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Copyright Easements

Jason Mazzone

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COPYRIGHT EASEMENTS

*Jason Mazzone**

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INTRODUCTION

Although there is only one Copyright Act, authors and publishers operate under very different copyright regimes. By creating works, authors own the copyright in the work. However, authors very often make wholesale assignments of that copyright to a publisher (or distributor).¹ From the perspective of an author, then, copyright is something to be given up in exchange for publication, with a corresponding loss of all rights in the work. Publishers (and distributors) operate in a quite different world. When they acquire copyrights from

* Albert E. Jenner, Jr. Professor of Law, University of Illinois at Urbana-Champaign. For helpful feedback, I am grateful to fellow participants at the University of Akron School of Law's David and Ann Brennan IP Scholars Forum held in September 2016 and to Derek Bambauer, James Grimmelman, and Jennifer Rothman.

1. Throughout the Article, references to "publisher" are equally applicable to distributors.

authors, they hold firmly onto them. Like authors, publishers make use of the copyright to enter into transactions with other parties, but, in contrast to authors, they do not do so through a wholesale assignment of rights. Instead, when publishers authorize other entities and individuals to publish and distribute a copyrighted work, they do so through licensing rather than by transferring the underlying right. Authors assign; publishers license.

There are distinct downsides to this divide. A system in which there are wholesale assignments of copyrights by authors—and then licensing by assignees—can easily impede productive uses of works. The author, having given up everything, loses future opportunities to use or to authorize others to use the work because control of the copyright is in the hands of the publisher. Often, the publisher, having acquired the copyright, will license some uses but not all those that the author would like or that would benefit a consuming audience.

This Article explores mechanisms by which authors, in seeking publication and distribution of their works, would not simply effect a wholesale assignment of a copyright in a work to a publisher. Instead, assignments would be made such that the publisher would acquire a significant interest—sufficient to incentivize publishing and distributing the work—but not the entire interest. Certain rights would instead be reserved for the benefit of the author or, more generally, to ensure future productive uses of the work (without any need to obtain permission from the assignee publisher). This Article proposes creation of *copyright easements* under which a designated entity or individual—referred to in this Article as the easement holder—would acquire certain rights in the work. The easement holder could hold a wide range of rights but, in typical circumstances, the holder would have the right to make or to authorize the making of designated uses of the work notwithstanding a publisher's ownership of the copyright in the work. As such, the easement holder would hold rights in a work that would qualify any future copyright assignment by the author to a publisher (or other party). Importantly, the author's *own* hands would be tied: the author could no longer assign an unfettered copyright because the easement holder, not the author, would hold the reserved interests in the work. This approach derives from the law of easements that governs real property under which easements give legal interests to non-owners to use land in certain ways or to limit uses the property owner may himself make of the property.

Copyright easements can help ensure that the author—and others—can make productive uses of works in ways that are unlikely to affect the

publisher's economic interests but that would otherwise require the publisher's permission. Copyright easements can also ensure that uses of works that do not require a copyright owner's permission but which publishers frequently seek to prevent, such as fair uses, could occur more easily. Copyright easements would thus benefit authors and the public alike. While publishers would not have the same copyright they are used to obtaining, the impact on them would likely be minimal. All of these benefits can be easily and immediately produced without any change in the law.

Part I of this Article describes problems associated with wholesale assignment of copyrights from authors to publishers and distributors. As Part I demonstrates, such assignments impose significant costs upon authors and upon the public at large. Part II identifies some existing mechanisms to respond to these problems and concludes that while those mechanisms have generated some benefits, they are ultimately of limited value. Part III sets out the proposal for copyright easements and discusses the benefits copyright easements would produce. Part IV concludes with a summary and identifies some next steps.

I. COPYRIGHT DILEMMAS

Authors face a dilemma. Most authors would prefer their works to be published by well-known publishers with access to mainstream distribution channels. Doing so, however, typically—although not universally²—requires assigning the copyright in the work to the publisher and thus a loss of control over the work by the author.³ As one

2. Some publishers demand only an exclusive license. See, e.g., *Copyrights and Permissions*, SAGE PUBLISHING para. 1, <https://us.sagepub.com/en-us/nam/contributor-agreement> (last visited Apr. 15, 2017) (“With an exclusive licence you retain copyright. Your work is credited as © The Author(s) but you license the control of all rights exclusively to SAGE or, where relevant, a society or other proprietary publishing partner. This means that all licensing requests including permissions are managed by SAGE.”). Notably, in recent years, U.S. law reviews have shifted away from requiring an assignment of copyright. See Benjamin J. Keele, *Copyright Provisions in Law Journal Publication Agreements*, 102 L. LIBR. J. 269, 273-74 (2010) (reporting, based on an examination of the publishing practices of 200 journals, that copyright transfer was the least common approach and that licensing, whether exclusive or non-exclusive, was far more common).

3. See, e.g., M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, *THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY* 172 (2007) (“[A]ll rights under copyright are customarily assigned to the publisher of popular music.”); Todd Brabec & Jeff Brabec, *Songwriter and Music Publisher Agreements*, ASCAP (2008), <http://www.ascap.com/music-career/articles-advice/industryNotes/200809.aspx> (last visited Mar. 2, 2017) (“The most common songwriter-publisher agreements are the individual song agreement and the exclusive agreement. Under the individual song agreement, a writer transfers the copyright to one composition or a selected number of identified compositions Under the exclusive agreement, the songwriter agrees to assign all compositions written during a specified term”); Cornell Univ., *Copyright Management*,

publisher explains: “[i]n order to ensure both the widest dissemination and protection of material published in our Journal, we ask Authors to transfer to the Publisher . . . the rights of copyright in the Articles they contribute.”⁴ Some publishers even insist on a copyright assignment as a condition for reviewing a work for publication⁵ or when entering a work

COPYRIGHT INFO. CENTER (2009), http://copyright.cornell.edu/policies/copyright_management.cfm (last visited Mar. 2, 2017) [hereinafter Cornell Copyright Management] (“When [authors] assign copyright to publishers, [they] lose control over [their] scholarly output. Assignment of copyright ownership may limit [authors’] ability to incorporate elements into future articles and books or to use [their] own work”); *FAQ: Authorship and Ownership in U.S. Copyright Law*, AUTHORS ALLIANCE (May 20, 2014), <http://www.authorsalliance.org/2014/05/20/authorship-and-ownership-faq/> [hereinafter Authors Alliance FAQ] (“[I]f an author transfers her copyright in its entirety to a publisher (or grants the publisher an ‘exclusive license’) only the publisher may do or authorize others to do these things. Even the author herself may no longer do them without the publisher’s permission”); Robert Zipser, *How to Option a Book for Film Adaptation*, FILM MAKER MAG. 2 (Aug. 8, 2013), http://filmmakermagazine.com/75484-how-to-option-a-book-for-film-adaptation/#.V_Ef2WOCzww (reporting that “standard parameters” of contracts for adapting books to films include that “the [book] author shall grant and assign exclusively to [film producer] in perpetuity and throughout the universe all motion picture, television (free, pay, cable, etc.), video/DVD, internet production, and allied and ancillary rights to the book including, but not limited to, remake, sequel, and television series rights, and merchandising and commercial tie-in rights [and] the right to exploit and distribute any productions . . . [the book author produces] based on the book in any and all media, now known or hereafter devised, throughout the universe in perpetuity.”); Samuel Lewis, *5 Tips for Avoiding the Rights Grab*, DIGITAL PHOTO PRO (Aug. 23, 2010), <http://www.digitalphotopro.com/business/5-tips-for-avoiding-the-rights-grab/> (“The ‘rights grab’ is the use of contract language to effect a transfer of rights, usually copyrights, away from the person who created the work. In the context of a photographer, the contract language divests the photographer of the rights to the images that were created (or grants such broad license rights that it effectively obviates any rights).”).

4. *Agreement in Relation to Copyright in an Article for a Taylor & Francis/Routledge Journal*, TAYLOR & FRANCIS GROUP, <http://journals.taylorandfrancis.com/edmgr/TaylorandFrancisCopyrightForm/TaylorandFrancisCopyrightForm.pdf> (last visited Apr. 20, 2017); see also *Journal of West African History, Author Publishing Agreement (Article)*, MICH. ST. U. PRESS para. 1, <http://msupress.org/wp-content/uploads/2013/09/JWAH-Article-Publishing-Agreement.pdf> (last visited Mar. 8, 2017) (“You, as Author of the Article, hereby grant and transfer exclusively to the Journal and the Publisher . . . copyright . . . during the full term of copyright in the United States of America and elsewhere.”); Am. Soc’y of Mech. Eng’rs, *ASME Copyright Guidelines*, ASME, <https://www.asme.org/shop/proceedings/conference-publications/asme-copyright-guidelines> (last visited Mar. 2, 2017) (“ASME requests that authors/copyright owners assign copyright to ASME in order for a . . . paper to be published by ASME.”).

5. See, e.g., *Journal Publishing Agreement*, AM. CHEMICAL SOC’Y PUBLICATIONS para. 1, http://pubs.acs.org/paragonplus/copyright/jpa_form_a.pdf (last visited Mar. 8, 2017) (“The Corresponding Author . . . hereby transfers to the ACS the copyright ownership in the referenced Submitted Work, including all versions in any format now known or hereafter developed. If the manuscript is not accepted by ACS or withdrawn prior to acceptance by ACS, this transfer will be null and void.”); *Journal of the Am. Veterinary Med. Ass’n, Copyright Assignment Agreement and Authorship Form*, AM. VETERINARY MED. FOUND., <https://www.avma.org/News/Journals/Documents/javma-caa.pdf> (last visited Mar. 28, 2017) (“In consideration of the acceptance of the . . . Work for publication, I do hereby assign, transfer, or otherwise convey exclusively to the Publisher all my rights, title, and interest in and to the copyright, [and] any and all rights incident

in a competition the publisher is conducting.⁶ With the advent of digital self-publishing tools, an author need not, of course, relinquish copyright (and control) in order to have a work published: anything can be published *somewhere*. But for most authors—and for their audiences—there is a world of difference between publishing an essay in, for example, *The New York Times* and publishing it at a self-operated blog site. Likewise, most photographers would prefer to see their photos published in *National Geographic*, *Time*, or *Vogue* rather than lost among the millions of images on Flickr; for scriptwriters and filmmakers, it is far better to be picked up by mega-studio MGM than to upload self-made films to Reelhouse; most novelists would opt for Random House over self-publication through print-on-demand services such as Lulu.

Publication with a major entity can confer significant benefits. These might include access to in-house resources that improve the quality of the final product, greater distribution of the work, the ability to attract the attention of reviewers and prize committees, prestige for the author (resulting, perhaps, in a contract for a new work, a promotion, or a better job), and financial benefits such as an advance and royalties. The downside is that the ability to access these potential benefits often comes with a price: assigning copyright to the publisher so that it can control the author's work.⁷

thereto, in the Work . . ."); Johns Hopkins Univ. Press, *Publishing Agreement*, AM. J. MATHEMATICS, <http://www.math.jhu.edu/~ajm/pub-agreement.pdf> (last visited Mar. 8, 2017) ("Should the Press decide to publish the Article in the Journal, you, as Author of the Article, hereby grant and transfer exclusively to the Press all rights of whatever kind to the Article, including but not limited to copyright, during the full term of copyright in the United States of America and elsewhere.").

6. See, e.g., *Official Rules: Online Contests*, N.Y. MAG., <http://nymag.com/newyork/contestrules/> (last visited Mar. 8, 2017) ("Entrant hereby acknowledges that Entry and all other materials of every kind whatsoever created by contestant relating to the Contest (collectively, the 'Work') are a 'work made for hire' (as that term is used in the United States Copyright Act) for Sponsor, and assigns to Sponsor . . . all rights of every kind and nature (whether now known or hereafter devised, including all copyrights therein and thereto and all renewals and extensions thereof), throughout the universe, in perpetuity, for all purposes . . .").

