may wish to agree in writing that the article shall be considered a work made for hire. In the case of a "work made for hire," the employer or other person for whom the work was prepared is considered the author.

The "work made for hire" doctrine was a basic principle of the 1909 Act and is continued in the new law. The presumption that

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24. The term "professional" encompasses both outside authors and in-school professors.

25. A work made for hire is—

(1) work prepared by an employee within the scope of his or her employment; or

(2) work specially ordered or commissioned for use as contribution to collective work, as part of motion picture or other audiovisual work, as translation, as supplementary work, as compilation, as an instructional text, as test, as answer material for test, or as an atlas, if the parties expressly agree in written instrument signed by them that the work shall be considered work made for hire. For the purpose of the foregoing sentence, supplementary work is work prepared for publication as secondary adjunct to work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.


26. The legislative history of the Act shows that § 201(b), which codified the work made for hire doctrine, was carefully balanced compromise. Senate Report, supra note 9, § 201(b), at 17. At the congressional hearings, authors raised two arguments designed to alter this doctrine. First, they raised the constitutional point that
initial ownership vests in the employer is well established in copyright law. This presumption is based on several grounds: The work is produced on behalf of the employer and under its direction; the employee is paid for the work, and the employer, since it pays all the costs and bears all the risks of loss, should reap any gain. The 1976 Act does not give explicit guidelines as to what does, and does not, constitute a "work made for hire." Judicial decisions, however, have enumerated the significant criteria to be considered. The following factors are characteristic of a "work made for hire" classification:

27 Senate Report, supra note 9, § 201(a), at 17

(1) The existence of an arrangement going beyond an assignor-assignee relationship prior to the undertaking of the particular work.

(2) The payment of wages or other remuneration.

(3) The right of the employer to direct and supervise the manner in which work is performed.

(4) The existence of an express contract for hire, especially one calling for an author to devote his exclusive artistic services to his employer.

(5) Regular working hours.

(6) The fact that the creative work occurred in whole or in part at the employer's place of business.

(7) The master's right to suspend or dismiss the employee.  

Of these factors listed, the payment of wages and other remuneration has been held to be of minor relevance.  

Applying these factors to the law review setting, it is possible that, absent an agreement to the contrary copyright ownership vests initially in the review. This result is most apparent in the case of student staff writing. Normally the editorial board has the right to terminate a staff member from the review. The board directs and supervises the everyday operations of the review. These factors, as well as editorial control over the style and content of the writing are the most significant factors pointing to a "work made for hire" relationship. In addition, although actual monetary compensation is lacking, there is a quid pro quo. The writer is getting something in return for his or her work. The writer has the use of law review facilities, the prestige of membership, special library privileges, and help and direction from the editors.

On the other hand, absent a contract, a persuasive argument can be made that a "work made for hire" relationship does not exist. There are neither regular working hours nor monetary compensation, and the writer need not devote his or her services exclusively to the review. On balance, it is not clear whether student writing may be classified as "work made for hire.

As for the professional contributor, substantially less control would be exerted by the law review. While the writer receives the benefit of publication, and some editorial help, no other quid pro


32. 1 M. NIMMER, NIMMER ON COPYRIGHT § 5.03 [B][1][a] (1979).
quo exists. Consequently, it is doubtful, without a contract, that the law review would receive the copyright for articles written by professionals under the "work made for hire" doctrine.

If the "work made for hire" doctrine does not apply, copyright ownership in a contributed article is determined by section 201(c), the contribution to collective works provision. A law review is considered a collective work under the definition of collective work in section 101. Recognizing the problems inherent in periodical contributions under the 1909 Act, Congress sought to clarify the rights of the respective parties. The basic principle underlying section 201(c) is that copyright in the individual contribution and copyright in the collective work as a whole are separate and distinct. The writer of the contribution owns the copyright to that article, while the law review owns the copyright to the compilation as a whole. As copyright owner of the compilation, the review may reproduce that particular issue or the contribution as part of a later issue. The law review may not revise the contribution itself or include it in a different collective work.

