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**NOT-SO-OPEN ACCESS TO LEGAL SCHOLARSHIP:
BALANCING STAKEHOLDER INTERESTS WITH COPYRIGHT
PRINCIPLES**

By Christopher J. Ryan, Jr.*

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I. INTRODUCTION

A. Recent Developments in the Case for Open Access to Scholarly Research

[1] Last February, John P. Holdren, director of the White House Office of Science and Technology Policy, issued a new policy designed to increase open access to federally-financed research.¹ The memorandum, covering federal agencies with annual expenditures in excess of \$100 million for scientific research and development, requires, *inter alia*, that: (1) agencies develop “clear and coordinated policies” to make federally-funded studies freely available to the public within one year of publication,

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¹ See Memorandum from John P. Holdren, Director, Exec. Office of the President, Office of Sci. and Tech. Policy, to the Heads of Exec. Dep’ts and Agencies 1 (Feb. 22, 2013), *available at* http://www.whitehouse.gov/sites/default/files/microsites/ostp/ostp_public_access_memo_2013.pdf.

and (2) researchers account for and manage the digital data resulting from federally-funded scientific research.² In addition, the policy requires data from publicly-funded research to be stored for “long-term preservation and [be] publicly accessible to search, retrieve, and analyze in ways that maximize the impact and accountability of the Federal research investment.”³ The policy also encourages agencies to collaborate with each other as well as with private entities to accomplish these important goals.⁴

[2] This new policy marks an important step toward open access and appears to have satisfied both publishers and most open access advocates.⁵ The policy’s purpose is clear: it rests upon the proposition that citizens deserve easy access to the results of scientific research funded by their tax dollars.⁶ The Office of Science and Technology Policy has examined the

² *See id.* at 1-6.

³ *Id.* at 3.

⁴ *See id.* at 4.

⁵ Scholarly Publishing and Academic Resources Coalition (SPARC), a leader in the open access movement, and the Association of Research Libraries “celebrated the news, calling the new policy ‘historic.’ . . . [T]he Association of American Publishers, which has often clashed with open-access advocates. . . issued a statement calling the policy a ‘reasonable, balanced resolution.’” Jennifer Howard, *Activists and Publishers Cheer Policy on Open Access but Look to Next Battle*, CHRON. HIGHER EDUC., Mar. 8, 2013, at A6; *see The Fair Access to Science and Technology Research Act (FASTR)*, AM. LIBR. ASS’N, <http://www.ala.org/advocacy/access/legislation/fastr> (last visited Nov. 6, 2013). For more information on SPARC, such as its Author Addendum and discussion of author rights, *see SPARC Author Addendum to Publication Agreement*, SPARC, www.sparc.arl.org/resources/authors/addendum-2007 (last visited Nov. 17, 2013).

⁶ *See* Memorandum from John P. Holdren, *supra* note 1, at 1 (“The Administration is committed to ensuring that, to the greatest extent and with the fewest constraints possible and consistent with law and the objectives set out below, the direct results of federally funded scientific research are made available to and useful for the public, industry, and the scientific community.”).

issue at length by soliciting stakeholder input and convening an interagency work-group to develop a policy that would balance these often divergent interests.⁷ Among the stakeholders considered were “scientists and scientific organizations, publishers, members of Congress, and other members of the public,” all of whom recognize the importance of meeting the demand for expanded access to the results of publicly-funded research.⁸

[3] The policy inspired congressional interest, resulting in the Fair Access to Science and Technology Research Act of 2013—bipartisan companion bills in the House and Senate. The companion bills’ aim is to make having the results of federally-financed research publicly available within six months of publication the law of the land rather than the precedent of one presidential administration.⁹ Between the policy and the legislation, the timelines for open access after publication differ by six months.¹⁰ That said, the functional effect of the policy and legislation is

⁷ Michael Stebbins, *Expanding Public Access to the Results of Federally Funded Research*, OFF. SCI. & TECH. POL’Y (Feb. 22, 2013, 12:04 PM), <http://www.whitehouse.gov/blog/2013/02/22/expanding-public-access-results-federally-funded-research>.

⁸ *Id.* To wit, “over [sixty-five] thousand of [these stakeholders] recently signed a *We the People* petition asking for expanded public access to the results of taxpayer-funded research.” *Id.*

⁹ See Howard, *supra* note 5, at A6; see also Fair Access to Science and Technology Research Act of 2013, H.R. 708, 113th Cong. (1st Sess. 2013); Fair Access to Science and Technology Research Act of 2013, S. 350, 113th Cong. (1st Sess. 2013). It should be noted that presenting companion bills—of any kind—in the House and Senate with bipartisan support in the 113th Congress is no small feat.

¹⁰ Compare Memorandum from John P. Holdren, *supra* note 1, at 3 (“[E]ach agency plan shall . . . use a twelve-month post-publication embargo period as a guideline for making research papers publicly available . . .”), with Fair Access to Science and Technology Research Act of 2013, H.R. 708, 113th Cong. § 4(b)(4) (1st Sess. 2013), and Fair Access to Science and Technology Research Act of 2013, S. 350, 113th Cong. (1st Sess. 2013) (“Each Federal research public access policy shall provide for . . . free online public

identical: providing a temporal window in which publishers and researchers may capture the value of the publication of new studies while also allowing for public use once these economic interests have been realized.

[4] Though both the policy and legislation explicitly cover scientific data, research, and journal articles, each course of action also has the potential to impact scholarship broadly, including federal agencies in the humanities and social sciences.¹¹ Moreover, both documents specifically contemplate the significance of public digital access to all academic scholarship, without simply confining its importance to the sciences.¹² Also, anticipating the end result of recent digital publication trends, both the policy and legislation underscore the effectiveness of digital documentation as a superior medium for storing, archiving, and transmitting data, while acknowledging the limitations of paper as a medium for the same purposes.¹³

access to such final peer-reviewed manuscripts or published versions as soon as practicable, but not later than [six] months after publication in peer-reviewed journals.”).

¹¹ See Howard, *supra* note 5, at A6 (noting that the policy may impact agencies such as the Smithsonian Institution or the National Endowment for the Humanities).

¹² See generally H.R. 708; S. 350; Memorandum from John P. Holdren, *supra* note 1, at 1.

¹³ See Timothy K. Armstrong, *Crowdsourcing and Open Access: Collaborative Techniques for Disseminating Legal Materials and Scholarship*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 591, 592 (2010) (“A wealth of knowledge, including legal knowledge, remains effectively trapped inside paper records, where it can be used only by those with access to the physical medium in which it is contained. The movement to digitize paper records and make them freely available online promises to liberate information, including legal information, from these physical constraints and make it accessible around the globe.”). For example, the Library of Congress has undertaken the digitizing of historical American documents and source texts for its American Memory Project. See *id.* at 606 n.69. In addition, the Google Books project, which aimed to increase open access to scholarship, was the recent subject of copyright litigation. See *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 669-70 (S.D.N.Y. 2011) (denying Google’s settlement agreement with plaintiff authors and publishers who alleged copyright infringement of digitally copied books and writings without authorization).

[5] The policy and the legislation correspond to a rising wave of broad interest in digital access to all scholarship, not simply federally-funded, scientific scholarship. It is conceivable, then, that this regime may have opened the door to requiring open access in all academic scholarship, regardless of discipline—particularly considering that the federal government awards more than \$40 billion each year to American universities for research purposes.¹⁴ Should the legislation or a similar statute pass into law, it would necessitate clear guidance for all academic

However, with vast reserves of knowledge in print, the trouble with digitizing extant scholarship is the enormity of the task; even the most organized and well-funded efforts simply cannot make appreciable progress in this regard. In fact, the Library of Congress estimated that, at its current pace, it would take “*almost two thousand years* to digitize the nine billion text records it presently holds in its collection.” Armstrong, *supra* at 592-93.; see Katie Hafner, *History, Digitized (and Abridged)*, N.Y. TIMES (Mar. 10, 2007), <http://www.nytimes.com/2007/03/10/business/yourmoney/11archive.html?pagewanted=all&r=0>. But see Stacey Patton, *Group Advocates Option of Longer Embargoes on Digital Dissertations*, CHRON. HIGHER EDUC., Aug. 2, 2013, at A9 (“The American Historical Association has published a new policy statement that ‘strongly encourages’ graduate programs and university libraries to allow new Ph.D.’s to extend embargoes on their dissertations in digital form for as many as six years. The association says its stance seeks to balance the competing ideals of the profession: timely dissemination of new historical knowledge and the ability of young historians to choose when to release their research without jeopardizing a future publishing contract or tenure. . . . ‘History has been and remains a book-based discipline,’ the statement says, ‘and the requirement that dissertations be published online poses a tangible threat to the interest and careers of junior scholars in particular.’”).

