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Editorial

Copyright, Law Journals and a Romantic View of *EJIL*

For at least 20 years I have been conducting guerrilla warfare against legal publishers on the matter of copyright. Whenever I get a copyright form I either 'forget' to send it back to the publisher (in more than half the cases no one seems to notice or care) or, if they do insist, I always cross out the critical language concerning my intellectual property (they usually ask you to make them a gift of your copyright) and replace it with a handwritten grant of a non-exclusive licence. I was challenged only once. I informed the publisher of the journal in question (Blackwell) that if they were unhappy they should feel free to drop my piece. That did not happen. The first footnote proudly displayed: ©JHH Weiler.

I remember the moment of change. The publisher in question was Walter De Gruyter, publisher of the multi-volume series *Integration through Law*, of which I was co-editor and in which I had published a couple of pieces myself. Some years later I wanted to photocopy one of the pieces for my students. University copy-centres in the USA take copyright seriously and requested a release from the publishers. I requested such from De Gruyters, who promptly sent it accompanied by a hefty bill. They owned, it appeared, the copyright on my work and were now re-selling it for a profit (two years later I would presumably receive a 10% royalty on the fee I had paid. . .). *Res ipsa loquitur*.

Consider the raw deal we authors get from most legal publishers, including law journals. Typically you are asked in exchange for publishing your brilliant piece, the result of many months of research, drafting and redrafting, to cede your copyright to the publisher of the journal. Now make no mistake: law journals are a serious source of profit for publishers. The break-even point occurs at a remarkably low subscription rate. Internet publishing has made them even more profitable – as the ratio between paper subscription (with the heavy costs of production, warehousing and delivery) and the cheaper online-only version shifts to the latter. Internet journal publishing has given a considerable boost to another source of publisher income: online access to individual articles. In the past it was rare that a publisher would get a significant second bite at the apple. After all, how many permission requests for republication would come their way after the initial publication of an article in the printed journal? But now, with internet research there is an appreciable market for the one-of-a-kind-download-for-payment, which generates very considerable income for the publisher. You, the author, see none of this. The issue is not the money. It is the restriction of access to our work that rankles.

The prevailing fiction is that you give your copyright in exchange for publication, which does involve costs and which gives you fame and recognition. But that would

be like saying that in exchange for exhibiting his or her paintings, an artist must actually give them to the gallery or museum as a gift. By simply allowing the journal to publish your piece, by giving them a licence, you are giving them something of value. People subscribe to the journal because enough authors of quality like yourself allow their work to be published therein. So on what ground should one be asked to give away, for ever, the intellectual property in one's work?

Now of course the right 'to exhibit' your work has to be handled in such a way that the public has an incentive to visit the gallery or buy the book in which the paintings are reproduced. If they could be accessed easily and freely otherwise, the gallery would collapse to the detriment both of the exhibiting painters and the public interest in the development of art.

My gripe with most law journals is that the balance between the legitimate interests of the journal and publisher on the one hand and the author on the other is unacceptably skewed in favour of the former.

There have been some improvements. Some publishers have special provisions for the author to reproduce his or her own work for teaching and similar purposes. I suppose we should thank God for small mercies. Another important development is that it has become more common for publishers to request the author to give them a licence and retain the copyright themselves. But it is worth reading the small print. Here is an example from our very own OUP, publishers of, *inter alia*, the *Journal of Church and State* in which I recently published a book review. What I received, I should mention, is quite standard in the industry.

The operative language read, *inter alia*, as follows:

You hereby grant to **the J.M. Dawson Institute of Church-State Studies** an exclusive licence for the full period of copyright throughout the world:

- to publish the final version of the Article in the above Journal, and to distribute it and/or to communicate it to the public, either within the Journal, on its own, or with other related material throughout the world, in printed, electronic or any other format or medium whether now known or hereafter devised;
- to make translations and abstracts of the Article and to distribute them to the public;
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You may see the full version of the copyright permission at www.oxfordjournals.org/our_journals/jcs/for_authors/copyright.pdf.

An 'exclusive licence for the full period of copyright?', I wrote to OUP asking:

Can you kindly explain to me the difference between the exclusive license you are requesting . . . for the duration of the copyright, and an outright grant of my copyright to you?

I received no reply. I did receive an automated reminder that they had not received my signed form. So eventually I crossed out all that mumbo jumbo and inserted my habitual 'non-exclusive licence' handwritten clause. My piece was published with no comment.