The writer, as the owner of the separate copyright in the article, has the five exclusive rights of copyright ownership granted by the Act: The right to reproduce the work, to prepare new versions of it, to distribute it publicly to perform it publicly and to display it publicly. Under section 201(c), there is no difference between

33. A collective work is work, such as periodical issue, anthology, or encyclopedia, in which number of contributions, constituting separate and independent works in themselves, are assembled into collective whole. 17 U.S.C. § 101 (1976).
34. Senate Report, supra note 9, § 201(c), at 17.
35. Id.
36. Exclusive Rights in Copyrighted Works
Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of motion picture or other audiovisual work, to display the copyrighted work publicly.

the student and professional writer. Both own their separate copyright unless they have expressly relinquished it.

In summary, absent a contract to the contrary, the 1976 Act supplies the professional contributor with all the exclusive rights to her or his article. The review receives only the limited rights which accompany its copyright in the journal as a whole. The status of the student writer is less clear. The student may be in the same position as the professional, or she or he may have no rights at all if the "work made for hire" doctrine applies. The parties, however, need not accept the all or nothing relationship conferred by section 201. Section 204 enables the parties to modify their respective positions by contract. 37

C. Contractual Modifications Under the 1976 Act.

Each party must decide what minimum rights she or he requires. In addition to the statutory rights granted as copyright owner of the journal, the review will probably desire the right of first publication and the right to reprint the contribution individually. Reprint rights are important because requests are often made to law reviews for copies of articles. The review may also desire the right to permit certain uses of the article by third persons. It is more convenient for a potential user to request permission from the journal than from the writer, who can be difficult to locate. These authorized uses should be specified by the parties. The writer will want the right to make any later use of her or his article, and to receive the payment or royalties from this later use.

The parties may choose from several possible types of contractual arrangements. 38 For instance, the contract between the stu-

37 Execution of Transfers of Copyright Ownership
(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

(b) A certificate of acknowledgement is not required for the validity of transfer, but is prima facie evidence of the execution of the transfer if
(1) in the case of transfer executed in the United States, the certificate is issued by a person authorized to administer oaths within the United States; or
(2) in the case of transfer executed in foreign country the certificate is issued by a diplomatic or consular officer of the United States, or by a person authorized to administer oaths whose authority is proved by certificate of such an officer.

Id. § 204.

38 See appendix supra.
dent writer and the law review may expressly declare that the article is considered a "work made for hire." This means that all rights vest initially in the review. The review could then expressly transfer to the student such rights as the right of later publication, the right to all royalties, and the right to authorize later uses by third persons. The law review would retain all rights not specifically granted, including the right of first publication.

Under the "work made for hire" arrangement, two different kinds of transfers can be made to the student. The review could transfer one or more exclusive rights or it could merely transfer nonexclusive licenses. The holder of an exclusive right, or subdivision of an exclusive right, is entitled to sue for infringement of that right. A transfer of an exclusive right must be in writing and signed by the transferor. While the transferee is not required to record the transfer in the Copyright Office, recordation is a prerequisite to an infringement suit. Even though an infringement suit can be instituted on a cause of action that arose before recordation, under section 205 there are incentives which encourage recordation.

39. This is authorized by clause two of the work made for hire definition. 17 U.S.C. § 201(b) (1976).
40. The concept of the divisibility of copyright embodied in the new Act means that the five exclusive rights may be subdivided indefinitely and owned and enforced separately. Senate Report, supra note 9 § 106. Section 501(b) of the Act allows the owner of particular right to bring an action in his own name subject to requirement that the other owners whose rights are affected are notified and given chance to join the action.
42. Id. § 205.
43. Recordation of Transfers and Other Documents

(a) CONDITIONS FOR RECORDATION.—Any transfer of copyright ownership or other document pertaining to copyright may be recorded in the Copyright Office if the document filed for recordation bears the actual signature of the person who executed it, or if it is accompanied by sworn or official certification that it is true copy of the original, signed document.

(b) CERTIFICATE OF RECORDATION.—The Register of Copyrights shall, upon receipt of a document, return it with certificate of recordation.