¹⁴ See H.R. 708; S. 350; Memorandum from John P. Holdren, *supra* note 1, at 3-6; see also CHRISTINE M. MATTHEWS, CONG. RESEARCH SERV., R41895, FEDERAL SUPPORT FOR ACADEMIC RESEARCH 9 (2012), available at <http://www.fas.org/sgp/crs/misc/R41895.pdf>; 24/7 Wall St., *10 Universities that Receive the Most Government Money*, HUFFINGTON POST (Apr. 29, 2013, 3:57 PM), http://www.huffingtonpost.com/2013/04/27/universities-government-money_n_3165186.html. See generally JOHN V. LOMBARDI, ET AL., CTR. FOR MEASURING U. PERFORMANCE, THE TOP AMERICAN RESEARCH UNIVERSITIES: 2011 ANNUAL REPORT (2011), available at <http://mup.asu.edu/research2011.pdf> (analyzing research expenditures and different standards of achievement for universities throughout the United States).

scholarship, carefully balancing publishers' interests with those of authors, institutions, and the public.

B. The Open Access Movement and the Internet

[6] The Open Access Movement promotes robust public digital access, via the Internet, to peer-reviewed scholarly work—usually free of charge.¹⁵ The low cost of digitally publishing and disseminating scholarship, when compared with the average cost of publishing scholarship in print, has been a significant boon to the argument for open access.¹⁶ Additionally, Open Access Movement advocates point to the practicality of the Internet as a more convenient, if not increasingly more popular, source for publishing, disseminating, and accessing scholarly work.¹⁷ After all, the expediency of immediately downloading scholarship free of charge from a centralized digital repository—not to

¹⁵ See Peter Suber, *Open Access Overview*, EARLHAM COLL., <http://legacy.earlham.edu/~peters/fos/overview.htm> (last visited Nov. 8, 2013) [hereinafter *Open Access Overview*]. This is particularly the case with a flavor of open access known as “gratis open access.” See Peter Suber, *Gratis and Libre Open Access*, SPARC, <http://www.sparc.arl.org/resource/gratis-and-libre-open-access> (last visited Nov. 8, 2013); see also Sean Burns, et al., Lecture for the University of Kentucky Open Access Week, #Altmetrics: Demystifying the Link between Research Impact and Social Media (Oct. 22, 2013) (supporting the use of scholarly blogs and gratis open-access publications for consideration by tenure committees in academic portfolios). For a strong explanation and apology of the Open Access Movement by the former national president of the Association of University Professors, see Cary Nelson, *Open Access and Academic Freedom*, INSIDE HIGHER ED (Nov. 15, 2013), <http://www.insidehighered.com/views/2013/11/15/essay-impact-open-access-requirements-academic-freedom>.

¹⁶ See *Open Access Overview*, *supra* note 15. Primarily, the two vehicles for delivering open access to research articles to the public are open-access journals and open-access archives or repositories. See *id.*; see also Burns, et al., *supra* note 15.

¹⁷ See Robinson Meyer, *How Open-Access Scholarship Improves the Internet*, ATLANTIC (Aug. 5, 2013, 2:43 PM), <http://www.theatlantic.com/technology/archive/2013/08/how-open-access-scholarship-improves-the-internet/278371/>.

mention from the convenience of the reader's computer, tablet, or smart phone—objectively trumps traveling to a research library to perform a lengthy search for the desired scholarly article.¹⁸

[7] But the Open Access Movement, which has itself benefitted greatly from the rise of Internet, also benefits the average user across a multitude of digital media platforms.¹⁹ This is because public digital access to scholarship makes the public's vast storehouse of "knowledge"—Wikipedia, which, importantly, services the search functions for much of Apple's Siri and Google—more reliable.²⁰ Although secondary and tertiary source sites and programs currently underutilize existing digital scholarly repositories,²¹ there is "a potential symbiosis between Wikipedia and academic research in institutional repositories,"²² because as open-access repositories become more comprehensive, they ensure that the highest caliber of research becomes the primary source for online bloggers, editors, and even the casual Siri query.²³

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *See id.*; *see, e.g.*, Frederic Lardinois, *Apple Updates Siri with Twitter, Wikipedia, Bing Integration, New Commands and Male and Female Voices*, TECH CRUNCH (June 10, 2013), <http://techcrunch.com/2013/06/10/apple-updates-siri-with-twitter-wikipedia-bing-integration-new-commands-and-male-and-female-voice/>.

²¹ For example, Wikipedia cites to less than one percent of any digital repository's articles. *See Meyer, supra* note 17; *see also* Alistair G. Smith, *Wikipedia and Institutional Repositories: An Academic Symbiosis?*, in PROCEEDINGS OF THE ISSI 2011 CONFERENCE: INTERNATIONAL CONFERENCE OF THE INTERNATIONAL SOCIETY FOR SCIENTOMETRICS & INFORMETRICS 794, 797 (2011), *available at* http://www.vuw.ac.nz/staff/alastair_smith/publns/SmithAG2011_ISSI_paper.pdf.

²² Smith, *supra* note 21, at 800.

²³ *See Meyer, supra* note 17.

[8] At its core, open access, particularly public access to scholarly research, is grounded in considerations of transparency, accountability, democratic legitimacy, and the fulfillment of perhaps the most fundamental function of academia—providing educational service for the public.²⁴ This Article seeks to address the varied stakeholder interests in academic scholarship—specifically legal scholarship. In Part II, this Article presents a current picture of legal academe and explains the process by which academic scholarship is accessed. Part III explores the scholarship incentive scheme and evolution of policy and case law defining copyright and ownership interests in scholarship, and applies these principles to the modern employment relationship between faculty member and university. In Part IV, this Article addresses concerns that an author’s interests are hampered by the university’s ownership of copyrighted works and discusses the economic and social implications of open access to legal scholarship. Finally, Part V endeavors to recommend considerations for model policy impacting open access to scholarship.

II. ACADEMIC SCHOLARSHIP TODAY

A. A Snapshot of the Current State of Legal Academe

[9] When *U.S. News & World Report* began publishing law school rankings in 1987,²⁵ a new era of insularity, competition for new students, and fixation on standings relative to peer institutions took hold of legal

²⁴ See Armstrong, *supra* note 13, at 593, 597.

²⁵ Paul L. Caron & Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEX L. REV. 1483, 1510 (2004). For a concise history of the *U.S. News & World Report* law school rankings, see *id.* at 1509-11. At the time of this article’s publication, the most recent *U.S. News* law school rankings are available at USnews.com. *Best Law School Rankings 2014*, US NEWS, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited Oct. 9, 2013).

academe.²⁶ Pierced by a combination of “*U.S. News*-driven ranking mania, law schools’ insatiable hunger for growth, and huge law firms’ obsession with profit above all else,” the bubble burst.²⁷ In January 2013, the Law School Admission Council reported that law school admission applications were headed for a thirty-year low, in part, because of “increased concern over soaring tuition, crushing student debt, and diminishing prospects of lucrative employment upon graduation.”²⁸ The

²⁶ See Steven J. Harper, *Pop Goes the Law*, CHRON. REV., Mar. 15, 2013, at B6-B7 (blaming “the bursting of the law bubble” on, among other things, “decades of greed and grandiosity[,] . . . the profession’s darker side, including the recession’s exacerbation of the attorney glut, . . . [and the fact that] law schools and the American Bar Association [] abdicated their responsibilities in . . . an effort to satisfy the mindless criteria underlying law-school rankings, especially *U.S. News & World Report’s* annual list”). In reality, the decline in law schools is more nuanced, but is inextricably tied to the decline of the economy during the Great Recession and the resulting decline in demand for law jobs.

²⁷ *Id.* at B6; see Ronald G. Ehrenberg, *American Law Schools in a Time of Transition*, 63 J. LEGAL EDUC. 98, 98 (2013) (“The economic model for law schools is breaking down because of the collapse of the job market for new lawyers, making it difficult to justify ever increasing tuition levels.”); Genevieve Blake Tung, *Academic Law Libraries and the Crisis in Legal Education*, 105 L. LIBR. J. 275, 275 (2013); Ethan Bronner, *Law School Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES (Jan. 30, 2013), http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html?_r=0 (“‘We are going through a revolution in law with a time bomb on our admissions books,’ said William D. Henderson, a professor of law at Indiana University, who has written extensively on the issue. ‘Thirty years ago if you were looking to get on the escalator to upward mobility, you went to business or law school. Today, the law school escalator is broken.’”).