This matter has been of concern to us at *EJIL* for a long time. The most dramatic and significant innovation was introduced several years ago. *EJIL*, to my knowledge (I would be happy to be corrected), was the first law journal to have a website and offer its content online at www.ejil.org. We are, again to the best of my knowledge, the only law journal, whose electronic archive is accessible free to the public one year after publication on the same website. Anyone, anywhere, can access the entire *EJIL* free of charge. We believe that this renders a huge service to the legal community, to our readers and, of course, to our authors (www.ejil.org/archives.php).

For the last 12 months or so I have been re-negotiating our publication agreement with OUP for the next five years. One of the biggest sticking points was the question of copyright – notably copyright in the age of the internet. We asked to revisit the whole question of copyright with a view to reaching an agreement that would equitably balance the interests of our readers, our authors, *EJIL* as an institution and OUP our present publishers. I told them that we should aim for an agreement that could be used as a model for other similar law journals. I have only praise for the spirit in which OUP conducted the negotiations. I think the results are a marked advance, and in some respects even radical, though only time will tell whether we have reached the Promised Land.

Here are the highlights which will be reflected, starting in 2011, in our new author licence forms. Under the new agreement, the authors retain copyright of their work and grant *EJIL* and OUP a limited publication licence. We draw a distinction between licence over print and electronic versions of the articles.

In relation to print, we radically shifted the terms of the licence in favour of the author. We request a licence simply to be the first locus of the printed version of the article. It, or a version substantially like it, may not have appeared in print elsewhere before publication in *EJIL*. Once it has appeared in print in *EJIL*, the author is free to publish it or allow it to be published in print elsewhere immediately, without the habitual time delays of 12–18 months common in the industry. The only requirement is that its *EJIL* origin be acknowledged in any subsequent publication.

Digital versions are trickier. To illustrate: during a conversation with a visiting researcher at NYU about some recent articles in *EJIL* I was shocked to discover that she had no subscription. Whence, I wondered, the intimate knowledge of these articles? They are, she said, for the most part all available in one version or another online. I checked; she was right. It is problematic if readers can simply look at our Table of Contents and then access all or most of our articles elsewhere online.

We already have among the lowest subscription rates in the industry; we have special access arrangements for developing countries, and we have universal free access of our entire archive 12 months after publication. *EJIL* is quite rigorously refereed and, simply by virtue of the number of submissions, rather selective. It enjoys a prestige which, we hope, is second to none. Consequently, we believe our authors benefit considerably from publication in *EJIL* in terms of both distribution of their work and recognition. Even from an author's perspective there is a delicate balance to be struck between the wish to have one's work as widely available as possible and yet enjoy the imprimatur it receives by having the *EJIL* brand.

One should not allow an excessive greed for access to kill the goose which lays the golden eggs of recognition and validation. From *EJIL*'s perspective the golden egg is not material. In fact, the Journal you see is the result of a labour of love. Our past Editors-in-Chief, Renaud Dehousse, Philip Alston and your current Editor all worked and work pro-bono. Our paid staff is skeletal, part time and poorly paid, given their commitment and effort. *EJIL* spends its surplus income on its own development, in holding symposia, conferences and the like. Still, we cannot be indifferent to the issue of our subscriber base. A healthy, indeed growing, subscriber base is in the overall interest of *EJIL* – including its authors and readers.

Tricky, then, as I said. In arriving at our proposed solution, we held discussions with endless numbers of people – readers, authors, colleagues, publishers. The result is simple enough to explain, though only time will tell how well it will work. In our new copyright settlement we are asking our authors, in consideration for publication, for a licence which will give us 12 months digital exclusivity. Our authors will be asked to ensure that once their piece is published in *EJIL*, all versions, substantially the same, which may already exist on the net, be removed and replaced with a link to *EJIL*, access to which would require an institutional or personal subscription. (Authors will, of course, continue to receive digital pdf reprints, etc.) We believe that this strikes an equitable balance among the various interests at play – author, reader, scientific community, *EJIL* and our publishers OUP.

Overall, taking print and digital rights together, coupled with the low *EJIL* personal subscription rates and the free archive, we believe you will be hard pressed to find an intellectual property arrangement which is as author and reader friendly as this. Still, we do not quite claim infallibility. We welcome author and reader comment.

This brings me to the 'romantic' vision of *EJIL*. In working our way through the copyright issue, notably the digital copyright issue, we were able to take stock in a lucid way of the changes in the reading culture of journals. People of my age, whose academic career began in the pre-digital era, still remember the one and only way to access scholarship: picking up this or that journal in one's hands, scrutinizing the table of contents, rushing through the book reviews, scanning (with one's eyes!) the abstracts, reading some articles, maybe making a photocopy or two.

