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## Paper Tigers: Copyright and Scholarly Publishing

In recent years, discontent has been growing in academia over certain practices of the proprietary scholarly publishing industry. The expensive subscription fees, restrictive access policies, and copyright assignment requirements of many journals have been criticized by some scholars and universities who find these practices fundamentally unfair given that the industries' two main inputs – articles and peer-review – are provided to it free of charge. Furthermore, while many publishers continue to enjoy substantial profit margins, many elite university libraries have been forced to triage their collections, choosing between purchasing monographs or subscribing to journals or, in some cases, doing away with “non-essential” materials altogether. The situation is even more dire for non-elite schools, individual scholars, and members of the general public. There is a growing sense within that something has to give but change has been slow coming, in part, because many members of academia, being beholden as they are to the scholarly publishing industry, fail to recognize their own power.

A few concerted efforts have challenged the proprietary publishing industry's practices. MIT's policy of making all faculty works freely available online and the Compact for Open Publishing Equity are two examples which support alternative publishing models and the promotion of free and open access to scholarly communications. While coalition-building and concerted action may prove to be effective levers of change concerning the scholarly publishing industry, I suggest that these efforts actually give more deference to publishers than is required. The proprietary scholarly publishing industry is a paper tiger.

This paper offers universities an alternative approach to promoting change within scholarly publishing. I argue that, despite customary practice and common (mis)understanding, universities own the copyrights in faculty-created works under the work-for-hire doctrine. While a common law “teacher exception” existed at one time to exempt teachers from the operation of the work-for-hire doctrine, Congress' failure to codify the exception in the 1976 revisions to the Copyright Act extinguished the old common law rule. I then describe how, in response, universities developed various policy “solutions” in an attempt to circumvent the application of the work-for-hire doctrine but the solutions fail to satisfy the requirements set forth by the Copyright Act. I argue that, while these policy failures have disastrous implications for the proprietary scholarly publishing industry, the potential impact on the public's interest in open access to scholarly works is quite promising. In addition, I argue that the concerns expressed by some scholars and commentators that faculty-creators will be harmed by university exercise of copyright ownership are mitigated by equitable estoppel which would prevent universities from enforcing their copyrights against the faculty-creators. Finally, I suggest that existing university policies might be revised to effect valid copyright transfers but note that several legal hurdles remain which might, in practice, make such transfers impractical on a university-wide basis.