²⁸ Bronner, *supra* note 27; see also Staci Zaretsky, *Law School Applications Plummet*, ABOVE THE LAW (Aug. 20, 2013, 11:08 AM), <http://abovethelaw.com/2013/08/law-school-applications-continue-to-tumble/>. This could well be a response to the bleak marketplace for full time, permanent attorney jobs available to recent law graduates. See Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL STREET J. (June 25, 2012, 10:18 AM), <http://online.wsj.com/news/articles/SB10001424052702304458604577486623469958142>. Worse yet for the future of the legal profession, significantly less “qualified” prospective law school applicants sat for the LSAT in 2012 than did in 2011, suggesting that the wrong students—the top performers—have written off their plan to pursue a law degree. See Jordan Weissmann, *The Wrong People Have Stopped Applying to Law*

number of law school applicants this year—54,000—is nearly half of what it was in 2004.²⁹

[10] As the volume of law school applications rose in the last quarter of the twentieth century, universities increasingly treated their law schools as profit centers: while data from private law schools is virtually inaccessible, a 2010 report from the University of Baltimore School of Law corroborates a widely held view that universities appropriate between twenty and twenty-five percent of their law schools' gross revenues.³⁰ Dwindling applications and enrollment in the last few months has prompted law schools to layoff and buyout valuable employees.³¹ Many

School, ATLANTIC (April 10, 2012, 10:37 AM), <http://www.theatlantic.com/business/archive/2012/04/the-wrong-people-have-stopped-applying-to-law-school/255685/>.

²⁹ See *id.*; see also Harper, *supra* note 26, at B6.

³⁰ See Harper, *supra* note 26, at B7. Perhaps, for this very reason, a respected two-year law degree—or at least an optional third year—is a pipe dream. See Matt Barnum, *The Two-Year Law Degree: A Great Idea That Will Never Come to Be*, ATLANTIC (Nov. 12, 2013, 8:53 AM), <http://www.theatlantic.com/education/archive/2013/11/the-two-year-law-degree-a-great-idea-that-will-never-come-to-be/281341/>.

³¹ See, e.g., David Lat, *A Law School's Possible Purge of Its Junior Faculty Ranks*, ABOVE THE LAW (July 1, 2013, 4:05 PM), <http://abovethelaw.com/2013/07/a-law-schools-possible-purge-of-its-junior-faculty-ranks/>; Debra Cassens Weiss, *'Massive Layoffs' Predicted in Law Schools Due to Big Drop in Applicants*, A.B.A. J. (Jan. 31, 2013, 6:37 AM), http://www.abajournal.com/news/article/massive_layoffs_predicted_in_law_schools_due_to_big_drop_in_applicants; Jon Wolper, *Vermont Law School Gives Buyouts to Ten Workers*, VALLEY NEWS (Jan. 18, 2013), <http://www.vnews.com/news/3896880-95/buyouts-laid-law-members>; Staci Zaretsky, *Much-Maligned Law School Conducts Faculty and Staff Layoffs*, ABOVE THE LAW (Aug. 16, 2013, 12:09 PM), <http://abovethelaw.com/2013/08/much-maligned-law-school-conducts-faculty-and-staff-layoffs/> (referencing extensive layoffs at Thomas Jefferson School of Law). See generally Erin Fuchs, *The Law School Crisis Could Crush 'Stand-Alone' Schools*, BUS. INSIDER (Jan. 31, 2013, 5:33 PM), <http://www.businessinsider.com/which-law-schools-might-fail-2013-1>.

have attacked the *U.S. News* methodology for compiling its law school rankings as a source of fuel for the conflagration that has engulfed legal education in recent months,³² even suggesting that faculty production of scholarship is so vital to legal academe that SSRN output should be the measure of a law school's faculty.³³ Whatever the cause of these

³² Professor Harper argues that “[f]lawed methodology infects each category—quality assessment, selectively, placement, and resources.” Harper, *supra* note 26, at B7. For example,

[q]uality assessment is the biggest contributor to a law school's *U.S. News* ranking, accounting for [forty] percent of its total score. The category itself is a misnomer because it doesn't reflect quality at all. Rather, using statistically suspect samples of scholars and practicing lawyers, it's a superficial and unreliable assessment of a school's reputation.

Id. At the same time, Professors Black and Caron recognize that

legal scholars can neither cede to a news magazine the task of measuring our performance, nor pretend that the *U.S. News* rankings do not matter, nor simply complain about their weaknesses and hope they will improve over time. Instead, we need to produce our own measures that capture attributes that *U.S. News* misses.

Bernard S. Black & Paul L. Caron, *Ranking Law Schools: Using SSRN to Measure Scholarly Performance*, 81 *IND. L.J.* 83, 84 (2006). For a discussion of *U.S. News'* rankings methodology, see Sam Flanigan & Robert Morse, *Methodology: Best Law School Rankings*, *U.S. NEWS & WORLD REP.* (Mar. 11, 2013), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2013/03/11/methodology-best-law-schools-rankings>.

³³ See Black & Caron, *supra* note 32, at 84-85 (“The methods for ranking the scholarly performance of law faculties include reputation surveys . . .[,] publication counts . . .[,] and citation counts . . . Each offers a useful but partial picture of faculty performance. Our modest claim is that SSRN-based measures can offer a different, also useful, albeit also partial, picture that has its own set of limits and biases, but at the same time can address some of the deficiencies in other measures.”). See generally Richard A. Danner et al., *The Durham Statement Two Years Later: Open Access in the Law School Journal Environment*, 103 *LAW LIBR. J.* 39 (2011), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2988&context=faculty_scholarship; James M. Donovan & Carol A. Watson, *Citation Advantage of Open Access Legal Scholarship*, 103 *LAW LIBR. J.* 553 (2011), available at

problems, the landscape of legal academe—a historically immutable field³⁴—is incontrovertibly changed and must adapt to the modern market to reestablish its relevancy. Doing so requires reclaiming the primary public functions of legal academe: (1) keeping up with the needs of the profession and the public,³⁵ and (2) educating the profession and the public on legal affairs.³⁶

B. Access to Legal Scholarship

[11] Academic scholarship is subject to the practices of the proprietary publishing industry, which, for both academicians and universities, places certain restrictions on scholarship: from access policies and subscription fees to the copyright assignment requirement of several scholarly

http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1026&context=law_lib_a_rthop.

³⁴ See, e.g., LAURENCE A. WEINSTEIN, MOVING A BATTLESHIP WITH YOUR BARE HANDS: GOVERNING A UNIVERSITY SYSTEM 4, 6 (1993) (comparing, hyperbolically, effecting change in academic institutions to “moving a battleship with your bare hands”); Neil R. Kestner, *The Changing Landscape of Academics as Affected by New Communications Technology*, in THE TRANSITION FROM PAPER: WHERE ARE WE GOING AND HOW WILL WE GET THERE? (R. Stephen Berry & Anne Simon Moffat eds., 2001), available at <https://www.amacad.org/content/publications/pubContent.aspx?d=562>. As an aside, I would like to include a paraphrased joke told to me by a former-state-supreme-court-justice-turned-law-school dean, who shall remain nameless: “If you took an architecture professor from fifty years ago and placed him in an architecture classroom today, he wouldn’t have the foggiest idea where he is. However, if you took a law professor from the last century and put him at the front of a classroom today, he would be right at home lecturing on *Palsgraf*.”

³⁵ See Bronner, *supra* note 27.