(c) RECORDATION AS CONSTRUCTIVE NOTICE.—Recordation of document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if—

(1) the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by reasonable search under the title or registration number of the work; and
(2) registration has been made for the work.
recorded document, and gives the transferee priority over a conflicting transfer. Between two conflicting transfers, the one executed first prevails if it is recorded before the later transfer is recorded, or if it is recorded within one month after its execution in the United States or within two months after its execution outside the United States. After the one month or two month grace period, the later transfer will prevail if recorded first, as long as it was taken in good faith, for valuable consideration, and without notice of the earlier transfer. To fully safeguard his or her interests, the transferee of an exclusive right would be wise to record. The Copyright Office fee to record a transfer is $10.  

As an alternative, the review could transfer nonexclusive licenses to the student. The term “license” is not defined in the Act. Analogizing to the 1909 Act, a license is something less than an exclusive right, and is not an ownership interest in the copyright. It is simply permission for use. The licensor is agreeing not to sue the licensee for infringement. The holder of a nonexclusive license has no standing to sue for infringement. Only an owner of an exclusive right has standing. The licensee would not have to pay the recordation fee to the Copyright Office since there would be no advantage in recording. 

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(d) RECORDATION AS PREREQUISITE TO INFRINGEMENT SUIT.—No person claiming by virtue of transfer to be the owner of copyright or of any exclusive right under copyright is entitled to institute an infringement action under this title until the instrument of transfer under which such person claims has been recorded in the Copyright Office, but suit may be instituted after such recordation on cause of action that arose before recordation.

(e) PRIORITY BETWEEN CONFLICTING TRANSFERS.—As between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice under subsection (c), within one month after its execution in the United States or within two months after its execution outside the United States, or at any time before recordation in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such manner, and if taken in good faith, for valuable consideration or on the basis of binding promise to pay royalties, and without notice of the earlier transfer.

(f) PRIORITY BETWEEN CONFLICTING TRANSFER OF OWNERSHIP AND NONEXCLUSIVE LICENSE.—A nonexclusive license, whether recorded or not, prevails over conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or such owner’s duly authorized agent, and if—

1. the license was taken before execution of the transfer; or
2. the license was taken in good faith before recordation of the transfer and without notice of it.

Id.

44. Id. § 708(a)(4).
45. Id. § 501(b).
46. Id. § 205(f). See note 43 supra.
If the "work made for hire" provision does not apply copyright vests in the writer. A possible arrangement under the contribution to a collective work provision leaves the copyright in the writer with an express granting of rights to the review. This is applicable to both professional and student writers. The review can be granted the exclusive right of first publication; certain reprint licenses such as those which are nonincome producing or done for merely nominal cost, and similar licenses to consent to uses by third persons. The writer would retain all rights not expressly granted. She or he would have the choice of transferring exclusive rights, subdivisions of exclusive rights, or nonexclusive licenses to the review.

The writer should transfer the right of first publication. This is a subdivision of the exclusive right of reproduction. It is exclusive because the term "first publication" connotes something more than mere permission to publish. It implies the ability to exclude others from publishing the article first. A subdivision of an exclusive right can be recorded. This may not be necessary even though there is the possibility that the writer may execute a conflicting transfer before the review first publishes the article. The breach of contract action may adequately protect the interests of the review. If the review desires the right to sue the infringer, however, the transfer should be recorded. Any other rights transferred should be nonexclusive licenses since there is no need to grant other exclusive rights.

The central question in contract negotiations between the law review and student should be deciding who should have the right to sue for infringement. In a "work made for hire" arrangement where the law review does not transfer any exclusive rights to the student, the review will have the sole right to sue for all infringements. If copyright vests in the writer, and the only exclusive right transferred is the right of first publication, the student will have the right to sue for any infringement other than an infringement of the right of first publication. In the usual circumstance, it is the writer who would be most able and willing to sue. Current law review members would find it difficult to spot an infringement of an

47 See 17 U.S.C. 201(a) & (b) (1976).
48 This contrasts with the 1909 Act where the right of first publication, since it was not transfer of the entire copyright, was license. The licensee, under the 1909 Act, did not have standing to sue for infringement of this right. Under the 1976 Act the owner of the right of first publication has subdivision of an exclusive right, and thus can sue for infringement.
article written several years earlier and would need to retain an attorney in order to sue. The writer, on the other hand, would easily recognize an infringement of his or her own article. If that writer is a practicing attorney she or he could directly sue the infringer. The law review would not have the same capability or personal incentive to proceed with a suit.