It is all different now, and in some ways for the better. For example, one gets, in an increasing number of institutions, an electronic Table-of-Contents service. (Faculty libraries with 'recent publication' corners have become desultory locales.) But even use of that service is in decline. Mostly we access new scholarship through various online research technologies. If you are fortunate to belong to an institution that has a block subscription to Lexis, Westlaw and the like, you may within seconds have on your screen and ready for printing any interesting title that your research has brought your way.

It is precisely this that I lament. At *EJIL* we do not think of ourselves as a referee service, simply publishing in *EJIL* the best that comes our way. You will know that about half of our content is Editorial Board generated – the outcome of deliberation at our Board and Scientific Board meetings, resulting in conferences, symposia, commissioned pieces on topics which we believe are of importance and interest. We put a

huge amount of thought, discussion and planning into the content of each issue. You know, too, my culinary proclivities – each issue is thought of as a special meal, where the overall menu is as important as the quality of each dish. We definitely think that the whole is greater than the sum of its parts. In an era where one suffers from a surfeit of information, and glut of (mostly self-published) articles, reading *EJIL* is a good way to maintain a steady diet of quality scholarship and debate about the fundamental and cutting edge issues in the field. But there is another, not trivial, side to all of this. We think of *EJIL*, too, as a deliberate counterbalance to the ‘age of the monitor’. Those of you who read us only electronically may not know how much thought and effort we put into the printed issue. Over the years we have hugely improved the quality of cover, paper, print. We say with no embarrassment – we want each issue to be beautiful, lustrous, conveying a tactile and sensory feel of a quality not only commensurate with the intellectual content but with our editorial policy to eschew ephemera and indeed to make each *EJIL* issue of book quality. We most decidedly imagine, in this romantic vision, an *EJIL* moment, when the physical issue lands on your desk – it is, well, bibliophilic.

This is, most likely, a losing battle, a lost cause. At some point we will have to decide whether we want to keep the print version at all. We did consider the option not long ago. I believe, as long as the likes of Bruno Simma and myself have a say in the matter, that will not happen easily.

In the meantime I want to encourage our individual readers to consider a personal subscription, which includes both the print version (with the pleasure of the bibliophilic moment . . .) and the digital version. The rate is £39 for students and £49 for all other individual subscribers.

A No-Brainer @ oxfordjournals.org/our_journals/ejilaw/access_purchase/price_list.html.

In this issue

This issue begins with a symposium on treaty interpretation. The principal *EJIL* 20th Anniversary symposia were extra-systemic: looking at the way international law deals with the use of force or certain aspects of globalization. For this issue of Volume 21, we chose a different tack. The aim was to hold a workshop with an ‘introspective’ focus, honing in on the processes of international law as a legal discipline. The goal was to re-examine a classical topic. The issue of treaty interpretation or re-interpretation immediately presented as both important and interesting. Thus, a lively workshop on this topic was held last November in Florence.

Our panel of authors included George Letsas, Leena Grover, Lucas Lixinski, Isabelle Van Damme and Riccardo Pavoni. Luigi Crema also submitted a fine paper on this topic, which we later added. After much dialogue and revision, we are pleased to publish our symposium, *The Interpretation of Treaties – A Re-examination*.

Next, we publish three articles under our occasional series, Critical Review of International Governance. In our last issue, we published three articles in this series from

authors hailing from Ethiopia, China and Malaysia. In this issue, all of our ‘Critical Review’ authors call Europe home and focus respectively on European institutions. As with our last iteration of this series, however, we suspect you will find that in critically confronting the operations of a specific ‘global’ institution, these authors provide important contributions to broader debates on global governance. Here at the *EJIL* we often find that it is the confrontation with the particular that gives us a better understanding of the whole. The first is an article by Juliet Chevalier-Watts on investigations under Article 2 of the European Convention on Human Rights. Next is an article by Frank Hoffmeister. The *EJIL* has long been interested in questions of state responsibility for internationally wrongful acts. Hoffmeister studies this issue through a new lens, examining how the European Union might bear responsibility for internationally wrongful acts, taking particular note of the International Law Commission’s draft articles on the attribution of responsibility to international organizations. Last we have an article by Anne-Sophie Tabau and Sandrine Maljean-Dubois, which considers the relationship between the Kyoto Protocol System and the European Union.

We also publish in this issue a Review Essay by Sergio Dellavalle, which fleshes out the central arguments from a number of texts on the topic of global order. All authors chosen by Dellavalle write within the universalist paradigm of international law. This essay’s contribution is that it serves as an able guide to a number of recent distinctions within this mode of thought.

We conclude with a poem, *Cosmos Assessed*, by Eric Stein.

JHHW

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