³⁶ “[E]xploring whether data about papers posted on the Social Science Research Network (SSRN) can supplement existing methods for ranking law school faculties,” Professors Black and Caron believe that the result will inure to the benefit of the public as well as create a more transparent and objective picture of legal academe. Black & Caron, *supra* note 32, at 84-85.

journals.³⁷ In the last decade, university libraries have been forced to choose between purchasing monographs and journal subscriptions, or undergoing complete deaccession of non-essential materials; in contrast, the proprietary publishing industry has continued to enjoy considerable profit margins.³⁸ This is not to say the proprietary publishing industry is the villain in this story; it does, however, account for publishing the lion's share of academic scholarship to the exclusion of resources that promote open access.³⁹

[12] The publication of American legal scholarship, on the other hand, follows somewhat of a different model from that of the other academic disciplines; it is lacking in many of the complications that are commonplace in, for example, publishing scientific scholarship.⁴⁰ While

³⁷ Especially given that articles are submitted and peer-reviewed virtually free of charge to scholarly journals, these practices lack justification and “seem fundamentally unfair.” Alissa Centivany, *Paper Tigers: Rethinking the Relationship Between Copyright and Scholarly Publishing*, 17 MICH. TELECOMM. & TECH. L. REV. 385, 385-86 (2011), available at <http://www.mtlr.org/volseventeen/centivany.pdf>; see also *Columbia University Senate Endorses Resolution on Open Access and Scholarly Communication*, COLUM. U. LIBR./INFO. SERVICES (Apr. 4, 2005), http://library.columbia.edu/news/libraries/2005/20050421_open_access.html (“[T]echnological, legal[,] and economic barriers continue to be erected to obstruct . . . open access”); Jennifer Howard, *U. of California Tries Just Saying No to Rising Journal Costs*, CHRON. HIGHER EDUC. (June 8, 2010), <http://chronicle.com/article/U-of-California-Tries-Just/65823/>.

³⁸ See Centivany, *supra* note 37, at 386; Karla Hahn, *ALR Statement to Scholarly Publishers on the Global Economic Crisis*, RES. LIBR. ISSUES, Feb. 2009, at 6, 6-11, available at <http://publications.arl.org/n8218.pdf>; MLA Ad Hoc Comm. on Future of Scholarly Publ'g, *The Future of Scholarly Publishing*, in PROFESSION 2002, at 172, 172-75 (Phyllis Franklin ed. 2002).

³⁹ See Centivany, *supra* note 37, at 411-12.

⁴⁰ See Jessica Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779, 782-83 (2006), available at <http://law.lclark.edu/live/files/9593-lcb104litmanpdf>.

commercial law journals,⁴¹ learned law society journals,⁴² refereed law journals,⁴³ and peer-reviewed law journals⁴⁴ do exist, their market share is overshadowed by law journals published by or affiliated with American law schools.⁴⁵ Outside grants rarely fund the production of legal research; in many ways legal publishing already employs open access funding initiatives, similar to how universities encourage open access publishing of scholarship from the other academic disciplines, such as underwriting the “author pays” approach to open-access publishing,⁴⁶ and instituting

⁴¹ A number of proprietary legal publishers operate commercial journals, such as Thomson West’s Intellectual Property Law Review. *See generally Intellectual Property Law Review*, LEGAL SOLUTIONS, <http://legalsolutions.thomsonreuters.com/law-products/Law-Reviews-and-Journals/Intellectual-Property-Law-Review/p/100027780> (last visited Nov. 8, 2013). Since the days of the early republic, commercial publishing of legal scholarship was a dubious business prospect. For an intriguing history of legal scholarship publication in America, see Ross E. Davies, *The Original Law Journals*, 12 GREEN BAG 2D 187, 187-90 (2009).

⁴² For example, the American Bar Association, the Copyright Society of the U.S.A. and the American Intellectual Property Association also operate their own journals. *See generally* ABA JOURNAL, <http://www.abajournal.com> (last visited Nov. 8, 2013); COPYRIGHT SOC’Y U.S.A., <http://www.csusa.org/?page=Journal> (last visited Nov. 8, 2013); AIPLA, <http://www.aipla.org/learningcenter/library/books/qj/Pages/default.aspx> (last visited Nov. 8, 2013).

⁴³ *See, e.g., Journal of College and University Law*, UNIV. NOTRE DAME <http://www3.nd.edu/~jcul/> (last visited Nov. 8, 2013).

⁴⁴ *See, e.g., J.L. TECH & POL’Y*, <http://www.illinoisjltp.com/journal/> (last visited Nov. 8, 2013); *J. PHIL. SCI. & L.*, <http://www.jpsl.org> (last visited Nov. 8, 2013).

⁴⁵ *See* LEXISNEXIS, 2005 DIRECTORY OF LAW REVIEWS vii (Michael H. Hoffheimer comp., 2004) (listing American law schools’ law reviews). *See generally Law Journals: Submissions and Ranking, 2005-2012*, WASH. & LEE U. SCH. L. LIBR., <http://lawlib.wlu.edu/LJ/index.aspx> (last visited Nov. 8, 2013) (choose journals published in the “US”; narrow to “student-edited” journals).

⁴⁶ One such example is the Compact for Open-Access Publishing Equity, committing its signatories to underwrite the costs associated with “author-pays” models of open access scholarly publishing. *Compact for Open-Access Publishing Equity*, OACOMPACT.ORG, <http://www.oacompact.org/compact/> (last visited Nov. 8, 2013). Using this method of

policies to promote faculty contributions to open repositories or journals.⁴⁷

[13] Critics suggest that an open-access publishing model is unrealistic, ignores vital market factors, and is premised on a deficient understanding of business.⁴⁸ Because open-access publishing methods are largely untested, do not enjoy the same readership, and have not as yet developed a financially viable model, these same critics caution that authors and publishers should be wary of open access publishing—after all, someone must pay the costs associated with publishing scholarship.⁴⁹ These

open-access publishing, the costs associated with publication are often paid by the author or the institution with which the author is affiliated. See, e.g., *Berkeley Research Impact Initiative: Advancing the Impact of UC Berkeley Research*, U.C. BERKELEY LIBR., <http://www.lib.berkeley.edu/brii/> (last updated Apr. 24, 2013); *JH Libraries Open Access Promotion Fund*, JOHNS HOPKINS SHERIDAN LIBR., <http://guides.library.jhu.edu/content.php?pid=315747&sid=2802982> (last visited Nov. 8, 2013).

⁴⁷ Universities that have instituted such policies include Cambridge neighbors, Harvard University and the Massachusetts Institute of Technology. See *MIT Faculty Open Access Policy*, SCHOLARLY PUBL'G MIT LIBR., <http://libraries.mit.edu/scholarly/mit-open-access/open-access-at-mit/mit-open-access-policy/> (last visited Nov. 8, 2013); *Open Access Policies*, HARV. U. LIBR., <http://osc.hul.harvard.edu/policies> (last visited Nov. 8, 2013).

⁴⁸ See Litman, *supra* note 40, at 780 (“Nobody, [critics] insist, has yet demonstrated that open access publishing can generate profits, or even support a nonprofit periodical as a going concern.”); see also David Tempest, *Open Access: Developing New Publishing Models, Editor’s Update*, ELSEVIER (Mar. 18, 2012), <http://editorsupdate.elsevier.com/issue-35-march-2012/a-focus-on-open-access-development-of-new-publishing-models/> (“Blind adherence to open-access idealism is untenable from an economic perspective, even with an all-digital publishing model.”).

⁴⁹ See Litman, *supra* note 40, at 782-83; see also *Memorandum on Creative Commons Licenses*, ASS’N LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE (Jan. 22, 2006), http://www.alai-usa.org/recent_developments.htm (follow “Memorandum from ALAI” hyperlink) (“*Caveat auctor!* Let the author beware before she chooses! A [Creative Commons] license may be appropriate and desirable for some authors, particularly academics, but, given the dangers the license poses to authors’ prospects for control over and compensation for their works, the decision to license should be made with a full

arguments, however, are considerably less convincing in their application to legal scholarship.

[14] Legal scholarship presents the most straightforward case for open-access publishing because of its unique independence from market factors and reduced reliance on the commercial publishers relative to its peer academic disciplines.⁵⁰ The cost of publishing legal scholarship in law journals is substantially underwritten by the universities with which the law schools are associated, “to an extent that dwarfs both the mailing and printing costs that make up law journals’ chief budgeted expenditures and the subscription and royalty payments that account for their chief budgeted revenues.”⁵¹ Furthermore, the majority of American law journals rely on unpaid law students to select and edit legal scholarship, and no one participating in the law journal publishing process—from research, writing, selecting, editing, and publication—does so because of copyright incentives.⁵² Perhaps the investment of the law students and their institutions in the production and dissemination of legal scholarship through their law journals—possibly even the very purpose of legal academe—is enhanced by open access publishing.⁵³

appreciation of the possible consequences.”).

⁵⁰ See Dan Hunter, *Walled Gardens*, 62 WASH. & LEE L. REV. 607, 623-24 (2005). That being the case, in law schools around the country the tide is only now finally turning so that electronic sources are more widely accepted in legal writing. See Ellie Margolis, *It’s Time to Embrace the New—Untangling the Uses of Electronic Sources in Legal Writing*, 23 ALB. L.J. SCI. & TECH. 191, 191-93 (2013).