For the professional contributor, the problem is simplified. As long as the parties do not create a contractual “work made for hire” arrangement, rights will initially vest in the contributor. She or he will be the proper party to institute an infringement action.

One other factor should be considered in deciding between the work made for hire and contribution to a collective work categories. In the contribution to a collective work” category the writer may after a specified term of years, terminate her or his previous transfers to the review of exclusive or nonexclusive rights. This would end the law review’s contractual rights in the article. This provision, section 203 of the Act, does not apply in the case of a work made for hire. The writer, in that case, could not terminate any rights in the journal.

The new Copyright Act does not seek to change the balance of power between publishers and contributors. In spite of the clear intent of section 201(c) to vest the copyright initially in the writer, a publisher may easily require that, as a condition of publication, the writer must transfer all rights to the publisher. Since, in the law review setting, neither party is seeking profit, a review will probably not require this type of contract.

In summary the parties may accept the status conferred by the 1976 Act or may modify their relationship by contract. The better choice is to enter into a contract which allows the writer to retain all rights, except those licenses and the right of first publication expressly granted to the law review. This is an equitable policy to follow and is procedurally efficient in the event an infringement action is warranted.

49. The purpose of the termination right is to safeguard authors against unremunerative transfers. It is often impossible to determine the full value of an author work until it has been published. Congress felt this provision was needed to remedy the unequal bargaining position of authors. Senate Report, supra note 9, § 203. The writer can terminate all law review rights in the article by serving advance notice on the review. The right to terminate cannot be waived in advance or contracted away. Id. Termination of the grant may be effected at any time during period of five years beginning at the end of thirty-five years from the date of publication of the work, or at the end of forty years from the date of execution of the grant, whichever term ends earlier. 17 U.S.C. § 203(a)(3) (1976).
III. LIMITATIONS ON EXCLUSIVE RIGHTS

Although section 106 speaks in terms of exclusive rights, these rights are limited by the doctrine of fair use which is a defense to an infringement action. Fair use has been defined as permitting the reproduction of a reasonable portion of a copyrighted work without permission when it is necessary for a legitimate purpose which is not competitive with the owner's market for his or her work. Section 107 of the Act is designed to codify existing case law. It sets forth guidelines courts have used while recognizing that the issue must be decided on a case by case basis, after looking at all the circumstances. Factors to be considered are:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substance of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.

The scope of the defense of fair use depends on the nature of the works involved. Legal writing differs from other types of writing since it builds, by necessity on earlier works, such as law review articles. Law review writing is most likely to be used by writers of other legal publications and the potential for other usage is remote. Cases involving publishers of law reporters, digests, and encyclopedias give specific guidelines on how much use a later legal writer can make of an earlier legal work. Law books can be di-

50. Fair use, although the predominant defense used in infringement actions, has not been the only one tried. A recent case held that the first amendment was not valid defense to an infringement suit. Sid & Marty Krofft Television Prod. v. McDonald's Corp., 357 PAT. T.M. COPYRIGHT J. (BNA) A-1 (9th Cir. 1977). The only limitation on exclusive rights discussed in this article is the concept of fair use.
54. It is settled that court opinions and statutes are not copyrightable. They are in the public domain. Banks v. Manchester, 128 U.S. 244 (1888); Callaghan v. Myers, 128 U.S. 617 (1888). See generally Banks v. West Publishing Co., 27 F 30 (8th Cir. 1886). Although casenote may make extensive use of court opinions, this does not mean that later user of the casenote may copy the article without worry. The author arrangement of cases and other independent work is copyrightable. See text accompanying note 59 infra.
vided into three general categories: compilations, digests, and treatises. A law review while not fitting neatly into any one category is most similar to a treatise. A treatise is the product of intellectual labor and literary skill, the results of which are unique each time the subject is handled independently.