7. National Geographic asserts copyright in the content of its periodicals, books, and website and requires permission for use of that content. See *Frequently Asked Questions*, NAT'L GEOGRAPHIC, <http://www.nationalgeographic.com/faq/permissions.html> (last visited Mar. 8, 2017). The one exception is with respect to photos submitted as part of "Your Shot" competitions National Geographic periodically conducts in which users upload their own photos on designated themes. See *Support Center*, NAT'L GEOGRAPHIC, <http://help.nationalgeographic.com/customer/portal/articles/1081018-when-i-submit-a-photo-to-your-shot-do-i-retain-the-copyright-to-the-photograph> (last visited Mar. 8, 2017). *The New York Times* asserts copyright in everything it publishes. See *Obtaining and Using Times Content*, N.Y. TIMES, <http://www.nytimes.com/content/help/rights/permissions/permissions.html> (last visited Mar. 8, 2017) ("[A]ll use of New York Times

In an ideal world (one imagined by many novice authors), the assignment of a copyright will prove beneficial to the author and publisher alike: the publisher, who owns the copyright, will aggressively market the work and toil tirelessly to bring attention to the author's creation. Sales will be strong, new editions and new formats will be released (books will become movies, movies will have sequels), and lucrative foreign markets will be pursued. The author, having sensibly assigned copyright ownership to an entity devoted to ensuring the work gets everything it deserves, will enjoy fame and fortune. Such scenarios are, however, exceedingly rare. Much of the time, the interests of author and publisher do not align or align only weakly. The typical publisher is concerned with the bottom line across the entire catalog of represented works, which means extracting the maximum value from each work at the lowest possible cost. One way of lowering costs is to pay the author nothing or to structure compensation as a small royalty. A second method, common in the music industry, is to structure investments as loans that must be repaid from sales.⁸ A third cost reduction strategy is to minimize production costs by requiring the author to pay for editing, indexing, and the like.⁹ A fourth approach is to invest stingily in marketing except for works that, because the author is already famous, are very likely to become megahits with a strong promotional

content (text, photographs, graphics, etc.) requires the permission of The New York Times.”). Condé Nast owns the copyright to *Vogue*. See The Library of Congress, *Condé Nast Publication: Rights and Restrictions Information*, PRINTS & PHOTOGRAPHS READING ROOM, https://www.loc.gov/tr/print/res/708_conde.html (last visited Mar. 8, 2017). MGM asserts copyrights in the movies it produces and operates a division devoted to licensing of clips. See *Media Licensing FAQ*, MGM, MGMMediaLicensing.com (last visited Mar. 28, 2017). While *Time Magazine* and other publications of Time Inc. do not require assignment of copyright, they do require the grant of a very broad license conferring the right to publish the work in multiple formats and to assign publication rights to others, as well as an embargo on the creator exercising retained rights for designated periods of time. See Norm Pearlstine, *Time Inc. Photographer Contract 2016*, SCRIBD, <https://www.scribd.com/document/290673735/Time-Inc-Photographer-Contract-2016> (last visited Mar. 8, 2017).

8. See, e.g., Heather McDonald, *Music Industry Investors*, BALANCE (Oct. 14, 2016), <https://www.thebalance.com/music-industry-investors-2460761> (describing availability of loans in music industry). Numerous companies exist to make loans to musicians or to connect musicians to third-party lenders. See, e.g., *A Guide to Music Financing for Artists*, ROYALTY EXCHANGE, <https://www.royaltyexchange.com/artist-guides/a-guide-to-music-financing-for-artists#sthash.VgjAb84q.dpbs> (last visited May 15, 2017) (“Our online marketplace helps artists raise money by connecting them directly to private investors interested in either buying royalties or providing loans backed by royalty payments.”).

9. See, e.g., *AuthorNet: Information for Authors*, CAMBRIDGE U. PRESS, <https://authornet.cambridge.org/information/productionguide/aus/index.asp> (last visited Mar. 11, 2017) (“Our contracts generally require that authors act as their own indexers . . .”).

campaign.¹⁰ While some first-time authors and artists might become overnight sensations, the odds of that happening are long, and a publisher cannot easily predict in advance where lightning will strike.¹¹ Even sales by established and prize-winning authors can be low.¹² Thus,

10. See JACQUELINE DEVAL, *PUBLICIZE YOUR BOOK!: AN INSIDER'S GUIDE TO GETTING YOUR BOOK THE ATTENTION IT DESERVES* ix (2008) (“[T]he big-name authors get tons of money spent on their campaigns . . . [when] a new author [who] could use some of those marketing funds to begin to build a reputation.”); JOHN B. THOMPSON, *MERCHANTS OF CULTURE: THE PUBLISHING INDUSTRY IN THE TWENTY-FIRST CENTURY* 189, 91 (2012) (describing a system of “title prioritization” under which “as many as three-quarters of the books being published by the [book publishing] corporation are not being prioritized; they are not completely neglected, but they are not given the kind of attention and concerted sales and marketing support as the prioritized titles.”); Steven Piersanti, *The 10 Awful Truths about Book Publishing*, BERRETT-KOEHLER PUBLISHERS (Sept. 26, 2016), <https://www.bkconnection.com/10-awful-truths-about-book-publishing> (“Publishers have managed to stay afloat in this worsening marketplace only by shifting more and more marketing responsibility to authors, to cut costs and prop up sales.”); Valerie Peterson, *What is an Author Platform? And Why Publishers Want Authors With Platforms*, BALANCE (July 24, 2016), <https://www.thebalance.com/what-is-an-author-platform-2800074> (“An author with an established audience assures that booksellers will take notice of the book, that the book will likely get media attention (audience feeds more audience), and that there are likely fans who will immediately buy the book—all good for the publishing business. For that reason, literary agents, book editors and publishers look for the size of an author platform when considering a prospective author’s manuscript or proposal.”); Chris Holifield, *The Marketing Department – what it does*, WRITERS SERVICES (2006), <http://www.writersservices.com/resources/marketing-inside-publishing> (last visited Mar. 11, 2017) (“Book marketing has become much more professional and effective in recent years, but the emphasis is now on focusing on a small number of big titles, i.e., making the bestsellers into bestsellers. Most of the rest are left to make their own way in the world, with perhaps a little attention from the publicity department.”).

11. See THOMPSON, *supra* note 10, at 211 (describing publishers’ determinations as to which works are likely to be bestseller as “a gamble, a roll of the dice, which pays off in some cases and fails in others” so that “the challenge for the publisher is to try to ensure that you win enough times to compensate for the books that fail.”); Piersanti, *supra* note 10 (reporting that “[t]he average U.S. nonfiction book is now selling less than 250 copies per year and less than 2,000 copies over its lifetime” and that “[a] book has far less than a 1% chance of being stocked in an average bookstore.”); Dana Beth Weinberg, *Investigating Author-Publisher Dynamics: 2015 Author Survey Results*, DIGITAL BOOK WORLD (Jan. 22, 2015), <http://www.digitalbookworld.com/2015/investigating-author-publisher-dynamics-results-from-the-2015-author-survey/> (“[W]e . . . found that few authors . . . were making much money from their writing and that most books were not selling large volumes of copies—no matter how they were published.”); Chris Holifield, *The Writer/Publisher Financial Relationship*, WRITERS SERVICES (2006), <http://www.writersservices.com/resources/writerpublisher-financial-relationship-inside-publishing> (last visited Mar. 11, 2017) (“The very high prices paid for some new writers’ work have often made the headlines and unfortunately given many aspiring writers the idea that writing is the way to make a quick fortune. These big deals are the exception rather than the rule”); Scott Macaulay, *How to Find a Producer*, FILMMAKER MAG. (Dec. 21, 2014), http://filmmakermagazine.com/76650-how-to-find-a-producer/#.V_Esm2OCzwx (“As most producers know, works from first-time directors are seldom presellable. These projects are often what’s known as ‘execution dependent’ and their production usually relies upon equity financing, grants, crowdfunding and a small number of industry sources willing to take a gamble on a new voice.”).

12. See Lynn Neary, *When it Comes to Book Sales What Counts as Success Might Surprise*

the incentive on the part of the publisher is not to invest heavily in any particular work.¹³

Perhaps most significantly, while many publishers care only (or primarily) about profits, most authors care also (and perhaps more) about recognition.¹⁴ Authors, who may be prone to over-estimate monetary rewards in the first place,¹⁵ typically want their works to reach the widest possible audience even if the personal financial returns are small. Indeed, authors have an interest in disseminating their works to audiences unwilling to pay for the work and beyond the period of viable sales. Yet, the author will often be unable to pursue that interest precisely because the copyright was assigned. Having assigned the copyright, the author cannot, for example, just start printing additional

You, NPR (Sept. 19, 2015), <http://www.npr.org/2015/09/19/441459103/when-it-comes-to-book-sales-what-counts-as-success-might-surprise-you> (reporting on low book sales for National Book Award and Man Booker Prize winners).

13. See THOMPSON, *supra* note 10, at 267 (“[A] book has just a few weeks—typically no more than six, and in practice often less—to show whether it’s going to move, and if it’s not moving then it will be pulled out of promotion and the marketing spend will be wound down or cut off.”); Ian Irvine, *The Truth About Publishing*, IAN IRVINE, <http://www.ian-irvine.com/on-writing/the-truth-about-publishing/> (last visited Mar. 11, 2017) (“Sales and marketing are both very expensive, and most books aren’t going to sell enough copies to justify much more than the minimum expenditure (i.e., an entry in the monthly sales catalogue.”); Scott Berkun, *28 (Better) Things No One Tells You About Publishing*, SCOTT BERKUN (Feb. 24, 2015), <http://scottberkun.com/2015/28-better-things-about-publishing/> (“Publishers only invest in big PR for famous authors. For new authors there’s little reason to believe the investment will pay off.”); Jane Friedman, *The Future of the Author-Publisher Relationship*, JANE FRIEDMAN, <https://janefriedman.com/future-author-publisher-relationship/> (last visited Mar. 11, 2017) (“[M]ost books and authors receive limited support and attention, and, for too many authors, this is not what they expect or want from their publisher relationship.”).

14. Nina Amir, *Do You Have What Publishers Really Want?*, WRITERS DIG. (Apr. 8, 2014), <http://www.writersdigest.com/online-editor/do-you-have-what-publishers-really-want> (“The publisher . . . seeks someone with a viable, meaning marketable, product who will be a good business partner. A good business partner, in this case, is someone who can complete the creative end of the production process—write the book—but who can also help the product succeed—sell the book.”); Friedman, *supra* note 13 (“The biggest problem that authors must solve for themselves, year after year, is (1) staying competitive, current, and discoverable in a shifting digital landscape (2) having the right tools to be effective and in touch with their readers, and (3) having a strong network of connections that helps them better market and promote. All of these things are well within a publisher’s ability to assist with, only they haven’t been putting any resource into providing such assistance. They have been focused on their own corporate problems of shifting to a digitally enabled business, and squeezing as many sales as possible out of their mastery of print book sales and distribution.”); Rufus Purdy, *What Authors Want*, CURTIS BROWN CREATIVE (Apr. 30, 2013), <http://www.curtisbrowncreative.co.uk/jonny-geller-of-curtis-brown-on-what-authors-want/> (“What do authors want from their publisher? In my experience it is two things: 1. Their book to get to as many people as possible in the most agreeable form and manner possible. 2. See Point 1.”).