⁵¹ Litman, *supra* note 40, at 783.

⁵² *Id.* (“[C]opyright is sufficiently irrelevant that legal scholars, the institutions that employ them, and the journals that publish their research tolerate considerable uncertainty about who owns the copyright to the works in question, without engaging in serious efforts to resolve it.”).

⁵³ See *id.*

III. THE MISALIGNED INCENTIVE SCHEME IN ACADEMIC SCHOLARSHIP

[15] Incentives to encourage academic scholarship in legal academe vary slightly from other disciplines. However, across all disciplines, the majority of publishers of academic scholarship charge expensive subscription fees and limit access by conditioning publication on the scholar's transfer of copyright interests.⁵⁴ Scholars' willingness to transfer their copyright interests to publishers is the product of a system that lacks sufficient incentives for the scholars.⁵⁵ In academia, the *credo* is, and may always be, "publish or perish;" a faculty member's growing *curriculum vitae* and publication record is often the measure of his or her professional performance.⁵⁶

⁵⁴ Centivany, *supra* note 37, at 387; *see, e.g., Retain Certain Copyrights*, U. CAL., http://osc.universityofcalifornia.edu/manage/retain_copyrights.html (last visited Nov. 8, 2013) ("Traditionally[,] . . . publishers require the transfer of the entire bundle of rights as a condition of publication."). As described above, some universities encourage open-access publishing with explicit policies; however, these policies often waive the requirement to the extent that it conflicts with the terms of a publisher's copyright transfer agreement. *See, e.g., Open Access Policy Guidelines*, HARV. U. LIBR., http://osc.hul.harvard.edu/authors/policy_guide (last visited Nov. 8, 2013); *Request a Waiver*, HARV. U. LIBR., <http://osc.hul.harvard.edu/authors/waiver> (last visited Nov. 8, 2013).

⁵⁵ *See* Centivany, *supra* note 37, at 387-88.

⁵⁶ Ushma S. Neill, *Publish or Perish, But at What Cost?*, 118 J. CLINICAL INVESTIGATION 2368 (2008); *see, e.g., DIANE HARLEY ET AL., ASSESSING THE FUTURE LANDSCAPE OF SCHOLARLY COMMUNICATION: AN EXPLORATION OF FACULTY VALUES AND NEEDS IN SEVEN DISCIPLINES ii* (2010), available at <http://escholarship.org/uc/item/0kr8s78v.pdf> ("Advancement in research universities is often described as a 'three-legged stool,' with a 'research' leg that is far more important than the 'teaching' or 'service' legs. . . . The advice given to pre-tenure scholars was consistent across all fields: focus on publishing in the right venues and avoid spending too much time on public engagement, committee work, writing op-ed pieces, developing websites, blogging, and other non-traditional forms of electronic dissemination (including online course activities)."). *But cf.* Jennifer Howard, *Rise of 'Altmetrics' Revives Questions About How to Measure Impact of Research*, CHRON. HIGHER EDUC., June 7, 2013, at A6 ("Adding altmetrics [a *portmanteau* of 'alternative metrics'] to CVs and dossiers may not be common yet. But interest in altmetrics is growing fast, as scholars begin to realize that it's possible to track

[16] Not only is a large quantity of scholarship publication an important proxy for a successful career as an academic, universities also incentivize scholars to publish in the most prestigious journals.⁵⁷ The problem is a vicious cycle: the perceived reputation of the publication enables its publisher to require scholars to transfer their copyright interests to the publisher, and the publisher's ownership of these interests, in turn, enables the publisher to restrict access and charge expensive fees.⁵⁸ While duly according the importance of publication reputation, the current incentive scheme that is effectively stripping important copyrights from scholars represents a departure from the recognition of important cultural, social, and institutional dimensions of faculty-produced scholarship.⁵⁹

[17] When the Constitutional Convention of 1787 was convened to discuss what would become the Copyright Clause, it decided against the Hegelian option written by Charles Pinckney in favor of a clause combining proposals from both Pinckney and James Madison, which is now enshrined in Article I of our Constitution.⁶⁰ The Copyright Clause reads: "The Congress shall have the Power . . . To promote the Progress of

and share evidence of online impact, and publishers and new start-up companies rush to develop altmetric services to help them document that impact."); Jennifer Howard, *New Metrics Providers Help Keep Libraries in the Research-Tracking Game*, CHRON. HIGHER EDUC., June 7, 2013, at A6 ("As access to scholarly content online gets easier, librarians feel more pressure to be 'central to the research process again,' and altmetrics can help . . .").

⁵⁷ See HARLEY ET AL., *supra* note 56.

⁵⁸ Centivany, *supra* note 37, at 387-88; see also Jake New, *Journal's Editors Resign, Citing 'Restrictive' Authors Policy*, CHRON. HIGHER EDUC., Apr. 5, 2013, at A22 ("The editor and the entire editorial board of the *Journal of Library Administration* have resigned in response to a conflict with the journal's publisher over an author agreement that they say is 'too restrictive and out of step with the expectations of authors.'").

⁵⁹ Centivany, *supra* note 37, at 388 n.13 ("[S]ignificant changes to scholarly publishing will require more than a revised understanding of copyright law.").

⁶⁰ See 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 22-25 (1994).

Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶¹ The plain language of the Clause’s prefatory language reveals the drafters’ aspirational intent: scholarship and invention were meant to educate and benefit the citizens of the new republic. Recalibrating the measure of professional performance in academe in favor of incentivizing relevant, accessible publication that promotes the goodwill of the university, regardless of the source of publication, may retract the problem of self-reinforcing incentives and realign the creation of scholarship with our nation’s founding copyright principles.

A. Legal Treatment of Ownership Interests in Scholarship

[18] Ownership of the copyright interests in scholarship is somewhat ambiguous and is the subject of considerable debate.⁶² Under federal statute, a copyright in a work attaches first to the author of the work.⁶³ Accordingly, the long-standing tradition of the academy affords scholars most, if not all, the copyright interests in their work.⁶⁴ However, the practical application of university copyright policies circumvents the traditional rule.⁶⁵ In fact, for the most part, universities claim ownership

⁶¹ U.S. CONST., art. I, § 8, cl. 8.

⁶² Faculty scholarship practices are far more varied and abstruse than this article (or its traditional treatment by copyright law regimes) allows. *See id.*

⁶³ 17 U.S.C. § 201(a) (2006); *cf.* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) (citing 17 U.S.C. § 102) (“As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”); Centivany, *supra* note 37, at 389 (“Determining authorship is typically not difficult because, in most cases, the person who creates the work is also considered the author for purposes of copyright ownership.”).

⁶⁴ *See* Centivany, *supra* note 37, at 389.

⁶⁵ Note that prior to 1976, a common law “teacher exception” existed to exempt teachers from the operation of the works for hire doctrine; however, Congress failed to codify the

in the copyright interests of works created by their faculty under the “works made for hire” exception.⁶⁶ Under the Copyright Act, absent a written and signed instrument in which the parties have expressly agreed otherwise, works made for hire are considered to be the property of the employer or person for whom the work was prepared, for purposes of copyright.⁶⁷ The statutory hook of works made for hire contemplates the following arrangements: (1) works prepared by an employee in the scope of his or her employment, or (2) works specially ordered under one of nine statutory classifications⁶⁸ where the parties have also expressly agreed in a signed writing that the work is made for hire.⁶⁹

[19] Few, if any, faculty works are specially ordered or subject to a signed agreement between university and faculty member categorizing

exception in the 1976 revisions to the Copyright Act, extinguishing the exception provided by the common law rule. *Id.* at 388-89.

⁶⁶ See 17 U.S.C. § 201(b). This statute codifies a principle first recognized by the Supreme Court of the United States in *Bleistein v. Donaldson Lithographing Co.* See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248 (1903); CRAIG JOYCE ET AL., COPYRIGHT LAW 272 (8th ed. 2010); see also *Cnty. for Creative Non-Violence*, 490 U.S. at 737 (“Classifying a work as ‘made for hire’ determines not only the initial ownership of its copyright, but also the copyright’s duration, § 302(c), and the owners’ renewal rights, §304(a), termination rights, § 203(a), and right to import certain goods bearing the copyright, § 601(b)(1).”); Centivany, *supra* note 37, at 389.