A law review article is most commonly used by researchers who collect all the citations from the article, examine them, and use the applicable citations to support their work. This use is not an infringement. A clear policy supports it as fair use. The law of copyright was enacted to promote the progress of science and art. Legal writing is the result of evolution since each author has the benefit of preceding writings.

While the user may employ the article as a guide to further research, she or he may not copy the plan or arrangement of the prior article. Legal writing used for scholarship and research is treated differently from legal writing used for commercial purposes. Those working in a scholarly field have a broader defense of fair use, since their use stimulates the growth of the arts and sciences.

55. A compilation may be a list of citations or case histories on a given legal issue. Although these types of works do not require any literary or artistic talent, they represent original work and are copyrightable. W.H. Anderson Co. v. Baldwin Law Publishing Co., 27 F.2d 82 (6th Cir. 1928); Frank Shepard Co. v. Zachary P Taylor Publishing Co., 193 F. 991 (2d Cir. 1912). Considerable labor and cost is involved in putting together these works. Although the individual case names and citations are in the public domain, the arrangement is not. A later compiler may make some use of the earlier work. He must first do independent research, and then consult the earlier work only for verification. The independent work must be complete. When discrepancies or omissions are found, these must be corrected by further independent work. In this class of legal writing, any use of the prior work except for verification purposes is an infringement.

Slightly more analytic and creative work is involved in digests and headnotes. Although judicial opinions are not copyrightable, reporter who prepares a volume of law reports may obtain copyright on that volume. While judges, lawyers, and authors may use a digest to assist them in finding cases, extensive copying or paraphrasing of the syllabi is not fair use. Callaghan Myers, 128 U.S. 617 (1888). In West Publishing Co. v. Edward Thompson Co., 176 F. 833 (2d Cir. 1910), digest paragraphs were used by the defendant in writing an encyclopedia. The court found that the saving of labor and expense is not fair use. E.g., West Publishing Co. v. Lawyers Co-operative Publishing Co., 64 F. 360 (2d Cir. 1894), rev'd on other grounds, 79 F. 756 (2d Cir. 1897).


57 Id. at 925.


59 In Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d
Law review articles are frequently photocopied. Some of this photocopying is considered fair use. Legal controversies about what can be photocopied have occurred for some time.60 Both sections 107 and 108 deal with photocopying. Section 108 provides that libraries and archives may do a specified amount of copying under limited conditions. The reproduction must be made without any purpose of commercial advantage, the library must be available to persons doing research, the copy of the work must include a notice of copyright, and the reproduction must fall within specified categories of exemption.61 These rights do not apply to systematic reproduction activity.

Section 107 applies general fair use standards to photocopying and specifically provides that multiple copies made for classroom use may be considered fair use. Guidelines, contained in the legislative history of section 107 were drafted by committees representing educational organizations, authors groups, and music publishers. These guidelines represent their agreement on the extent of copying that should be allowed under section 107. They provide that a teacher making copies for classroom use must meet strict

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60. In 1935 gentlemen agreement" was entered into between the National Association of Book Publishers and joint committee of the American Council of Learned Societies and the Social Science Research Council. It provided that library or similar institution owning books or periodical volumes which were copyrighted may make single copy for scholar solely for the purpose of research provided that the researcher is given notice that he is not exempt from any possible liability to the copyright proprietor, and that the reproduction is furnished without profit to the institution. U.S. COPYRIGHT OFFICE, 86th CONG., 2D SESS., COPYRIGHT LAW REVISION STUDY 15, 52 (Comm. Print 1960).

tests of brevity, spontaneity, and cumulative effect. They require that copied articles be under a specified number of words, and the inspiration and decision to use the work must be so close to the date of use that it would be unreasonable to expect a timely reply to a request for permission. They further require that only one article may be copied from each author, no more than three from the same periodical volume during the class term, and no more than nine instances of multiple copying for a course during one class term. Copying may not substitute for a purchase of the periodical. Also, it may not be directed by higher authority nor repeated with respect to the same article by the same teacher from term to term.\footnote{62}

The Association of American Law Schools (AALS) goes beyond these guidelines. It is promoting widespread authorization by law reviews for photocopying of articles to be used in teaching courses at member schools.\footnote{63} It would like to see a broad statement in each review granting blanket permission for educational copying. Its latest suggestion for a model notice provision is:

"Except as otherwise expressly provided, the author of each article in this volume has granted permission for copies of that article to be made for classroom use in a nationally accredited law school, provided that 1) copies are distributed at or below cost, 2) author and journal are identified and 3) proper notice of copyright is affixed to each copy."\footnote{64}

This notice does not specify who it assumes the author is of each article. In the work made for hire arrangement, the employer is considered the author. Provision two of the notice requires that the author and journal be identified. This provision was probably intended to allow identification of both the writer and the journal even if the writer does not own any interest in the article. The provision should be clarified to require identification of the writer. Another provision should be added requiring that the journal receive notice from the user of the articles. This would enable

\footnote{62. See note 52 \textit{supra} at 69.} 
\footnote{63. Letter from Association of American Law Schools by Wayne McCormack and Millard H. Ruud to Deans of Member Law Schools and Editors of Law Reviews (Mar. 20, 1978) (memorandum 78-13).} 
\footnote{64. Letter from ASSOCiaTION of American Law Schools by Wayne McCormack, ASSOCIate Director, to Deans of Member and ABA-approved Nonmember Schools and Editors of Law Reviews 1 (May 23, 1978) (memorandum 78-25).}
the review to keep track of which articles and topics are most popular.\textsuperscript{65}

With these two changes, the AALS proposal makes more sense for law reviews than do the congressional guidelines. A law school wants its review read widely and used by law professors and students. The guidelines would only inhibit this.

Another method by which a user can secure the right to use a law review article is through a royalty arrangement similar to the American Society of Composers, Authors and Publishers. This is an organization which issues licenses to users on behalf of its member composers.\textsuperscript{66} A similar organization is being started by the Association of American Publishers. Their Clearance Center will collect a license fee from users of journal articles and other short works. It will transmit these fees, less cost, to the copyright owners, on a nonprofit basis. The copyright owner retains the right to set the fee. Its emphasis is on technical, scientific, and medical journals, but efforts are underway to expand the program.\textsuperscript{67} It could conceivably include law reviews.

Presently neither of these alternatives are necessary. Most use of law review articles is allowed under the doctrine of fair use, or can be allowed through blanket permission granted to nationally accredited law schools under the AALS proposal. The minor amount of use which does not fall into either of these two categories can be dealt with on an article by article basis. It would not be inconvenient for the user to contact the journal when such use was desired.

IV THE FORMALITIES

A. Notice

The old law required that there be a copyright notice affixed to the work as a condition of protection.\textsuperscript{68} This serve[d] four principal functions: (1) It ha[d] the effect of placing in the public domain a substantial body of published material that no one [was] interested in copyrighting; (2) It inform[ed] the public as to whether

\textsuperscript{65} This was suggested by various law reviews to the Association of American Law Schools. \textit{Id.} at 2.

\textsuperscript{66} \textit{AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ARTICLES OF ASSOCIATION} 1 (November 1978).


\textsuperscript{68} Senate Report, \textit{supra} note 9, § 401 at 176.
a particular work [was] copyrighted; (3) It identifie[d] the copyright owner; [and] (4) It show[ed] the date of publication."\(^{69}\)

This rule was criticized as being harsh and unfair. Critics desired elimination of this requirement in the new law.\(^{70}\) The new law is a compromise. It allows a work to bear a copyright notice, but omission of notice does not automatically invalidate copyright protection. In certain circumstances, the work is still protected for at least five years.\(^{71}\)

Law reviews and writers have a choice in deciding where to affix copyright notice. An individual article may bear its own notice with the writer listed as copyright owner, or there may be just one notice applicable to the entire journal naming the law review as the copyright owner.\(^{72}\) When the law review named in the single notice applicable to the entire journal is not the owner of all the exclusive rights in an article which does not bear its own notice, the article is treated as if it has been published with the wrong name in the notice.\(^{73}\) The ownership of the copyright is not affected, but unless the writer corrected this by filing with the Copyright Office, an innocent infringer might have a complete defense if she or he infringed under a transfer from the law review.\(^{74}\) This avoids technical forfeiture of copyright, while at the same time induces the use of the correct name and protects users who rely on erroneous information. Therefore, if the writer owns any of the exclusive rights, it is advisable for the review to affix a separate notice to that article naming the writer as copyright owner. This protects his or her rights against infringers and, in the event the article is photocopied, provides notice. Similarly the review should print its own copyright notice applicable to the journal as a whole. This would fully protect its interests in any articles that were made for hire," and its exclusive rights in that issue.