15. See Derek E. Bambauer, *Faulty Math: The Economics of Legalizing The Grey Album*, 59 ALA. L. REV. 345, 376 (2008) (describing how “people tend to overestimate their odds of financial success, particularly where the potential payoff is large”) (footnote omitted).

copies of the work and sell them cheaply or give them away. Likewise, there are audiences for works that publishers are disinclined to pursue because those audiences do not generate a sufficient return to the publisher. Most obviously, few publishers have an interest in audiences that do not pay at all for a work unless free distribution can be made part of an overall profit-generating strategy—for example, releasing for free a portion of the work to entice readers to buy the entire work.¹⁶

A. *The Case of Professor Smith*

An example would be helpful in demonstrating the author-publisher divide. Professor Tom Smith is a (fictional) political scientist at a major research university. He writes a book, “Divided We Fall,” analyzing why Americans are politically divided and offering some novel mechanisms to produce greater unity in ways that are beneficial to society. The book is published in hardcover by a prestigious university press to which Professor Smith has, as part of the publishing agreement, assigned the copyright. At the time of publication, the press includes

16. For example, in May 2016 the band Radiohead released the music video of the single “Burn the Witch” for free (or pay-as-you-wish download) prior to the release of the band’s ninth album “A Moon Shaped Pool”. See Nicholas Parco, *Radiohead release new song ‘Burn The Witch,’ the first song off of their upcoming ninth album*, N.Y. DAILY NEWS (May 3, 2016), <http://www.nydailynews.com/entertainment/music/radiohead-erase-social-media-posts-new-album-rumors-article-1.2621800>. Kindle subscribers can read the first chapter of many book titles before deciding to download the entire book. See *Help & Customer Service: Kindle Samples*, AMAZON <https://www.amazon.com/gp/help/customer/display.html?nodeId=201612700> (last visited Mar. 11, 2017) (“Before you buy a book in the Kindle Store, you can download a sample of the book for free.”). Apple iTunes allows subscribers to listen to ninety-second previews of songs prior to purchase. *Master your music*, APPLE, <http://www.apple.com/itunes/music/> (last visited Mar. 11, 2017). Some book publishers release chapters of books in newspapers. *The Guardian* published the first chapter of Harper Lee’s 2015 book, *Go Set A Watchman*, along with a narrated version by Reese Witherspoon. Harper Lee, *Go Set A Watchman*, GUARDIAN, <http://www.theguardian.com/books/ng-interactive/2015/jul/10/go-set-a-watchman-read-the-first-chapter> (last visited Mar. 11, 2017). *The New York Times* published as a special broadsheet section the first chapter of Colson Whitehead’s 2016 book, *Underground Railroad*. See *The New York Times to Publish Excerpt of Colson Whitehead’s “The Underground Railroad,”* N.Y. TIMES (Aug. 2, 2016), <http://www.nytc.com/the-new-york-times-to-publish-excerpt-of-colson-whiteheads-the-underground-railroad>. *The Washington Post* has an arrangement with publishers to permit readers to read the first chapter of selected new books reviewed in the paper. See *Chapter One*, WASH. POST., <http://www.washingtonpost.com/wp-srv/style/books/chapterone.htm> (last visited Mar. 11, 2017). Other publishers authorize authors to release portions of their works on their own websites. See, e.g., *Read Chapter 1 From the Book of Life*, DEBORAH HARKNESS, <http://deborahharkness.com/chapter-1-excerpt-from-the-book-of-life/> (last visited Mar. 11, 2017) (providing access to the first chapter of Deborah Harkness’s *The Book of Life*); *Read the first chapter of Wicked Burn!*, REBECCA ZANETTI (June 9, 2016), <http://rebeccazanetti.com/read-the-first-chapter-of-wicked-burn/> (providing access to the first chapter of Rebecca Zanetti’s *Wicked Burn*).

information about the book on its website and in a one-time advertisement of new titles that appears in the *New York Review of Books*. The press also sends review copies of the book to twenty-five potential reviewers. Sales are respectable for an academic title but modest: 1,000 copies sell in the first year after publication. Three years after publication, a total of 1,500 copies have sold, and in the fourth year after publication, sales have dropped to an average of one copy of the book sold per month. Professor Smith asks the press to release a cheaper softcover version of his book. Citing the low hardcover sales, the press declines to pursue this option even after Professor Smith offers to forego any royalties to which he would otherwise be entitled under his publishing contract.

Professor Smith really would like his work on political disunity to receive a wider audience. A colleague suggests that if fame, rather than fortune, is his motive, he turn the book into a PDF and make it available for readers to download for free. Professor Smith seeks permission from the university press to create and distribute a free downloadable version of the book. The press declines—it has no interest in a free version of the book.

Meanwhile, Professor Smith has given a talk about the book at a university in Tokyo. His Japanese hosts praise him for his insights and encourage him to have the book translated for a Japanese audience. Professor Smith's publisher determines, however, that given high distribution costs in the Japanese market, a translated version of "Divided We Fall" is unlikely to be profitable. Professor Smith relays that decision to his Tokyo contacts. They respond that their own university would be happy to have the book translated and to print 2,000 copies for distribution to academics and key public officials throughout Japan. However, Professor Smith's publisher refuses to grant a license for this purpose.

At the annual meeting of the American Political Science Association, Professor Smith spends an afternoon at the marketing table his publisher has set up to promote its catalog. Several dozen attendees stop by and praise Professor Smith for his book. Some visitors report that in their own university courses they would be inclined to assign to their students a chapter from the book but that the licensing fee the publisher charges for reproducing a chapter in course packets is prohibitive. Professor Smith suggests to his publisher that it lower reprint rates for academic use or make certain chapters available free for coursework. Citing its customary and standardized reprint charges, the publisher declines.

Finally, Professor Smith seeks to acquire back the copyright to his book. The publisher is willing to sell the copyright back but only on terms (an embargo on publication until eight years after the initial release of the book, a \$10,000 payment by Professor Smith, and fifty percent of any future net income the book generates) Professor Smith finds unfeasible. Within a few years, Professor Smith's book is out of print, although used versions are occasionally available.

B. Other Common Scenarios

The scenario depicted above is not unusual. Many authors in different fields find themselves unable to make (or to allow others to make) what would be, from their perspective, productive and desirable uses of their own works as a result of having assigned the copyright to a publisher or distributor—even when there seems little reason for the copyright holder to block the proposed use. Consider the following examples:

- The publisher of an anthology would like to include an essay published two years previously in *Harper's Magazine*. The essay author would be happy to have the essay reprinted. *Harper's*, which owns the copyright, requires a \$5,000 fee for republication, a sum that exceeds the entire budget for the anthology.
- A film festival designed to raise funds to restore a historic theater building would like to screen in a single afternoon its choice of "Top Five Films of the Year." Audience members will pay \$1,000 to view the five films and to have dinner with the directors after the screening. The studios, which own the copyrights to the films, refuse to allow them to be screened in this manner.
- A photographer has taken a very unflattering photo of a presidential candidate. The photographer sells the photo along with the copyright to it to a newspaper. The newspaper's owners support the candidate depicted in the photograph and prohibit publication. The photographer, who detests the candidate, decides to post the photograph on a website but the newspaper's lawyers threaten to sue the photographer and the photo is never released.
- A high school theater group wants to put on a production of a play currently running on Broadway. The playwright, who got his start in high school theater, has no objection.

The publisher that owns the copyright in the play will only grant a license if the high school pays \$250,000 for a single performance. The theater group stages *Macbeth* instead.

- During the course of making a documentary film, the filmmaker has captured, in a ten-second background sequence, a television with a famous comedian delivering jokes on a big network's popular late-night show. The filmmaker thinks the captured television segment would be covered by the fair use provision of copyright law. The depicted comedian is flattered to be included in the documentary even just in the background. The network, however, owns the copyright in the footage; it denies that fair use applies and threatens a lawsuit if the footage is used. The filmmaker deletes the scene.
- Publisher A acquires Publisher B. Publisher A has published a U.S. history textbook marketed to high schools for the past ten years. The textbook is in its fifth edition. Publisher B publishes a competing high school history textbook. After the merger, Publisher A decides it will not issue a sixth edition of the history text it has traditionally published and instead will promote the text published by Publisher B. The authors of the discontinued text would like to find a new publisher. Publisher A, however, refuses to sell back the copyright in the text or give a license to the authors to use any of the material included in the fifth edition. Faced with the prospect of having to start over, the authors abandon the project.
- A songwriter assigns copyright to a music publisher but the publisher goes out of business, and the song is never recorded.¹⁷

17. BMI includes this very scenario in its copyright information for songwriters:

Q. I assigned my copyright to a publishing company who never acquired a recording of my song. I would like to get it back and assign it to another, more active publisher or obtain a recording myself. However, I cannot locate the original publisher, who has gone out of business. Can I go ahead and re-assign the copyright?

A. Not unless you have a clause in your agreement with the original publisher that re-vested the copyright in you if he did not acquire a recording after a certain time period that has now passed. If no such clause existed, your assignment to the publisher probably was unconditional, and you have no right to treat the copyright as your own. Even if the company is out of business, the copyright may have been assigned to another publisher or to the owners of the original company. Remember that if you assign the song to a new publisher without telling him you do not really own it, you may be exposing yourself to liability if the original publisher or his assigns discover your attempted assignment of

In each of the above scenarios, the author's transfer of the copyright prevents use of the work that the author considers beneficial. To be sure, it is not all doom and gloom. Authors do sometimes succeed in acquiring back a copyright in a work from a publisher or acquiring a license from the original publisher to republish the work or make it available in new formats.¹⁸ Further, recognizing that past authors have given up copyrights in works that could now productively be used by them, Congress has provided some authors a right to terminate a past transfer under limited circumstances.¹⁹ Nonetheless, the path to success under either scenario is not easy.

From one perspective, that is exactly how things should be. The author has entered into a contract and received benefits from the bargain. The publisher, as lawful copyright holder, is entitled to determine whether and how the work is to be distributed. The author could have declined the publisher's offer and retained the copyright in the work or negotiated a different arrangement with the publisher (or with some other publisher) that would protect the author's ability to make certain uses of the work in the future. For instance, the author could have agreed only to allow the publisher an exclusive right to publish the work for a defined period of time. Alternatively, in assigning copyright, the author could have reserved rights to make or to authorize others to make designated uses of the work notwithstanding the copyright assignment. Thus, our hypothetical Professor Smith could have—and should have—reserved paperback, translation, and digital rights (perhaps if not

their copyright.

Songwriters and Copyright, BMI (2009), http://www.bmi.com/creators/detail/songwriters_and_copyright (last visited Mar. 11, 2017).

18. The Authors Alliance, which provides tools for authors to use in negotiating a reversion of rights, reports on some success stories. See *Authors Alliance Partners with the Internet Archive to Make Books Available*, AUTHORS ALLIANCE (Oct. 26, 2016), <http://www.authorsalliance.org/category/rights-reversions/tr-successes/>.

19. See 17 U.S.C. §§ 203, 304 (2012). Section 203 allows for the termination of an exclusive or nonexclusive grant of a transfer or license of copyright that was executed by the author on or after January 1, 1978, provided that the termination is made by the author (or if the author is dead, then by the author's successor) within a statutorily-designated period of time. Section 304 allows for a renewal and extension of an existing copyright term by sixty-seven years and for the termination of grants of transfers or licenses during this extended renewal period. Few terminations have actually been made under these provisions. See, e.g., Joe Bogdan, *The Little Law that Could (and Probably Will): Section 203 Copyright Recapture Terminations in America*, AM. J. ARTS MGMT. (2015),

http://www.artsmanagementjournal.com/resources/January_2016/The%20Little%20Law%20That%20Could.pdf (last visited Mar. 11, 2017) (reporting that “as of mid-2015, fewer than 300 authors (of all disciplines, be they songwriters, book authors, recording artists, etc.) have recorded recapture termination notices.”).

exercised by the publisher within a certain time frame) and rights to republish specified chapters for designated purposes. That Professor Smith's decision—one protected by the Copyright Act—to assign the copyright entirely to the university press limited his future ability to use the work or to allow others to use it in ways he thinks beneficial is instead the deal he struck, and he must live with it.