⁶⁷ This rule is particularly well acknowledged throughout federal court jurisprudence over the last one hundred twenty-five years. See *Cnty. for Creative Non-Violence*, 490 U.S. at 737. See generally *Bleistein*, 188 U.S. at 248; *Gill v. United States*, 160 U.S. 426 (1896); *Colliery Eng’r Co. v. United Correspondence Sch. Co.*, 94 F. 152, 153 (C.C.S.D.N.Y. 1899); *Carte v. Evans*, 27 F. 861 (C.C.D. Mass. 1886) .

⁶⁸ These include works made 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.” 17 U.S.C. § 101 (2006).

⁶⁹ *Id.*; see also Centivany, *supra* note 37, at 389.

scholarship as a work made for hire; in fact, such an arrangement would be both inefficient and burdensome. Judicial guidance responsive to the question of whether faculty-created works are considered to be “prepared by an employee within the scope of his or her employment”⁷⁰ has been relatively scarce, but does provide some, albeit complicating, direction.⁷¹ In considering this issue with regard to copyright interests, the Supreme Court’s multi-factored test in *Community for Creative Non-Violence v. Reid*⁷² represents the standard for resolving the question of whether an

⁷⁰ The Restatement of Agency explicitly contemplates the employment relationship as well. Compare RESTATEMENT (SECOND) OF AGENCY § 228 (1958) with RESTATEMENT (THIRD) OF AGENCY § 7.07(2)-(3) (2006).

⁷¹ In one such case, in which the district court attempted to establish clarity regarding the issue, the legatee of a dancer—who had also been the “employee” of her eponymous dance school—sought to prove the dancer’s copyright interest in dances she helped create. *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 224 F. Supp. 2d 567, 569-70 (S.D.N.Y. 2002). The Court of Appeals for the Second Circuit, however, had other ideas. See *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 647 (2d Cir. 2004) (affirming in part, reversing in part and vacating in part the decision—and the settling of the rule to the extent it existed—in the lower court). Having said that, the Second Circuit did preserve an important element of works made for hire jurisprudence, concluding that Graham, the dancer, individually owned the dances she created during the first ten years of her employment, because she worked only “one-third of her professional time” and choreography was not within the scope of her employment responsibilities as Program Director. *Id.* at 637-38. However, when Graham signed a new employment contract with the Center, doing so “altered both the nature and extent of her employment from part-time dance instructor to full-time choreographer,” and thus the dances she created during this period of her employment belonged to the Center as works made for hire. *Id.* at 639-41.

⁷² See *Cnty. for Creative Non-Violence*, 490 U.S. at 751-53. For a concise recitation of the facts of the case, see Centivany, *supra* note 37, at 390-91.

In that case, a non-profit organization, the Community for Creative Non-Violence (CCNV), hired James Earl Reid, to create a sculpture dramatizing the plight of the homeless CCNV provided Reid with a concept and a fairly detailed description of what they wanted, and after negotiating price and cost of materials, Reid created the sculpture. . . . [When] CCNV planned to take the statue on a tour of

employment relationship exists.⁷³

[20] The factors to be considered are: (1) the hiring party's right to control the manner and means by which the product is accomplished; (2) the skill required; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party.⁷⁴ Sealed with ambiguity, the true hallmark of a balancing test handed down from on high, the Court's decision specifically noted that "[n]o one of these factors is determinative," and that "the extent of control the hiring party exercises over the details of the product is not dispositive."⁷⁵ While this balancing test only reveals the fact

several cities to raise money for the homeless[,] Reid objected, arguing that the material the statue was cast in rendered it too weak to withstand CCNV's ambitious itinerary. . . . Reid [then] refused to return the sculpture to CCNV, registered copyright for the sculpture in his name, and planned a more modest tour of his own. CCNV then sued to establish copyright ownership in the sculpture.

The central issue before the court was whether the sculpture was a work-for-hire.

Id. Using the multi-factor test, the Court held that Reid was an independent contractor and not an employee of CCNV. *Id.* at 391-92.

⁷³ In proposing its balancing test, the Court retreated from the "control test," specifically holding that "employee" should not be interpreted exclusively in terms of whether the hiring party retains the right to control the product, nor in terms of whether the hiring party has actually exercised control over the creation of the work. *See Cmty. for Creative Non-Violence*, 490 U.S. at 742-43.

⁷⁴ *Id.* at 751-52.

⁷⁵ *Id.* at 752.

that copyright interests are not decisively settled, it does articulate the criteria that establishes an employment relationship between faculty members and their employer institutions, as well as the ownership of copyright interests in faculty-created works.

B. The Application of Copyright Interests in the Modern Academic Employment Relationship

[21] Applying the trappings of copyright law as articulated through statutes and case law discussed above, faculty members are almost certainly employees—as opposed to independent contractors—for purposes of the works made for hire doctrine. Universities tend to hire faculty members who hold terminal degrees and are thus expected to possess refined knowledge and skill in their field; however, a faculty member’s level of skill is distinguishable from that of a project-oriented, independent contractor.⁷⁶ Furthermore, the fact that a university chooses not to wield control over the manner and means of faculty-created works does not itself indicate that the university does not possess rights to control faculty creations.⁷⁷ Also, while universities serve a multitude of functions, their business is irreducibly that of education and research; thus, faculty-created works, whether manifested as scholarship, service, or teaching,

⁷⁶ See *Martha Graham Sch. & Dance Found., Inc.*, 224 F. Supp. 2d at 592. A clear indicator of the existence of an employment relationship is the fact that universities typically pay their employees salaries, as well as offer employee benefits, and withhold taxes, whereas such an arrangement is uncommon in a hiring party’s relationship with an independent contractor. Centivany, *supra* note 37, at 396. In addition, the

duration of the relationship between a university and its faculty is typically for one or more academic years with the possibility of renewal, rather than being limited to a short period of time or to a project with a clearly defined scope, as is generally the case with an independent contractor.

Id. at 397. In the case of tenured faculty, renewal is the presumption. *Id.* at 397 n.77.

⁷⁷ Centivany, *supra* note 37 at 396; see *Martha Graham Sch. & Dance Found., Inc.*, 224 F. Supp. 2d at 592.

form an essential part of universities' regular activities.⁷⁸

[22] Despite this seemingly clear relationship, not every court has characterized the association between a university and faculty member in the same light for purposes of copyright law. Such cases predate the *Community for Creative Non-Violence* decision, the new authoritative precedent on the issue, but do also cite academic tradition and the fact that scholarship is the result of highly-skilled expertise and creativity as support for deciding that such faculty-created works should fall outside the scope of employment.⁷⁹ Certainly this position has its merits; however, unlike common law traditions, which occasionally become codified as the law of the land, academic traditions are nonbinding.

[23] Finally, a faculty member's motivations for creating a work should have little bearing on this analysis. The jurisprudence in this area only requires that the work be actuated, in some part, by a purpose to serve the

⁷⁸ Centivany, *supra* note 37, at 397.

As part of their employment responsibilities, university faculty are generally expected to carry out duties consisting of some combination of teaching students, conducting research, and partaking in various service-orientated tasks. Works of authorship resulting from these activities, including scholarly books and articles, course materials, and departmental committee reports, are of the kind faculty are employed to perform and thus will typically fall within the scope of employment.

Id. at 399.

⁷⁹ See *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416 (7th Cir. 1988) ("Although [faculty members produce scholarship] as part of their employment responsibilities . . . the . . . assumption . . . was that . . . the right to copyright such writing belonged to the [faculty member] rather than to the . . . university."), *abrogated* by *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1094 (7th Cir. 1987) ("[A] professor . . . who proves a new theorem in the course of his employment will own the copyright to his article containing the proof. This has been the academic tradition since copyright law began."); see also Centivany, *supra* note 37, at 399. It must be noted that *Community for Creative Non-Violence* arguably rejects the assumptions taken by the Seventh Circuit in these cases.

university—a very low threshold to cross.⁸⁰ Self-motivation to create a work is not dispositive of whether the work was undertaken to serve, at least in part, the interests of the employer.⁸¹ Unless a work is made “with no intention to [create the work] as a part of or incident to” employment as a university faculty member,⁸² the work falls within the scope of employment.⁸³ Thus, nearly all faculty-created works are: (1) made within the scope of employment; (2) of a nature for which faculty are employed to perform; and (3) actuated, at least in part, by a purpose to serve the university.⁸⁴ There exists a strong, nearly irrefutable

⁸⁰ See Centivany, *supra* note 37, at 400-01.