These notice provisions, while beneficial for writers, mean confusion for users. A user of a law review article cannot be sure that it is in the public domain if there is no copyright notice affixed to it or to the journal. Congress recognized this problem, and so the Act partially protects the innocent infringer.\(^{75}\) A person who

\(^{69}\) Id.

\(^{70}\) OMNIBUS COPYRIGHT REVISION, supra note 5, at 121.


\(^{72}\) Id. § 404.

\(^{73}\) Id. § 406(a).

\(^{74}\) Id.

\(^{75}\) Id. § 405(b).
relies on an omission of notice incurs no liability for damages other than forfeiting his or her profits attributable to the infringement. The user will also not know by looking at the copyright date, whether the term of protection has expired. The duration of copyright is measured by the life of the author plus fifty years, and in the case of a work made for hire, the term is seventy-five years from publication, or 100 years from creation, whichever expires first. Under the old law statutory protection began on the publication or registration date and continued for twenty-eight years with a possible renewal of twenty-eight years. Scholarly works frequently were not renewed, and so fell into the public domain after twenty-eight years. The new law gives longer protection for authors, at the expense of users. Congress concluded that the disadvantage of this provision to users was outweighed by the policy of insuring the author the fair economic benefits from his or her work.

B. Registration

There are strong inducements for the author to register the copyright, although registration is not required. Registration is a prerequisite, however, for bringing an infringement suit. For an infringement before registration, the infringer is liable only for a provable amount of actual damages and the infringer's profits. For an infringement after registration, the copyright owner is entitled to statutory damages and attorneys' fees. This is important in the case of law review issues and articles. Statutory damages range up to $50,000. Since it will often be hard to prove actual damage suffered by the review or writer, the best choice is to follow the provisions for registration. The registration fee is $10.

V Conclusion

In the absence of an agreement, the 1976 Copyright Act by its own force creates a relationship between law review writers and publishers. Professional writing is considered as a “contribution to a collective work.” The status of student writing is ambiguous. A student article may be considered a “work made for hire,” in which

76. Senate Report, supra note 9, § 302 at 167.
77. Id.
79. Id. § 412.
case copyright ownership vests in the review or a contribution to a collective work, in which case copyright ownership vests in the writer. A contract should be made clarifying the rights each party will retain and grant to the other party.

In deciding which arrangement with the student or professional writer should be utilized, the review should give primary consideration to the issue of who should have the right to sue for infringement. The writer is most likely to have the capability and personal incentive to sue. The parties should utilize section 201(c) so that the copyright vests in the writer. The writer should grant nonexclusive licenses and the right of first publication to the review. The nonexclusive licenses should permit the review to reprint the article and consent to specified uses, such as photocopying for classroom use in an accredited law school, and other nonincome producing uses. Permission for other uses, which are not within the fair use doctrine, must be requested from the writer.

To attain the full benefit of the law both the review and writer should register their interests at the Copyright Office and place a notice of copyright on the journal issue and each individual article.

Winnie Wellman Zimberlin
COPYRIGHT CONTRACT

Date__________

______________ (hereafter writer") and ________________ Law Review (hereafter the review") agree that their relationship will be governed by 17 U.S.C. § 201(c) (1976). The writer grants to the review the right of first publication of [name or subject matter of article]. Writer grants the review the right to reprint the contribution individually and to give or sell the reprints at a nominal cost to third parties for their personal use. Writer grants the review the right to consent to use by third parties to make copies of the article or use the reprint for classroom use in a nationally accredited law school, provided that 1) copies are distributed at or below cost, 2) writer and journal are identified, and 3) proper notice of copyright is affixed to each copy. The writer retains all other rights not expressly granted.

__________________________
(writer) ______________________
(review)