While a simple individual autonomy approach may have some appeal, broadening the perspective adds some wrinkles. Two points bear emphasis. First, while there is variation by subject matter, as a practical matter, most authors are not in a position to negotiate individualized terms with a potential publisher that will allow the author to control publication of the work in the future. Instead, many (though not all) publishers demand, through a standardized contract, assignment of copyright in the work as a condition of publication.²⁰ The author's ability to publish the work in a different form or setting in the future—or to allow others to do so—thus depends upon the publisher's permission. Some publishers might grant such permission. Others will not. But permission will be required—and that is exactly the arrangement most publishers want because it is difficult to determine in advance whether some future proposed use will make economic sense. Relatedly, few authors are in a position to find (or threaten to find) a different publisher in order to strike a more favorable deal.²¹ Publishers adhere to well-defined norms governing their own field. For example, terms offered by one university press are likely to be quite similar to those offered by another university press.²² Finding different terms will normally require

20. See *supra* Part I.

21. For instance, at the end of 2015, when Time Inc. (which publishes some ninety magazines) adopted a new contract requiring assignment of a broad set of rights by contributing photographers, there was substantial criticism of the terms by photographers and their representatives. See Holly Hughes, *Photographers, Reps Push Back on Time Inc Contract's Rights Grab*, PDNPULSE (Dec. 3, 2015), <http://pdnpulse.pdnonline.com/2015/12/photographers-reps-push-back-on-time-inc-contracts-rights-grab.html> (“Photo agents, trade groups and individual photographers are raising alarms over the new photography contract issued last month by Time Inc. . . . [which] . . . grants Time Inc. broad rights to reuse assignment photos in affiliate brands and books, and reduces fees for reuse in related publications, books and foreign editions.”). Nonetheless, photographers signed the agreement. See Holly Hughes, *Time Inc Responds to PDN Article on Resistance to Time Inc's Contract*, PDNPULSE (Dec. 3, 2015), <http://pdnpulse.pdnonline.com/2015/12/time-inc-responds-to-pdn-article-on-resistance-to-time-incs-contract.html> (“Our new contract is fair and equitable. Many photographers have already signed the new agreement.” (quoting Jill Davidson, Vice President, Corporate Communications, Time Inc)).

22. Of course, this is not to deny that there may be minor variations. See, e.g., *Author FAQs: Rights & Permission*, JOHNS HOPKINS U. PRESS (2016), <https://www.press.jhu.edu/journals/authorfaq.html> (last visited Mar. 11, 2017) (“I wrote an article for one of the Johns Hopkins journals a few years ago. Do I need JHUP's permission to print this article in my upcoming book?”)

publishing in a very different venue, such as self-publishing rather than publishing with a university press.

Second, at least in regard to the U.S. system, an individual autonomy approach discounts the basic utilitarian purpose for copyright protection—the generation of works for public consumption.²³ In assessing the desirability of blanket copyright assignment, it is not merely the author’s own interests that are relevant: an eye should be kept on the interests of the general public. On that score, blanket assignments of copyright can have a negative result. The assignment of a copyright is likely to *prevent* what would otherwise be productive uses of a work. As several studies demonstrate, a copyright can make a work disappear—reduce rather than promote the dissemination of the work—and also discourage the production of new works.²⁴ A publisher holding a

No. You have our permission to publish the article in any book that is solely your own work. Please see your publishing agreement. If you are editing a book that contains your article but has others’ work, too, please consult our Permissions Department.”); *Academic: Author Reuse and Self-Archiving*, OXFORD U. PRESS (2016), <https://global.oup.com/academic/rights/permissions/autperm/?cc=gb&lang=en> (last visited Mar. 11, 2017) (“Why do I need permission to reuse my own writing? Our publishing agreement with you enables OUP to make many investments in your work, including editorial review, copyediting, typesetting, design, printing, coding for electronic publication, marketing, distribution, and securing copyright against piracy and plagiarism. Reuse permission protects these investments.”); *Permissions Requests from our Authors: To Re-Use Material from their Works*, CAMBRIDGE U. PRESS, <http://www.cambridge.org/about-us/rights-permissions/permissions/permissions-requests-our-authors/> (last visited Mar. 11, 2017) (“In certain circumstances, permissions requests are not required from authors who wish to re-use original material they have written for a Cambridge publication, provided that the subsequent use includes a full acknowledgement of the original publication, together with the copyright notice and the phrase ‘Reprinted with permission’ For all other uses, permission is required, and the author or the author’s publisher should refer to the Permissions requests page.”); *Permissions*, STAN U. PRESS, <http://www.sup.org/authors/current/docs/Permissions.pdf> (last visited Mar. 11, 2017) (“If you will be using parts of your book in a course or in another publication, by the terms of your author contract, you will need to obtain permission from the Press first. Please note that, once you sign a contract with SUP, the Press holds the copyright to your book. If you decide to republish any content from your book any time after signing your contract—even before the official publication of your book—you must seek permission from the Press.”).

23. See U.S. CONST. art. I, § 8 (“The Congress shall have power . . . [t]o 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.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”).

24. See, e.g., Paul J. Heald, *How Copyright Keeps Works Disappeared*, 11 J. EMPIRICAL LEGAL STUD. 829, 830-31 (2014) (reporting that books and music become more available to the public when they fall into the public domain); Cornell Copyright Management, *supra* note 3 (“When you assign copyright to publishers, you lose control over your scholarly output. Assignment of copyright ownership may limit your ability to incorporate elements into future articles and books or to use your own work in teaching at the University. . . . [Y]ou may be forbidden by the publisher to do the following: Post the work to your own web site or to a disciplinary online archive, [c]opy

copyright has little incentive to authorize any publication of a work that does not generate revenues for the publisher itself, and even when a proposed use of a work would have no obvious impact upon the publisher's revenues, the publisher is likely always to be concerned about the possibility of making, however unlikely, some future profitable exploitation of the work. Thus, the inclination is to strongly enforce the copyright rather than act permissively.

Moreover, quite apart from ways in which the author might wish to make productive uses of the work down the road (as some of the hypothetical scenarios above already suggest), *other* individuals and entities might also seek to use a work in ways that, because of the copyright assignment, require the publisher's permission. Such uses might include preparing and publishing a translation, republishing the work in a different format, and publishing portions of the work in a different setting. As with requests from authors, however, unless the publisher can identify a financial benefit to granting permission, it may have little incentive to permit such third-party uses.

Indeed, blanket copyright assignment can undermine uses of a work that do not require permission. Most significantly, publishers who acquire a copyright in a work tend to take an exceedingly narrow view of the fair use provision of the Copyright Act that permits uses of a work (in certain circumstances) without having to obtain the permission of the copyright holder. Many publishers act as though fair use simply does not

the work for distribution to students, [u]se the work as the basis for future articles or other works, [g]ive permission for the work to be used in a course at Cornell, [and] [g]rant permission to faculty and students at other universities to use the material.”); Am. Soc’y of Journalists & Authors, *Rights 101: What Writers Should Know About All-Rights and Work-Made-for-Hire Contracts*, WRITERS & EDITORS (2003), http://www.writersandeditors.com/files/Rights101_%282003%29.pdf (last visited Mar. 11, 2017) (“By conveying away ‘all rights,’ the writer gives up the right to re-license his work to a reprint magazine, foreign periodical, electronic database, anthology, or business publication, for example, or to re-use the work in a future book.”); Authors Alliance FAQ, *supra* note 3 (“[A]uthors are increasingly frustrated to realize that although the Internet gives them the technological ability to disseminate their works to readers around the world, their publishing contracts deny them the legal right to do so. . . . [T]oday many authors might want to revise and distribute their own works but find themselves without the rights they need to do so (and no hope that they will outlive the copyright, which now lasts for the life of the author plus 70 years.)”; Elizabeth L. Rosenblatt, *The Adventure of the Shrinking Public Domain*, 86 U. COLO. L. REV. 561, 573 (2015) (“[A] robust public domain . . . not only facilitates, but also fosters, creativity by making culturally familiar source materials available to creators and adapters at no cost”); Nicholas Ruiz, *Copyright’s Paradox: The Public Interest and Private Monopoly*, 18 INTELL. PROP. L. BULL. 213, 214 (2014) (“Congress has expanded the scope of copyright protection in a way that has decreased the availability of information. More specifically, the derivative work right has become so broad as to prohibit secondary artists from borrowing from existing material to create new works, thus hindering creativity and preventing authors from sharing new works with the public.”).

exist and as though all uses require a license and payment.²⁵ Here again, the interests of the author and publisher/copyright owner diverge. The author, with a stronger stake in exposure of the work, might be delighted to see his or her work used by others in ways that fair use law allows. Publishers, however, see instead opportunities to extract a licensing fee, with the result that lawful fair uses are not made.²⁶

II. CORRECTIVE MECHANISMS

How might things be changed so that authors (and others) can make future uses of a work in ways that are not likely to impact the economic interests of a publisher? This Part considers three mechanisms currently in use: tools to allow authors to engage in self-help, seizures of interests by third parties to protect future uses of works, and mechanisms to nudge authors to resist blanket assignment of copyright. While each mechanism has some benefits, none is sufficient to resolve the problems identified. Nonetheless, these mechanisms provide the basis for the development of copyright easements discussed in the next Part.

A. *Self-help*

One recent approach to the problem of blanket copyright assignment that curtails future uses is to provide authors and other creators with tools to allow them to strike better deals with publishers and distributors. In particular, various entities have prepared and distributed boilerplate addenda for authors to attach to the contracts they receive from the publisher so as to protect the author's own future interests in the work. When the author receives the publishing contract—typically requiring the author to assign copyright wholesale—the author sends back a signed version of that contract along with a signed version of an addendum to it in which, by altering the original contract, the author retains specified rights. For example, the Scholarly Publishing and Academic Resources Coalition (SPARC) makes available an “Addendum to Publication Agreement” for authors to attach to the publisher-provided contract governing academic articles.²⁷ The

25. See JASON MAZZONE, *COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW* 37-50 (2011) (reporting on publishers, as copyright owners, interfering with fair uses of copyrighted works).

26. See *id.*

27. Scholarly Publishing & Academic Res. Coal., *Addendum to Publishing Agreement*, SPARC, http://sparcopen.org/wp-content/uploads/2016/01/Access-Reuse_Addendum.pdf (last visited Mar. 11, 2017) [hereinafter SPARC].

addendum contains the following provision:

Author's Retention of Rights. Notwithstanding any terms in the Publication Agreement to the contrary, AUTHOR and PUBLISHER agree that in addition to any rights under copyright retained by Author in the Publication Agreement, Author retains: (i) the rights to reproduce, to distribute, to publicly perform, and to publicly display the Article in any medium for non-commercial purposes; (ii) the right to prepare derivative works from the Article; and (iii) the right to authorize others to make any non-commercial use of the Article so long as Author receives credit as author and the journal in which the Article has been published is cited as the source of first publication of the Article. For example, Author may make and distribute copies in the course of teaching and research and may post the Article on personal or institutional Web sites and in other open-access digital repositories.²⁸

Of course, individual authors will have different interests. Not everyone will want to retain the particular rights asserted in the SPARC addendum or any other particular addendum. Some entities, including Harvard University, have therefore created an online "addendum generator" allowing the author to select specific rights he or she wishes to reserve and incorporate into the addendum that is forwarded to the publisher along with the original publishing agreement.²⁹

The benefit of these sorts of author addenda is that they represent a low-cost way for an author to reserve certain rights. No lawyer needs to be hired; no protracted negotiations with the publisher need be undertaken. The author simply returns the addendum along with the signed publishing agreement.

The downside, of course, is that no contract may actually result. The publisher, particularly if taken by surprise, might reject the new terms, especially if (as in the case of the SPARC addendum above) the reserved rights are extensive. A publisher might then simply advise the author that it does not accept the terms of the addendum and that if the author wishes to accept the original offer, the author must return a signed copy of the publishing agreement without changes.³⁰ We might, then, be back to square one. Worse, a publisher might decide the author is a troublemaker and not renew the original offer at all.

28. *Id.*

29. *Amend a Publishing Agreement*, HARV. LIBR. OFF. FOR SCHOLARLY COMM. (2015), <https://osc.hul.harvard.edu/authors/amend/> (last visited Mar. 11, 2017).

30. SPARC, *supra* note 27.

B. *Seizures*

A different approach is more coercive. Under this approach, some entity reserves to itself rights in a work prior to the assignment of a copyright to the work. In other words, the entity seizes an interest from the author that serves to prevent the author from later assigning an unfettered copyright.