[T]he extent to which a faculty work is actuated by a purpose to serve the university depends to some degree on the category of work in question and the intent of the particular faculty member. Some faculty members may create works that are fully actuated by a purpose to serve the university and would not have created the works but for their employment obligation. However, many faculty members may be internally motivated to conduct research, teach, or participate in service-related activities; they may even feel that they would create works associated with these activities regardless of whether it was their job to do so.

Id.

⁸¹ See *Martha Graham Sch. & Dance Found., Inc.*, 389 F.3d at 640 (“Graham was a self-motivator, and perhaps she would have choreographed her dances without the salary of Artistic Director, without the Center’s support and encouragement, and without the existence of the Center at all, but all that is beside the point. The fact is that the Center did employ her to do the work, and she did the work in the course of her regular employment with the Center.”); RESTATEMENT (SECOND) OF AGENCY § 236 (1958) (“Conduct may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person.”).

⁸² RESTATEMENT (SECOND) OF AGENCY § 235 (1958). “An act . . . is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which [the employee] is employed.” *Id.*

⁸³ Centivany, *supra* note 37, at 401.

⁸⁴ *Id.* at 398 (citing RESTATEMENT (SECOND) OF AGENCY § 228 (1958)).

presumption, then, that faculty members are employees of the university for copyright purposes under the works made for hire doctrine; therefore, copyright in faculty-created works vests initially in the university.⁸⁵

IV. CONCERNS, BENEFITS, AND APPLICATIONS OF UNIVERSITY COPYRIGHT INTERESTS IN FACULTY-PRODUCED SCHOLARSHIP

A. Addressing the Concern That the “Monopoly” of University Copyright Interests in Scholarship Is a Fetter to Faculty Creativity and the Educational Function of the University

[24] From academe’s inception, its uniquely creative environment has been its defining feature. Critics argue that a university’s exercise of copyright ownership over faculty-created works undermines faculty innovation by drastically altering this environment.⁸⁶ Further, opponents of vesting the copyright interests of faculty-created work in the university

⁸⁵ *Id.* at 401.

⁸⁶ Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 591-92 (1987). In her article, Professor Dreyfuss expresses a concern that the works made for hire doctrine hampers employee creativity, especially among university faculty, because of the 1976 Act’s elimination of the teacher exception. *Id.*; cf. Centivany, *supra* note 37, at 407-08 (discussing how universities own the copyrights in faculty-created works under the works made for hire doctrine and that policies purporting to transfer these rights, either back to the faculty member or a third party, are unlikely to meet the signed writing requirement under Section 204 of the 1976 Copyright Act). *But see* SPARC, AUTHOR RIGHTS: USING THE SPARC AUTHOR ADDENDUM TO SECURE YOUR RIGHTS AS THE AUTHOR OF A JOURNAL ARTICLE (2006). http://www.sparc.arl.org/sites/default/files/SPARC_AuthorRights2006_0.pdf. “As the author of a work you are the copyright holder *unless* and *until* you transfer the copyright to someone else in a signed agreement” (original emphasis removed). *Id.* at 3. However, the ability of a university policy to establish a default position that the university owns all copyright rights in faculty created work is insufficient to meet the signed writing requirement, and this finding has been consistently applied by courts. *See, e.g.*, *Foraste v. Brown Univ.*, 290 F. Supp. 2d 234, 236 (D.R.I. 2003); *see also* Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1926 (2007).

argue that universities should not enforce ownership over these copyright interests at the risk of degrading long-held academic principles and traditions.⁸⁷ Additionally, there are those with concerns that, in practice, the pecuniary interests of the institution will supplant the non-pecuniary motivations of the faculty member.⁸⁸ However, the current copyright regime's treatment of ownership interests in the copyright of scholarship has neither stunted faculty creativity nor encumbered the production of scholarship. These concerns, while valid, have yet to come to fruition since the Copyright Act was revised in 1976 and construed to vest copyright interests in universities in their faculty-created scholarship.⁸⁹

[25] To date, attempts have been unsuccessful to circumvent the default position that the works made for hire doctrine applies to scholarship produced by faculty member employees of a university because they fail to satisfy the requirements of the Copyright Act.⁹⁰ Though the failure of such policies may negatively impact the proprietary scholarly publishing industry, such detrimental impact on this industry also remains to be seen.⁹¹ It is worth noting that, despite these ownership rights vesting first

⁸⁷ Dreyfuss, *supra* note 86, at 638 (“In exchange for a modest chance of pecuniary gain, the university risks fundamental alterations in the environment it creates for its student body and professional staff.”).

⁸⁸ *Id.* at 590-91.

⁸⁹ See Centivany, *supra* note 37, at 409-13 (analyzing Professor Dreyfuss' concerns in light of over two decades of experiences and discussing the implications for the scholarly publishing industry as a whole). “Due to its express policies, the university may be estopped from subsequently attempting to enforce its copyrights against the faculty-creator.” *Id.* at 411; see 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.07(A) (2013). A university has a duty to act in agreement with the terms of the contracts between it and its faculty. RESTATEMENT (THIRD) OF AGENCY § 8.13 (2006). To contravene this duty would be a serious blunder, not just legally, but perhaps more damningly, for brand and public relations of the university.

⁹⁰ See Centivany, *supra* note 37 at 408.

⁹¹ See *id.* at 412-13.

in the university, in practice universities rarely enforce them as against their faculty members; to do so could diminish what is perhaps a university's greatest asset—its goodwill.⁹² A university, not unlike other collective groups, is the sum of its parts. Thus, in place of exercising ownership rights in scholarship to the exclusion of its faculty member creator, it is in the best interest of the university, in fulfilling its educational function, to support the public's interest in open access to scholarly works.⁹³

B. The Implications of Open Access to Legal Scholarship

[26] Believe it or not, the seeds of change—from purely proprietary publishing to open-access publishing—have been sown at the very top of legal academe for over five years. In 2008, the Harvard Law School faculty voted to offer their scholarship “freely available in an online repository.”⁹⁴ Later that year, the directors of the law libraries at eleven of

⁹² *Cf. id.* at 401 (noting that “while copyright initially vests in universities under work-for-hire, *university policies* effectively transfer those rights to the faculty-creators” (emphasis added)).

⁹³ See, e.g., Jennifer Howard, *Open Access Gains Major Support in U. of California's Systemwide Move*, CHRON. HIGHER EDUC. (Aug. 2, 2013), <http://chronicle.com/article/Open-Access-Gains-Major/140851/>.

[T]he University of California's Academic Senate has adopted an open-access policy that will make research articles freely available to the public through eScholarship, California's open digital repository. . . . More than 175 universities have preceded California in endorsing open access, but the huge research footprint of the California system gives its action extra significance. . . . The new mandate ‘signals to scholarly publishers that open access, in terms defined by faculty and not by publishers, must be part of any future scholarly-publishing system,’ the statement says.

Id.

⁹⁴ *Harvard Law Votes Yes on Open Access*, BERKMAN CTR. FOR INTERNET & SOC'Y (May 7, 2008), <http://cyber.law.harvard.edu/node/4273>.

the most elite law schools met at Duke Law School to draft what became the Durham Statement on Open Access to Legal Scholarship.⁹⁵ Ushering in the open access era, the Durham Statement called for all law schools to move toward electronic publication of scholarship, to commit to making available and storing electronic versions of scholarship in stable, open, digital formats, and, eventually, to stop publishing journals.⁹⁶ The principal argument for a movement toward open access in legal academe is an easy case to make: in addition to the philosophical principles advanced by open access, on a practical level it supports a vital professional goal of the faculty members by maximizing the impact of their work.⁹⁷ After all, what attorney does not appreciate recognition in his or her field? Not surprisingly, “[f]ew commentators have objected to the Durham Statement’s call for open access publication of law journals.”⁹⁸

[27] Apart from these elite schools, however, few schools have followed suit and very few United States law reviews are registered with

⁹⁵ The universities represented were: the University of Chicago, Columbia University, Cornell University, Duke University, Georgetown University, Harvard University, New York University, Northwestern University, the University of Pennsylvania, Stanford University, the University of Texas, and Yale University. Perhaps an homage to the Declaration of Independence, the Durham Statement stored on Harvard University’s Berkman Center for Internet and Society website a list of signatories. *Durham Statement on Open Access to Legal Scholarship*, BERKMAN CTR. FOR INTERNET & SOC’Y, <http://cyber.law.harvard.edu/publications/durhamstatement> (last updated Feb. 1, 2012).

⁹⁶ *Id.*; see Danner et al., *supra* note 33, at 40 (noting that the Durham Statement calls for open access publication and an end to print publication of law journals); Donovan & Watson, *supra* note 32, at 554 (discussing the aims of the Durham Statement).

⁹⁷ Donovan & Watson, *supra* note 33, at 560.

⁹⁸ Danner et al., *supra* note 33, at 40. This may be because the biggest impact of the Durham Statement manifests itself as organizing principle for the future of its signatory law libraries. See *id.*

the Directory of Open Access Journals.⁹⁹ That being said, a growing number of schools post some scholarship content on their publicly-accessible journal websites, despite the risks of reducing revenue from print subscriptions and royalty income from proprietary online aggregators.¹⁰⁰ This small gesture may expose legal academe's less than ostensible belief that scholarship fulfills a public good.¹⁰¹

[28] While this Article recognizes the strong policy considerations for applying open-access principles to legal scholarship, the discussion should also be approached from an economic perspective. Perhaps legal academe has tarried in adopting open access publishing because of the absence of any demand to explore low-cost alternatives to the traditional subscription model.¹⁰² Legal scholarship publishing costs are modest when compared with scholarly publishing in other academic disciplines.¹⁰³ "Law journal subscription prices are low, and have risen at less than the rate of inflation for a generation."¹⁰⁴ At the same time, law faculty members enjoy virtually free access to electronic versions of published law review articles

⁹⁹ See *DOAJ Members*, DIRECTORY OPEN ACCESS J., <http://www.doaj.org/doaj?func=loadTempl&templ=members&uiLanguage=en> (last visited Nov. 8, 2013) (listing only twenty-four libraries, universities, and research centers in the United States that are registered with the Directory).

¹⁰⁰ See Danner et al., *supra* note 33, at 41.

¹⁰¹ See *id.* (quoting Richard Edwards & David Shulenburger, *The High Cost of Scholarly Journals (And What to Do About It)*, CHANGE, Nov./Dec. 2003, at 10, 13. Danner et al. go on to posit that "in the age of the Internet, a commitment to research and scholarship carries with it a responsibility to circulate one's work as widely as possible." *Id.* (citing JOHN WILLINSKY, THE ACCESS PRINCIPLE xii (2005)).

¹⁰² See Litman, *supra* note 40, at 791.

¹⁰³ See Paul George et al., The Future Gate to Scholarly Legal Information, AALL SPECTRUM, Apr. 2005, at 1,1, available at http://www.aallnet.org/products/pub_sp0504/pub_sp0504_MB.pdf.

¹⁰⁴ Litman, *supra* note 40, at 791.

through proprietary outlets, such as HeinOnline, Lexis, and Westlaw, all of which require subscriptions.¹⁰⁵ The driving force for open access in legal publishing comes almost entirely from the perspective of supplying scholarship: law school faculty members who want to increase readership of their research outside of legal academe cannot reach this audience through HeinOnline, Lexis, and Westlaw.¹⁰⁶ The latter two resources have made vast fortunes from material that is mostly in the public domain, by making it available subject to useful search functionality, but are expensive and functionally irrelevant to academics outside legal academe.¹⁰⁷ While these powerful search tools are not without value, reliance on them diminishes when law journals and their parent institutions develop resources to publicly access and archive legal scholarship—an idea with the potential to transform legal scholarship as it currently exists.¹⁰⁸

V. A RECOMMENDATION FOR ENSURING OPEN ACCESS TO LEGAL SCHOLARSHIP

[29] Universities, the holders of copyright in academic scholarship, are uniquely situated to achieve their public, educational function, as well as to reduce reliance on the proprietary scholarly publishing industry, and empower faculty while promoting open access.¹⁰⁹ In legal academe, many universities already underwrite the cost of submitting scholarship for

¹⁰⁵ *Id.* It should be noted that legal research and scholarship require access not only to other legal scholarship, but also to primary sources of law; thus, “open access to legal scholarship must be discussed within the context of electronic access to other types of legal information.” Danner et al., *supra* note 33, at 41.

¹⁰⁶ *See* Litman, *supra* note 40, at 791.

¹⁰⁷ *See id.* at 792.

¹⁰⁸ *See id.* at 792-93.

¹⁰⁹ *See* Centivany, *supra* note 37, at 388-89.

publication and should extend their support one small step further by providing faculty with financial assistance to cover the associated costs of publication in open-access journals and repositories.¹¹⁰ Given that many universities, particularly research universities, are the recipients of federal funds derived from public tax dollars, it is in the universities' best interest to reinvest some portion of these funds in relevant and publicly accessible scholarship to benefit not only the profession but also local, regional, and national communities.¹¹¹

[30] With these changes, academe should prioritize the development of a viable alternative method of peer review.¹¹² Internally, universities must shift the focus of the existing academic incentive system, and its reliance on the proprietary publishing industry, to examine the ways in which faculty accumulate goodwill for employer institutions.¹¹³ Open-access journals, open educational resources, and open archival repositories serve the important interests of the public that are often ignored in the context of the debate over copyright interest in academic scholarship.¹¹⁴ The language of the Copyright Clause could not be clearer in stating that creation of copyrightable works inures to the benefit of the public.¹¹⁵

¹¹⁰ Litman, *supra* note 40, at 793; *see* Centivany, *supra* note 37, at 414.

¹¹¹ *See* Memorandum from the John P. Holdren, *supra* note 1, at 1-3, 5, 6; George et al., *supra* note 103, at 2.

¹¹² With the advent of altmetrics, digital media is increasing a feasible source of disseminating knowledge. Thus, the process for peer and tenure review to reflect this modern reality may already be underway. *See* Howard, *supra* note 5, at A6; *see also* Leonard Cassuto, *The Rise of the Mini-Monograph*, CHRON. HIGHER EDUC., Aug. 16, 2013, at A31 ("Fewer advisers now imagine their graduate students' dissertations necessarily as books in the making. While the book still remains the absolute standard in many departments, the group that thinks that way is getting smaller.").

¹¹³ *See* Centivany, *supra* note 37, at 386, 413.

¹¹⁴ *See* Donovan & Watson, *supra* note 33, at 558-59.

¹¹⁵ U.S. CONST., art. I, § 8, cl. 8.

Academe's support of open-access resources is essential; however, it is not necessary for academe to completely emancipate itself from proprietary publishers, many of whom serve an important role in the profession and possess their own stakeholder interests in copyright.¹¹⁶

[31] The reality is that proprietary scholarly publishers currently exert a disproportionate amount of control over scholarly works.¹¹⁷ Perhaps the best elements of existing solutions proffer the best foundation for the application of open access to scholarly publication. The temporal solution put forth by the White House Office of Science and Technology Policy appears to handle the interests of each stakeholder—the scholar, the institution, the publisher, and the public—most fairly.¹¹⁸ The open-access repository of faculty scholarship chartered by Harvard presents the ideal access portal and archive of publicly accessible scholarship.¹¹⁹ Finally, when compared with individual faculty members, universities have a substantially stronger bargaining position to help reclaim the broad copyright interests that scholars transfer to their publishers as of right.¹²⁰

¹¹⁶ See Litman, *supra* note 40, at 781-82. In fact, the original copyright protection, the Statute of Anne, was designed to protect the interests of publishers. Act for the Encouragement of Learning, 1710, 8 Ann., c. 19 (Eng.), *available at* http://avalon.law.yale.edu/18th_century/anne_1710.asp.

¹¹⁷ See Litman, *supra* note 40, at 784; *see also* Mridu Khullar Relph, *In India, Academics Defend Photocopying of Textbooks for Course Packs*, CHRON. HIGHER EDUC., July 15, 2013, at A15 (chronicling the legal battle by the world's three largest academic publishers—Cambridge University Press, Oxford University Press, and Taylor & Francis—with the University of Delhi and Rameshwari Photocopying Services over the photocopying of short excerpts of books to create curricular course packs for use in university classrooms). *See generally* Centivany, *supra* note 37 (discussing, in greater detail, the extent of the control exercised by publishers in the publication of academic scholarship in America.)

¹¹⁸ See Memorandum from John P. Holdren, *supra* note 1, at 2-3.

¹¹⁹ See Centivany, *supra* note 37, at 387 (citing *Open Access Policies*, *supra* note 47).

¹²⁰ *See id.* at 401.

By exercising ownership of copyright interests in scholarship, universities have the ability to profoundly influence the relevancy and public access of academic scholarship, promoting both the constitutional invocation of the Copyright Clause and the primary public function of the university—education.