Universities have begun to pursue this kind of approach in order to ensure that works created by their faculty members may be posted in an online open access repository of faculty works operated by the university. Universities have an interest not just in generating knowledge but in sharing it. Restrictive copyright policies that govern publications by faculty members can undermine broad dissemination of faculty works. This is particularly true of scientific papers published in high-profile journals for which subscription fees are extremely high such that a paper, produced by a faculty member at the university but then published in a journal, is not widely available.³¹

Rather than merely encourage faculty members individually to seek to amend publication terms through the attachment of an addendum and provide faculty members with tools to pursue that option, the

31. See, e.g., *Subscription Price List for Librarians and Agents*, ELSEVIER, <https://www.elsevier.com/books-and-journals/journal-pricing/print-price-list> (last visited Apr. 15, 2017) (showing the subscription rate for *Biological Psychiatry* at \$3,886, *Cancer Genetics* at \$3,906, and *Cell Chemical Biology* at \$2,626); Eric Priest, *Copyright and the Harvard Open Access Mandate*, 10 NW. J. TECH. & INTELL. PROP. 377, 386 (2012) (“The rise in journal subscription fees . . . has led many university libraries to pare down their journal subscriptions. Journals that institutions drop often seek to offset those losses by raising prices even further for their remaining subscribers. Many university libraries are also forced to offset costs by purchasing fewer books, resulting in reduced access to information for scholars and precious revenue lost for nonprofit university presses.”); Julie L. Kimbrough & Laura N. Gasaway, *Publication of Government-Funded Research, Open Access, and the Public Interest*, 18 VAND. J. ENT. & TECH. L. 267, 282 (2016) (“[M]any [Scientific, technical, and medical (“STM”)] authors are university faculty members, and they want to help their institutions deal with the prices of expensive academic journals. The price of STM journals has increased more over the last thirty-five years than the price of journals in other fields, and the trend is continuing.”); Ian Sample, *Harvard University says it can’t afford journal publishers’ prices*, GUARDIAN (Apr. 24, 2012, 12:45 AM), <https://www.theguardian.com/science/2012/apr/24/harvard-university-journal-publishers-prices> (“A memo from Harvard Library to the university’s 2,100 teaching and research staff called for action after warning it could no longer afford the price hikes imposed by many large journal publishers, which bill the library around \$3.5m a year.”); Philip Young, *The Serials Crisis and Open Access*, VA. TECH. U. LIBR. 1 (Dec. 2, 2009), <https://vtechworks.lib.vt.edu/bitstream/handle/10919/11317/OAwhitepaper.pdf?sequence=1&isAllowed=y> (“The phrase ‘serials crisis’ has been in use for more than a decade as shorthand for the rise in costs for academic journals and the inability of libraries to bring these costs under control.”); Lisa Rose Wiles, *The High Cost of Science Journals: A Case Study and Discussion*, 52 J. ELECTRONIC RESOURCES LIBRARIANSHIP 219 (2011) (discussing reasons for rising costs of scientific journals).

university—as employer of the faculty member—asserts (i.e., seizes) a license to use the faculty member’s work and requires that the faculty author provide the university with a digital copy of the published work for it to post in a publicly-accessible electronic depository. Accordingly, when the faculty member places the work with a publisher, the faculty member notifies the publisher that his or her employer (i.e., the university) already owns a license to distribute the work via the repository and that any assignment of copyright to the publisher is subject to the conditions of that license.

The University of California system is at the forefront of these efforts,³² though other universities, including MIT,³³ Harvard,³⁴ and

32. A brief history with key supporting documents that led to the University of California’s policy is available at Univ. of Cal., *UC Presidential Open Access Policy*, OFF. SCHOLARLY COMM. (Oct. 23, 2015), <http://osc.universityofcalifornia.edu/open-access-policy/policy-text/presidential/> [hereinafter UC Presidential OA].

33. See *OA Policies at Other Universities*, MIT LIBR., <https://libraries.mit.edu/scholarly/mit-open-access/oa-policies-at-other-universities/> (last visited Mar. 11, 2017). For example, MIT’s Open Access Policy provides (among other things) that:

Each Faculty member grants to the Massachusetts Institute of Technology nonexclusive permission to make available his or her scholarly articles and to exercise the copyright in those articles for the purpose of open dissemination. In legal terms, each Faculty member grants to MIT a nonexclusive, irrevocable, paid-up, worldwide license to exercise any and all rights under copyright relating to each of his or her scholarly articles, in any medium, provided that the articles are not sold for a profit, and to authorize others to do the same. The policy will apply to all scholarly articles written while the person is a member of the Faculty except for any articles completed before the adoption of this policy and any articles for which the Faculty member entered into an incompatible licensing or assignment agreement before the adoption of this policy.

To assist the Institute in distributing the scholarly articles, as of the date of publication, each Faculty member will make available an electronic copy of his or her final version of the article at no charge to a designated representative of the Provost’s Office in appropriate formats (such as PDF) specified by the Provost’s Office.

MIT Faculty Open Access Policy, MIT LIBR., <http://libraries.mit.edu/scholarly/mit-open-access/open-access-at-mit/mit-open-access-policy/> (last visited Mar. 11, 2017).

34. “In 2008, Harvard’s Faculty of Arts & Sciences voted unanimously to give the University a nonexclusive, irrevocable right to distribute their scholarly articles for any non-commercial purpose.” *Open Access Policies*, HARV. LIBR. OFF. FOR SCHOLARLY COMM., <https://osc.hul.harvard.edu/policies/> (last visited Mar. 11, 2017). Under that policy, “[s]cholarly articles provided to the university are stored, preserved, and made freely accessible in digital form in DASH, Harvard University Library’s open access repository.” *Id.* According to the FAQs accompanying the policy, Harvard makes the following uses of the scholarly articles:

Availability in DASH. The University has set up an open-access repository called DASH to make available the scholarly articles provided by its faculty members. The repository is made open to harvesting by search services such as OAIster and Google Scholar.

Non-Commercial Distribution. Through the transferability provision, Harvard may further allow others to distribute content in DASH, provided that the articles are not sold for profit. For instance, faculty at other institutions could be given permission to make copies for free distribution directly to their students.

Instructional Purposes. The Open Access Policy grants Harvard the right to license arti-

Princeton,³⁵ have taken similar steps. In July 2013, the University of California Academic Senate adopted an “Open Access Policy” under which the university simply took a license to make available future faculty-authored scholarship in the university’s own online repository

cles for free use in a course pack, so long as the course pack is not sold for profit. . . . To take another example, Harvard could also authorize others to make articles available online (for example, on a course website or another repository), provided that these were not sold for a profit.

Harvesting, Indexing, and Other Services. Consistent with the goals of open access and ensuring wide visibility and availability of scholarly articles, the license allows Harvard to enable both commercial and nonprofit entities to use the articles to provide search or other services, so long as the articles are not being sold for a profit. For instance, the license allows Harvard to enable the articles to be harvested and indexed by search services, such as Google Scholar, so that they can more readily be found, and to be used to provide other value-added services that don’t involve selling the articles themselves for a profit. Harvard also could authorize use of the articles in a commercial service that provides information extracted from the articles (but not the full text itself), such as bibliographic data or citation lists.

Technological Innovation. If new means of distributing or making the articles available evolve during the lengthy term of copyright, the license is intended to give Harvard the flexibility to use those means to advance the purposes of the policy, provided always that the articles are not sold for a profit.

OAP Frequently Asked Questions, HARV. LIBR. OFF. FOR SCHOLARLY COMM., <https://osc.hul.harvard.edu/policies/faq/#what-will-harvard-do> (last visited Mar. 11, 2017). Harvard counsels its faculty members to take appropriate steps to limit any copyright assignment so as to protect the university’s license to use the work in each of these ways. The university advises:

Amend A Publishing Agreement

To avoid a conflicting transfer of copyright to the publisher and to protect yourself from breach of contract, you can use the addendum generator to prepare an “author addendum” to attach to the agreement with a publisher. Even without the attachment of an addendum, however, the license to Harvard will still have force unless it is waived for a particular article. . . . Publishers’ agreements concerning publication of articles often contain provisions that are inconsistent with the prior license granted to Harvard under the Open Access Policy. For instance, a publisher’s agreement may specify that you transfer all copyright in the article to the publisher and that you warrant that there are no prior licenses. The existence of the prior license to Harvard means that this warranty is not true. If you sign the publication agreement without an appropriate amendment, you may be in breach of the agreement.

Amend a Publishing Agreement, *supra* note 29.

35. Princeton has an “Open Access Policy,” under which:

[F]aculty members grant to The Trustees of Princeton University a nonexclusive, irrevocable, worldwide license to exercise any and all copyrights in their scholarly articles published in any medium, whether now known or later invented, provided the articles are not sold by the University for a profit, and to authorize others to do the same. This grant applies to all scholarly articles that any person authors or co-authors while appointed as a member of the Faculty, except for any such articles authored or co-authored before the adoption of this policy or subject to a conflicting agreement formed before the adoption of this policy.

Princeton Univ., *Open Access Policy*, OFF. DEAN FAC., <http://www.princeton.edu/dof/policies/publ/fac/open-access-policy/> (last visited Mar. 11, 2017).

called eScholarship.³⁶ The policy's preamble states:

The Faculty of the University of California is committed to disseminating its research and scholarship as widely as possible. In particular, as part of a public university system, the Faculty is dedicated to making its scholarship available to the people of California and the world. Furthermore, the Faculty recognizes the benefits that accrue to themselves as individual scholars and to the scholarly enterprise from such wide dissemination, including greater recognition, more thorough review, consideration and critique, and a general increase in scientific, scholarly and critical knowledge. Faculty further recognize that by this policy, and with the assistance of the University, they can more easily and collectively reserve rights that might otherwise be signed away, often unnecessarily, in agreements with publishers.³⁷

Under the adopted policy, faculty members became bound by the following provision:

Each Faculty member grants to the University of California a nonexclusive, irrevocable, worldwide license to exercise any and all rights under copyright relating to each of his or her scholarly articles, in any medium, and to authorize others to do the same, for the purpose of making their articles widely and freely available in an open access repository. Any other systematic uses of the licensed articles by the University of California must be approved by the Academic Senate. This policy does not transfer copyright ownership, which remains with Faculty authors under existing University of California policy.³⁸

While the policy did not apply to scholarly articles published prior to the adoption of the policy or articles for which the author had already assigned copyright to a publisher,³⁹ going forward, the University of California simply obtained—that is, seized—a license with respect to all of a faculty member's scholarly articles, thus limiting grants of copyrights to publishers. Nonetheless, the policy also included an opt-out provision: “[u]pon express direction by a University Author, application of the license will be waived for a particular article or access

36. Univ. of Cal., *Open Access Policy for the Academic Senate of the University of California*, OFF. SCHOLARLY COMM. (July 24, 2013), http://osc.universityofcalifornia.edu/wp-content/uploads/2013/09/OpenAccess_adopted_072413.pdf.

37. *Id.*

38. *Id.*

39. Univ. of Cal., *Open Access Policy*, OFF. SCHOLARLY COMM. 5 (Oct. 23, 2015), http://osc.universityofcalifornia.edu/wp-content/uploads/2015/11/UC-AP-15-0275_Open-Access.pdf [hereinafter UC OA Policy].

to the article will be delayed for a specified period of time.”⁴⁰ Authors—perhaps at the demand of a publisher—could avoid the automatic grant of a license to the university but the presumption was that such a license applied.

In October 2015, a “Presidential Open Access Policy” (POAP) extended the approach beyond faculty members to cover scholarly articles authored by all University of California employees and graduate students and, at the same time, clarified certain aspects of the policy.⁴¹ In particular, the POAP gave detailed procedures for university scholars to follow to comply with the university’s requirements. The POAP specifies that the ordinary procedure is that the university is automatically entitled to the license described above and so the author simply deposits a copy of the published version of the work with the university repository for use consistent with the license that is taken.⁴² Authors may, however, obtain a waiver of the licensing requirement with respect to a particular article by submitting an online form.⁴³ Authors may likewise use online tools to impose an embargo on release of a particular article via the repository for a designated period of time.⁴⁴ Authors can also use online tools to designate their works as governed by a creative commons license.⁴⁵ Finally, the POAP states that, while not required, an author may choose to submit an addendum to a publication agreement specifying the grant of the license to the university, and it provides a link for generating such an addendum.⁴⁶ The University of California system thus streamlines the entire process—the procedures for depositing the article, electing a waiver or embargo, and generating a publishing agreement addendum are all completed online. Additional online tools provide straightforward explanations of the policies and procedures and direct links to the various steps authors may seek to pursue.⁴⁷ Significantly, the university’s default position is that all works are governed by the designated open access license unless the author obtains a waiver and that any subsequent assignment of rights to a publisher is subject to the university’s license.⁴⁸

40. *Id.*

41. UC Presidential OA, *supra* note 32.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. See Univ. of Cal., *UC Open Access Policies*, OFF. SCHOLARLY COMM. (Oct. 23, 2015), <http://osc.universityofcalifornia.edu/open-access-policy/>.

48. Note that because the license is non-exclusive it need not be in writing and signed by the

In adopting its approach, the University of California wisely did not leave it to faculty members to transmit the news to publishers that their copyrights would be limited by a license seized by the university. The university individually contacted some 200 publishers to notify them of the policies and procedures it had adopted and the reasons for them.⁴⁹ Thus far, publishers have generally accepted the new limitations on their copyrights:

Though the vast majority of publishers that UC authors work with have been aware of UC's Senate OA policy for over three years, very few of them have asked authors to opt out of the policy by getting a waiver, and those who have requested waivers have done so inconsistently. No publisher has notified the University that it plans to request waivers from all UC authors as a matter of course.⁵⁰

Most demands for waivers come from a small set of publishers.⁵¹ Thus, most publishers have accepted the open access policy. Indeed, some publishers have even generated, on their own, publishing agreements for University of California authors that include recognition of the university's open access license.⁵²

The University of California's approach has several virtues. Rather than rely upon individual authors to negotiate arrangements with publishers, the default is changed so that the reservation is automatic unless the author opts out with respect to a particular work. In addition, that the policy is adopted and implemented at an institutional level—the massive University of California system—alters the balance of power. Authors are no longer individuals seeking concessions from a publisher. Instead, they have the university behind them. To be sure, the publisher might still insist upon assignment of an unrestricted copyright, but to achieve that, the publisher—not the author—has to initiate the steps to alter the status quo. The publisher realizes that it is not simply seeking to

author in order to be effective. 17 U.S.C. § 205(e) (2012).

49. Univ. of Cal., *Publisher Communications About the UC OA Policies*, OFF. SCHOLARLY COMM., <http://osc.universityofcalifornia.edu/open-access-policy/publisher-communications/> (last visited Aug. 23, 2016).

50. *Id.*

51. *Id.* At the top of the list are *Nature*, *Proceedings of the National Academy of Sciences*, the American Roentgen Ray Society, and the American Association for the Advancement of Science. *Id.*

52. *Id.* Likewise, Harvard reports that “[s]everal publishers have either confirmed that their policies are consistent with the Open-Access Policy or have negotiated an agreement to clarify and simplify procedures for publishing articles that fall under the policy.” Harvard Library, *Publisher Frequently Asked Questions*, OFF. FOR SCHOLARLY COMM., <https://osc.hul.harvard.edu/publishers/faq/> (last visited Mar. 10, 2017).

impose something upon an individual author (whose position can be “This is what my university requires”) but seeking to interfere with the university’s preferred policy. That might have significant ramifications for the publisher: fewer University of California authors submitting works, the university cancelling subscriptions to the publisher’s publications, and professors declining to assign the publisher’s works in class.

Such risks are augmented when other publishers play ball and the university publishes, as it is doing, information about which publishers insist an author obtain a waiver. More generally, the University of California is altering the publishing norms, at least with respect to its own authors: (our) authors do not blindly assign copyrights and when you publish work that comes out of the University of California, it is subject to reservations of certain rights. A downside is the waiver provision: a publisher can still insist upon a complete transfer of copyright. Yet, the evidence suggests such demands are not the norm, so the downside may be quite small. Indeed, the availability of the waiver may help explain the success, so far, of the university’s approach: that there is a waiver available may make the policy more palatable to publishers (and authors).

C. *Nudges*

Between the approach of advising authors how to amend their publishing agreements if they wish to reserve rights and seizing rights lies a middle option: nudging authors—often strongly nudging them—to limit rights assigned in a publishing agreement. Such nudges are often used by entities that provide grants to researchers with respect to the publications that are funded by the grant maker. As a condition of accepting the funding, the grant maker imposes upon the recipient requirements with respect to the distribution of the resulting work. Again, whatever rights the author subsequently gives to a publisher, such rights are meant to be subject to the conditions imposed by the funding entity.

Federal agencies routinely use nudges of this kind.⁵³ The most prominent example is the National Institutes of Health (NIH) which, pursuant to statutory requirements, has had a public access condition in place since 2008.⁵⁴ Researchers who receive NIH funding are required to

53. UC Presidential OA, *supra* note 32. See the website sidebar for series of documents regarding the history of the UC Presidential Open Access Policy.

54. *Frequently Asked Questions about the NIH Public Access Policy*, NAT’L INSTITUTES

submit their final peer-reviewed manuscripts to the digital publicly accessible archive PubMed Central to be made publicly available no later than twelve months after the official date of publication.⁵⁵

Unlike the University of California approach discussed above, NIH does not simply seize a license in the work that results from its funding. Instead, “[i]nstitutions and investigators are responsible for ensuring that any publishing or copyright agreements concerning submitted articles reserve adequate right to fully comply with this policy.”⁵⁶ The NIH advises its grant recipients that “[a]uthors should work with the publisher before any rights are transferred to ensure that all conditions of the NIH Public Access Policy can be met. Authors should avoid signing any agreements with publishers that do not allow the author to comply with the NIH Public Access Policy.”⁵⁷ NIH provides detailed instructions to authors to help ensure the publication agreement contains the appropriate language.⁵⁸ NIH does not generally grant exceptions to its policy.⁵⁹ Should an author fail to comply with the requirement (i.e. not make the funded work available), the author risks forfeiting the grant⁶⁰ and losing the opportunity to receive future NIH grants.⁶¹ The nudge, therefore, is quite strong.

In 2013, the White House Office of Science and Technology Policy (OSTP) issued a memo directing all federal agencies with more than \$100 million in annual R&D expenditures to develop plans to ensure

HEALTH pt. 2, § B, para. 2 (Mar. 25, 2014), <http://publicaccess.nih.gov/faq.htm#753> [hereinafter NIH FAQ]. The Policy implements a statutory requirement. *See* 42 U.S.C. § 282c (2012) (“The Director of the National Institutes of Health (‘NIH’) shall require . . . that all investigators funded by the NIH submit or have submitted for them to the National Library of Medicine’s PubMed Central an electronic version of their final, peer-reviewed manuscripts upon acceptance for publication, to be made publicly available no later than 12 months after the official date of publication: Provided, That the NIH shall implement the public access policy in a manner consistent with copyright law.”).

55. *NIH Grants Policy Statement*, NAT’L INSTITUTES HEALTH § 8.2.2 (Nov. 2016), http://grants.nih.gov/grants/policy/nihgps/html5/section_8/8.2_availability_of_research_results_publications_intellectual_property_rights_and_sharing_research_resources.htm (last visited Apr. 15, 2017).

56. *Id.*

57. NIH FAQ, *supra* note 54, at pt. 2, § B, para. 2.

58. *See When and How to Comply*, NAT’L INSTITUTES HEALTH (Mar. 18, 2014), <http://publicaccess.nih.gov>.

59. NIH FAQ, *supra* note 54, at pt. 2, § A, para. 14 (“We will grant exceptions only under the most extreme circumstances, such as death of the sole author. NIH will consider such exceptions on a case-by-case basis.”).

60. *NIH Grants Policy Statement 8.5: Special Award Conditions and Enforcement Actions*, NAT’L INSTITUTES HEALTH, http://grants.nih.gov/grants/policy/nihgps_2012/nihgps_ch8.htm#_Toc271264977 (last visited Apr. 15, 2017).

61. NIH FAQ, *supra* note 54, at pt. 2, § B, para. 12.

public access to publications and data from the grants they award.⁶² Among other things, the memo provided that “[e]ach agency plan shall . . . [e]nsure that the public can read, download, and analyze in digital form final peer-reviewed manuscripts or final published documents within a timeframe that is appropriate for each type of research conducted or sponsored by the agency,” with agencies directed to “use a twelve-month post-publication embargo period as a guideline for making research papers publicly available”⁶³ Development of these plans appears to be an ongoing project,⁶⁴ and particular requirements vary somewhat by agency.⁶⁵ But as a result, government money comes with conditions designed to incentivize the researcher to avoid giving up wholesale a copyright in funded works.

Beyond government funding programs, many private entities that fund research also impose conditions to promote dissemination of the resulting work product. The Bill and Melinda Gates Foundation, for example, follows an open access policy in order to “enable[] the unrestricted access and reuse of all peer-reviewed published research funded, in whole or in part, by the foundation, including any underlying data sets.”⁶⁶ As a condition of receiving a grant, funded publications and the underlying data must be deposited in an open access repository with appropriate tagging to allow for discoverability.⁶⁷ The publications must also be issued pursuant to a Creative Commons Attribution 4.0 Generic License (the most open license Creative Commons offers) or an equivalent to permit copying and redistribution of the work without permission or fees.⁶⁸ Perhaps most remarkable, the foundation will pay reasonable fees required by a publisher in order to give effect to these requirements.⁶⁹ Other foundations likewise impose open access

62. John P. Holdren, *Memorandum for the Heads of Executive Departments and Agencies* (Feb. 22, 2013), available at <https://www2.icsu-wds.org/files/ostp-public-access-memo-2013.pdf>.

63. *Id.* at 3.

64. See Univ. of Cal., *U.S. Federal Funder Public Access Policies*, OFF. SCHOLARLY COMM., <http://osc.universityofcalifornia.edu/scholarly-publishing/policies-legislation/us-federal-funder-public-access-policies> (last visited Apr. 15, 2017) (reporting on policies adopted by federal funding agencies).

65. See Columbia Univ. Libraries, *Public Access Mandates for Federally Funded Research*, COLUM. U. SCHOLARLY COMM. PROGRAM, <http://scholcomm.columbia.edu/open-access/public-access-mandates-for-federally-funded-research/> (last visited Mar. 10, 2017) (reporting on conditions attached to federal grants).

66. *Bill & Melinda Gates Foundation Open Access Policy*, BILL & MELINDA GATES FOUND., <http://www.gatesfoundation.org/how-we-work/general-information/open-access-policy> (last visited Apr. 15, 2017).

67. *Id.*

68. *Id.*

69. *Id.*

requirements that serve to deter funded researchers from assigning copyright wholesale to a publisher.⁷⁰

Again, there are significant advantages to the nudging approach in the context of funded research. Although individual authors are the ones required to ensure any grant of copyright is made consistent with the funding entity's demands, authors have strong incentives (i.e., risking research funding) to take the necessary steps to comply with those requirements. Further, if the author proves lax, there is likely an institution, such as a university, overseeing administration of the grant and compliance with the funder's requirements. Authors whose work has been funded also approach publishers in a position in which the reservation of a license is insisted upon by a big government agency or other funding entity. On the other side, publishers understand that articles resulting from funded research are subject to the funding conditions. Most researchers will seek a reservation of rights to the funder and few publishers will be in a position to reject the funder's demand because they are very likely to lose the opportunity to publish the associated works. Standardization of funding conditions will mean that everyone—researchers/authors and publishers—will operate under common expectations and adjust their behavior accordingly. Again, rather than individuals simply asking for an exception to the usual publishing terms, the exception is likely to become the norm. Of course, norms can be sticky. Some publishers, for example, have refused to accept the open-access policy of the Gates Foundation and thus declined to publish works by Gates-funded researchers;⁷¹ whether those

70. See, e.g., *Ford Foundation expands Creative Commons licensing for all grant-funded projects*, FORD FOUND. (Feb. 3, 2015), <https://www.fordfoundation.org/the-latest/news/ford-foundation-expands-creative-commons-licensing-for-all-grant-funded-projects/> (requiring funded research be made available under a Creative Commons Attribution 4.0 Generic License); *Intellectual Property Licensing Policy*, KNIGHT FOUND. (Aug. 27, 2015), <http://www.knightfoundation.org/apply/ip-licensing-policy/> (“If you receive a grant from Knight Foundation, the intellectual property developed using those grant funds generally will need to be released to the public under the open-source license most appropriate for your project.”); *Intellectual Property Arising Out of the Use of Foundation Funds*, MACARTHUR FOUND., <https://www.macfound.org/about/our-policies/intellectual-property/> (last visited Mar. 9, 2017) (“The Foundation’s policy is to ensure that use of the Grant Work Product furthers charitable purposes and benefits the public. To that end, the Foundation seeks prompt and broad dissemination or availability of the Grant Work Product at minimal cost to the public [The] Grant Work Product should, whenever feasible, be licensed under a Creative Commons license . . . or other similar scheme that provides for wide distribution or access to the public Ownership of intellectual property rights . . . should not be used to limit or deny access to the Grant Work Product . . . or to create revenue that is not used substantially for charitable purposes.”).

71. See Richard Van Noorden, *Gates Foundation Research Can't be Published in Top Journals*, NATURE (Jan. 13, 2017), <http://www.nature.com/news/gates-foundation-research-can-t>

publishers can maintain their refusal remains to be seen.⁷² In addition, compared to the University of California approach, the nudge does not involve an automatic seizure of a license, so some works may slip through the cracks. On the other hand, the University of California at least couples seizure with an opt-out provision so that there is likewise the possibility of some number of works still being subjected to a wholesale copyright assignment. Further study could determine which approach captures the greater number of works.

III. COPYRIGHT EASEMENTS

Drawing on the three above strategies for avoiding wholesale assignment of copyright—self-help on the part of authors, seizure of licenses, and nudges—allows for the development of a new (and improved) approach: copyright easements. The basic idea of the copyright easement is that an entity (the easement holder) holds a legal interest (an easement) in a copyrighted work that limits what can be assigned to or controlled by anybody else. The legal interest allows the entity to use or to permit others to use the work in ways determined by the nature of the interest that is held.

A. *Easements in Land*

Before discussing the proposal for copyright easements in further detail, a basic description of easements under real property law—the inspiration for the proposal—is useful. As first-year law students learn in real property law, an easement is a non-possessory interest in the land of another.⁷³ As such, an easement is not a mere contractual right: it is a protected property interest that cannot be revoked by the grantor and that in most cases runs with the land when the land is conveyed to somebody else. As a non-possessory interest, the easement confers a right only to use the land (not a right to occupy and possess it), but its existence means that the landowner and the easement holder can simultaneously

be-published-in-top-journals-1.21299 (reporting that Gates-funded researchers have been unable to publish in *Nature*, *Science*, the *New England Journal of Medicine*, and the *Proceedings of the National Academy of Sciences* because those journals have refused the foundation's open access requirements).

72. *See id.* (reporting on statement by Peter Suber, director of the Harvard Open Access Project: "I predict that the Gates Foundation won't compromise. The journals ought to compromise, and in due time, I predict they will.").

73. JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS & LICENSES IN LAND* § 1:1 (2016).

utilize the same parcel of land.⁷⁴ An easement differs from a license to make use of land because, among other reasons, a license can be revoked, whereas an easement is perpetual.⁷⁵ Because an easement is a non-possessory interest in somebody else's land, a landowner cannot obtain an easement in the landowner's own property.⁷⁶

A few distinctions are also helpful. An *appurtenant* easement is an easement that benefits a particular piece of land rather than any particular individual. For example, an appurtenant easement might provide the owner of a neighboring property with a right of way across the land subject to the easement. An *easement in gross*, by contrast, benefits a designated individual without regard to that individual's own land holdings. For instance, an easement in gross could grant a designated individual the right to hunt on the land in question. Significantly, an appurtenant easement runs with the land with respect to both the dominant (i.e., benefited) property and the servient (i.e., burdened) property. An easement in gross runs with the land with respect to the servient property but, because it is personal, it does not run with respect to any dominant property. Traditionally, an easement in gross could *not* be transferred to another individual and thus expired upon the holder's death. However, recent cases have permitted transfers of commercial (but not of non-commercial) easements in gross.⁷⁷

An easement can be granted *expressly* when the property owner assigns the interest to another; under the statute of frauds, because easements are interests in real property, the assignment must be in writing and signed by the grantor.⁷⁸ An easement can also be created by *reservation*, when the property owner reserves to himself an interest in the property at the time ownership of it is conveyed to another. Under some circumstances, courts are willing to recognize an easement as *implied*,⁷⁹ or by *prescription* as a result of adverse use of land.⁸⁰

Easements are also classified as *affirmative* or *negative*. An affirmative easement authorizes the holder to make use of the land in a manner that would otherwise constitute a trespass. A negative easement prohibits the owner of the servient property from making otherwise lawful uses of the land. *Conservation* easements are negative

74. *Id.*

75. *Id.* § 1:4.

76. *Id.* § 3:11.

77. *Id.* § 9:5.

78. *Id.* § 3:1.

79. *Id.* §§ 4:1-4:41.

80. *Id.* §§ 5:1-5:38.

easements.⁸¹ Under a conservation easement, a landowner donates or sells certain property rights in the land to a private organization or public agency, which acts as a trustee or conservator, holding onto the rights. Such rights may include, for example, the right to subdivide the land or develop it in certain specified ways.⁸² Typically, because conservation is the goal, under the terms of the arrangement, the trustee or conservator is bound not to exercise the rights or to permit anybody else to exercise them.⁸³ The property owner can still enjoy use of the land—e.g., live on it, farm it—but cannot exercise the full range of ownership rights.⁸⁴ If the land is later sold, the new owner is likewise limited by the terms of the conservation easement held by the trustee or conservator. Conservation easements can be designed in various ways in light of the conservation goals sought to be achieved and the interests of the landowner in continuing to be able to make use of the land. The underlying idea, though, is conservation: preserving private land in ways that will benefit future generations.⁸⁵ Conservation easements thus typically (though not always) serve public purposes, even if only tangentially. For instance, conservation easements can protect scenic views from public roadways or protect wildlife habitats.⁸⁶ Given these kinds of public benefit, there are, therefore, often federal and state tax benefits available to landowners who enter into such arrangements.⁸⁷ Significantly, the existence of a conservation easement does not mean that there will necessarily be public access to the land, which remains in private hands (though subject to restrictions). Conservation easements can protect landowners from the temptation to sell off their land to developers; no matter what price the developer offers or how much pressure the developer (or perhaps a landowner's heirs) brings to bear, the landowner cannot transfer to the would-be buyer the full range of property rights because any such transfer is subject to the terms of the easement held by the trustee or conservator.

81. *Id.* § 2:10.

82. *Id.* § 12:2. *See also* UNIF. CONSERVATION EASEMENT ACT (2007), available at <http://www.uniformlaws.org/Act.aspx?title=Conservation%20Easement%20Act> (providing text of uniform act adopted by nineteen states and the District of Columbia).

83. BRUCE & ELY, *supra* note 73, at § 12:2.

84. *Id.*

85. *Conservation Easements: What are Conservation Easements?*, NATURE CONSERVANCY, <http://www.nature.org/about-us/private-lands-conservation/conservation-easements/what-are-conservation-easements.xml> (last visited Apr. 15, 2017) (“Conservation easements protect land for future generations while allowing owners to retain many private property rights and to live on and use their land, at the same time potentially providing them with tax benefits.”).

86. BRUCE & ELY, *supra* note 73, at § 12:2.

87. *Id.*

B. *From Real Property to Copyrights*

A framework that roughly tracks easements in land can be readily adopted for copyrights. The basic elements of the framework are as follows:

1. Easement Holder

In a copyright easement, some person or entity other than the copyright owner holds a legal interest in the copyrighted work. That easement holder obtains the interest either automatically (as in the case of seized interest by the University of California) or by assignment by the author of the work.

In order to simply seize an interest in a work, there would almost certainly need to be some kind of pre-existing legal relationship between the author and the seizing party so that, by virtue of having entered into that relationship, the author has consented to the seizure of the interest in his or her copyrighted works. One such relationship is that of employer and employee. As in the University of California approach, a condition of employment is that the employer automatically obtains a legal interest in specified works created by the employee during the course of employment.

Another such possible relationship is through funding of the work. While federal government funders have tended to rely upon nudges, not seizures, a funding entity could automatically obtain an interest in works the author creates using funds provided by the entity. Other kinds of relationships giving rise to an automatic acquisition of a legal interest are imaginable. For instance, authors might become members of organizations that, as a condition of membership, require an automatic assignment of a specified interest in works created by members during the course of their membership. In exchange, the organization would provide members with various benefits including, for example, access to more favorable deals with publishers.⁸⁸

In every such instance, some specification of which works by the author are covered would be needed. This would likely vary by context.

88. Although collective efforts of this nature might seem difficult to arrange, historic examples demonstrate that they can succeed. *See, e.g.*, CATHERINE L. FISK, WRITING FOR HIRE: UNIONS, HOLLYWOOD, AND MADISON AVENUE 241 (2016) (discussing the role of the Writers Guild of America in securing and administering for the benefit of film and television writers screen credit and compensation rules that have lasted “even amid a collapse in union representative in the rest of the private sector” and identifying other “possibilities for collective representation of . . . creative workers in so-called ‘new economy’ jobs.”).

It would be unusual, for instance, for any copyrightable work the author ever creates to be subject to seizure, such that the university scientist who writes musical compositions or mystery novels during the weekend finds those swept up in the arrangement. One useful starting place (though not the only one) for specifying covered works in the context of employment-based seizures is the work-for-hire provision of the Copyright Act.⁸⁹ Under that provision, the employer is already entitled to claim copyright in a work that meets certain criteria: seizing a lesser interest in the work is therefore also feasible. For example, many universities have adopted employment policies under which faculty members own the copyrights in their scholarly works even though the works are prepared during the course of employment and arguably constitute works-for-hire.⁹⁰ A university could adhere to that approach by leaving the copyright in the hands of faculty members but nonetheless acquiring an interest in the scholarly works they produce. On the other hand, given the criteria for the work-for-hire provision to apply, universities (or other employers) might well seek an interest in a broader set of works.⁹¹

89. 17 U.S.C. § 201(b) (2012).

90. See, e.g., *Columbia University Copyright Policy*, COLUM. U. LIBR., <http://www.columbia.edu/cu/provost/docs/copyright.html> (last visited Apr. 19, 2017). Some courts have suggested that there may exist a “teacher exception” to the work-for-hire rules. See, e.g., *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416-17 (7th Cir. 1988) (“[C]onsidering the . . . settled practices of academic institutions, the lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production, and the absence of any indication that Congress meant to abolish the [traditional] teacher exception, we might, if forced to decide the issue, conclude that the exception had survived the enactment of the 1976 Act.”).

91. See 17 U.S.C. § 201(b) (2012) (“In the case of a 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 a written instrument signed by them, owns all of the rights comprised in the copyright.”). Section 101 of the Copyright Act defines a work for hire as either (1) “a work prepared by an employee within the scope of his or her employment” or (2) “a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.” *Id.* § 101. With respect to employment, the category of interest for present purposes, the Supreme Court has adopted from agency law a set of non-exclusive factors to determine whether the requisite employer-employee relationship (rather than one of independent contractor) exists, such that the work created is one for hire. See *Cnty. for Creative Non-Violence v. Reed*, 490 U.S. 730, 751-52 (1989) (“In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to

As an alternative to automatic seizure of an interest, the easement holder could obtain the interest by assignment. The author would transfer a specified interest in a work or set of works to a designated holder. Again, the holder might be an employer or a funding organization. But many other kinds of individuals and entities could also act as easement holders by transfer since the author could assign the interest to anybody at all. One can even imagine entities forming and existing *solely* for the purpose of serving as copyright easement holders.

Automatic acquisition of an interest in a work has certain advantages. One is that there is nothing for the author to do in order for the easement holder to obtain the interest. The easement holder is not, therefore, dependent upon the author fulfilling any formalities. A second advantage is that automatic acquisition binds the author's hands: when the author deals with publishers there is no possibility of assigning to the publisher a complete interest in the work because any such assignment is limited by the interest the easement holder possesses. Therein might also lurk a downside. Some publishers will refuse to publish a work in which somebody else claims a legal interest. The easement holder might, therefore, elect to permit the author to seek an opt-out (as in the University of California system). Here, some caution is warranted: if opt-outs are too easily available, publishers might routinely insist upon them, thus undermining the overall scheme. On the other hand, as the University of California's experience suggests, publishers might accept easements without too much resistance. One reason this might be true is that the termination of transfer provisions of the Copyright Act already limits the alienability of an author's rights. Under those provisions, an author who transfers a copyright has the ability (in accordance with the terms of the Act) to terminate the transfer at a later date. While easements, of course, represent an immediate restraint on alienation (rather than one that, under the termination of transfer provisions, only kicks in thirty-five or forty years down the road), publishers already operate in a world in which they cannot count on holding onto an assigned copyright for its entire duration.⁹²

work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.") (footnotes omitted). While the Court emphasized that "[n]o one of these factors is determinative," it did not explain how these various factors should be weighed against each other. *Id.* at 752.

92. I am grateful to Tim Armstrong for bringing this point to my attention.

2. Easement Terms

Various kinds of interests could be held by the easement holder under the terms of a copyright easement—with different kinds of private and public benefits.

The easement might, for example, give the holder the right to grant a license to authorize the author of the work—or somebody else—to publish the work or portions of it under designated circumstances. Return to our hypothetical Professor Smith. Rather than the university press having complete control through copyright ownership over Professor Smith's book, an easement holder could possess and exercise a right to authorize translations of the work should the publisher decline to do so, to authorize reissue of the work should the publisher end its print run, and to authorize reproductions of individual chapters for, say, classroom use.

The easement could empower the holder to make fair use determinations. Fair use, of course, does not require anybody's permission and the very notion of having to seek it cuts against the basic idea of fair use. But the reality is that it is better to know that a use is not contested—and that the user who is relying upon fair use will not be sued—before proceeding. The easement holder could have power to determine that a use is fair under the Copyright Act—doing so in accordance with what fair use law permits—with such a determination binding upon the publisher as copyright holder. In many cases, an author will be happy to see his or her work used in accordance with fair use provisions, but the easement holder, empowered to make fair use determinations, need not care what authors or publishers believe are desirable uses of a work. The only determination would be whether the use is fair; in some instances, fair uses (for example, in a critical review) will not align with the author's own interests. In sum, rather than, as in the current system, a publisher deciding what uses can be made of a work, those decisions would be turned over to an entity with a different mandate. Indeed, it is possible to imagine easement holders whose only function is to make fair use determinations that bind the copyright holder. Such a function would very likely facilitate fair uses of copyrighted works.

Also imaginable are more dramatic arrangements that approach assignment of virtually all of the rights a copyright protects. For example, the easement holder might itself hold the right to authorize publications of the work. Thus, any potential publisher would need to obtain a publication license from the easement holder. Such a license

could, for instance, provide for exclusive publication for a designated period or in specified formats. The easement holder could specify that should the publisher fail to publish or distribute a work within a designated period, or stop publishing and distributing the work, then the license would expire.

Other types of easements would, like conservation easements in real property, serve more clearly public—rather than private—purposes. For example, as with the examples of the University of California and federal funders discussed above, the easement holder could hold the right to make the work available for public access at some specified time after initial publication. Alternatively, an easement might permit the easement holder to make a work available to the public should the publisher fail to keep it in circulation. Just as some conservation easements allow for public use of protected lands, a copyright easement might also be designed to permit uses of a copyrighted work in ways that would otherwise constitute infringement.

Finally, copyright easements will work best when their scope is defined and other parties have notice of their existence and effect. Recordation of an easement under section 205 of the Copyright Act is therefore desirable.⁹³

C. *Benefits of Copyright Easements*

Copyright easements have significant benefits. First, creating and using copyright easements requires no change in the Copyright Act. Law reviews are filled with proposals to reform the Copyright Act in ways that would enhance the rights of authors, protect fair use, and promote public dissemination of works (among other purposes).⁹⁴ In contrast to

93. See 17 U.S.C. § 205(a) (2012) (“Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office”); *id.* § 205(c) (“Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if . . . (1) the document . . . 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 a reasonable search under the title or registration number of the work; and (2) registration has been made for the work.”). The Copyright Office’s broad interpretation of section 205 suggests an easement would qualify for recordation. See *Circular 12: Recordation of Transfer and Other Documents*, U.S. COPYRIGHT OFF. 3 (last revised Sept. 2016), <https://www.copyright.gov/circs/circ12.pdf> (“A document is considered to ‘pertain to a copyright’ if it has a direct or indirect relationship to the existence, scope, duration, or identification of a copyright, or to the ownership, division, allocation, licensing, transfer, or exercise of rights under a copyright. That relationship may be past, present, future, or potential.”).

94. See, e.g., Steven Bolaños, “Knock, Knock, Knockin’ on (Congress’s) Door”: A Plea to Congress to Amend Section 203 of the Copyright Act of 1976, 41 W. ST. U. L. REV. 391 (2014) (proposing to amend the Copyright Act of 1976 to exclude sound recordings); Thomas M. Byron,

those proposals (most of which have little chance of succeeding),⁹⁵ copyright easements require no amendment to the Copyright Act.⁹⁶ The Act *already* permits copyright owners to divide up and assign to others specified interests a copyright confers. An easement does exactly that. It can be created easily and immediately by private actors without any assistance from lawmakers or enforcers. More generally, copyright easements comport with the strong willingness of courts to enforce contracts in which parties alter the starting points of the Copyright Act and, through contractual arrangements, specify rights and relationships with respect to copyrighted works.⁹⁷ Easements fit squarely within this

For A Protected "Right to Use" in Copyright, 55 IDEA 249 (2015) (proposing a new right to use copyrightable works in certain digital contexts, specifically cloud-computing and virtualization); Joe Donnini, *Downloading, Distributing, and Damages in the Digital Domain: The Need for Copyright Remedy Reform*, 29 SANTA CLARA COMPUTER & HIGH TECH. L. J. 413 (2013) (providing reforms to statutory damages provision of Copyright Act); David R. Hansen, *Copyright Reform Principles for Libraries, Archives, and Other Memory Institutions*, 29 BERKELEY TECH. L. J. 1559 (2014) (advocating reforms to protect interests of libraries); Patrick Koncel, *Did Copyright Kill the Radio Star? Why the Recorded Music Industry and Copyright Act Should Welcome Webcasters into the Fold*, 14 J. MARSHALL REV. INTELL. PROP. L. 292 (2015) (proposing changes to reduce obstacles to digital distribution of music); Kurt E. Kruckeberg, *Copyright "Band-AIDS" and the Future of Reform*, 34 SEATTLE U. L. REV. 1545 (2011) (proposing changes in light of technological developments); Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1 (2010) (advocating stronger protections for creators over intermediaries); Jennifer E. Rothman, *Copyright's Private Ordering and the "Next Great Copyright Act"*, 29 BERKELEY TECH. L. J. 1595 (2014) (suggesting changes to the Copyright Act that would curtail contractual arrangements and other forms of private ordering in some circumstances but allow these mechanisms to flourish in other circumstances); Pamela Samuelson & Members of the CPP, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L. J. 1175 (2010) (discussing various reform proposals to the Copyright Act including with respect to registration, rights granted to authors, judicial authority, fair use, statutory damages, and injunctive relief); Marcy Rauer Wagman & Rachel Ellen Kopp, *The Digital Revolution is Being Downloaded: Why and How the Copyright Act Must Change to Accommodate an Ever-Evolving Music Industry*, 13 VILL. SPORTS & ENT. L. J. 271 (2006) (urging an updating of the Copyright Act to create specific rights for digital content creators and consumers); Hannibal Travis, *Free Speech Institutions and Fair Use: A New Agenda for Copyright Reform*, 33 CARDOZO ARTS & ENT. L. J. 673 (2015) (advocating reforms to the fair use provision of the Act).

95. See generally Pamela Samuelson, *Is Copyright Reform Possible?*, 126 HARV. L. REV. 740 (2013) (discussing possible reforms to copyright law and the challenges in achieving them).

96. One issue that would require resolution is whether an easement constitutes a "grant of a transfer or license of copyright or of any right under a copyright, executed by the author" and is therefore subject to termination. 17 U.S.C. § 203(a) (2012). Arguably, if an author grants the easement it would constitute a "transfer" by the author and thus be subject to termination. On the other hand, if an easement occurs by seizure it might not fall within the scope of section 203 because the author did not transfer anything. The possibility of termination may limit somewhat the benefits of an easement because the easement cannot be made permanent, thus suggesting the need for a statutory reform. On the other hand, easements subject to termination facilitate productive uses of works during the period in which termination cannot be made.

97. See, e.g., *Latin Am. Music Co. v. Am. Soc'y of Composers Authors & Publishers*, 593 F.3d 95 (1st Cir. 2010) (holding that the Copyright Act provision governing transfers of copyright ownership did not apply to termination of an exclusive license issued to a music publisher and so

paradigm.

Second, copyright easements would help level the playing field between authors and publishers. Authors would no longer be presented with publishing contracts under which they are asked to give away the store and left in the position of trying to negotiate individual exemptions. Instead, the author could only ever assign to the publisher what the author holds. Any such assignment would be limited by the terms of the easement.

Third, in addition to protecting the interests of authors, copyright easements (like conservation easements) can generate public benefits. For example, an easement that permits certain forms of licensing of a work can make the work more readily available. An easement holder who can protect fair uses of a work without the need to persuade a reluctant copyright owner serves a broad public goal of the Copyright Act. Significantly, future beneficiaries need not be parties to the original contractual arrangement that results in the easement. In this sense, copyright easements can protect works themselves—rather than (or rather than merely) their creators or those who, by virtue of an assignment, hold a copyright in the work.

CONCLUSION

Copyright easements represent a powerful solution to the problem of wholesale assignment of copyrights from authors and creators to publishers and distributors. Such easements have the potential to generate significant private and public benefits. This Article has sketched the basic proposal for copyright easements but some additional work is needed to make them a reality and ensure their success. In particular, there is a need for careful attention to the design and scope of copyright easements, including consideration of desirable variations

the contractual agreement in relation to the termination prevailed); *Lynn v. Sure-Fire Music Co., Inc.*, 237 Fed. App'x 49 (6th Cir. 2007) (holding that a music artist's state law claims against a music company alleging copyright ownership based on a written amended contract was not preempted by the Federal Copyright Act); *Lipscher v. LRP Publ'ns, Inc.*, 266 F.3d 1305 (11th Cir. 2001) (holding a publisher's breach of contract claim against a competitor was not preempted because the rights created by the contract were not exclusive and not equivalent to copyright protections); *Doody v. Penguin Grp. (USA) Inc.*, 673 F. Supp. 2d 1144 (D. Haw. 2009) (holding the Copyright Act did not preempt a manuscript author's breach of an implied contract claim against a book publisher and authors); *Lee v. Mt. Ivy Press, L.P.*, 827 N.E.2d 727 (Mass. App. Ct. 2005) (holding that a co-author's breach of contract claims against a publishing company and its owner were not preempted by federal copyright law in that the rights the author sought to enforce, contractual obligations freely negotiated and agreed to by the parties, were qualitatively different from the exclusive rights granted by the Copyright Act).

across fields of creativity. Authors and creators will need to be given the practical tools to create easements. Easement holders will also need to be identified and given tools to protect the interests they obtain. Publishers and distributors, accustomed to receiving unfettered copyrights, will need to adjust their practices to the new arrangements easements will produce. These tasks might seem challenging but they are far easier than asking Congress to reform copyright laws—and their payoff will be considerable.