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PREPUBLICATION PUBLICATIONS

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ABSTRACT

Many law professors now post essentially complete drafts of their articles on SSRN and/or on university-sponsored working paper websites prior to submitting those articles for journal review and possible publication. This “prepublication publication,” so to speak, is useful for both authors and their readers, but it raises some self-plagiarism issues. There does not yet appear to be a broad consensus among journal editors on how those issues should be addressed. I argue that this increasingly common practice of SSRN and working paper prepublication of articles prior to their submission for journal review should be recognized as entirely appropriate, particularly if this prior publication is disclosed in the journal submission or is otherwise called to the attention of the journal editors. I also argue that in light of this practice law journals should rather substantially change the way that they operate. They should move to a wholly online format and provide only article abstracts and website links for the articles that they “accept,” rather than editing the articles and then providing their readers with full article texts.

* * *

If an author submits an article to an academic journal for possible publication and does not indicate in the article or otherwise call to the attention of the journal editors that the article has been previously published elsewhere in essentially identical form, this is widely regarded as inappropriate “self-plagiarism”¹ and

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1. For a comprehensive discussion of self-plagiarism, particularly in the context of academic legal writing, see generally Josh Blackman, *Self-Plagiarism*, 45 FLA. ST. U. L. REV. 641 (2018).

resume-padding, and is unfair to the journal. Academic journals generally seek to publish only original work, rather than unknowingly republishing pieces that have appeared elsewhere in essentially the same form. This self-plagiarism is not viewed as being nearly as egregious an ethical offense as submitting to a journal an article that utilizes the work or phrasing of another author without proper attribution—ordinary plagiarism—but it is still regarded by many editors as a basis for denying publication of the article unless the article’s style of expression is significantly revised from the earlier phrasing.

However, in recent years many law professors have taken to posting essentially complete drafts of their articles online on the Social Science Research Network (SSRN) website, and also posting the articles on university-sponsored working paper websites, before submitting the articles to academic journals for review and possible publication with few revisions, sometimes without disclosing these prior online postings to the journal editors.² There unfortunately does not yet appear to be a consensus among editors as to whether these arguably “prepublished” articles should be disqualified from subsequent journal publication on self-plagiarism grounds unless they are substantially revised, leading to some awkward and embarrassing communications between authors and student editors, as well as sometimes substantial and arguably unnecessary author revisions to the articles.³

As I will briefly discuss below, I think that prior SSRN or university working paper postings of article drafts should *not* be regarded as disqualifying those articles from later journal publication, particularly if suitable disclosures have been made to the journal editors and readers. However, I believe that at least for law journals, if not for other academic journals as well, the growing prevalence of the practice of SSRN and working paper prepublication posting of essentially complete article drafts calls for a rather substantial change in the way those journals operate.

The current availability of SSRN and university working paper websites for posting article drafts is of great benefit to both authors and their readers, for several reasons. First, it allows for immediate dissemination of an author’s findings and insights, rather than the author having to bear the delay of months or even a year or more that is usually involved in traditional journal review—

The article notes that there is “little consensus” about the ethical implications of self-plagiarism within legal academia, given that much legal work done by practicing attorneys and many judicial opinions as well are deliberately repetitive and attempt to avoid originality in expression. *Id.* at 644. It also notes that legal articles often require introductory and substantial recitations of standard background material before breaking new ground, *see id.* at 651, and the article references and discusses the very modest body of legal scholarship on self-plagiarism. *Id.* at 644–45. The article also references and discusses the somewhat more substantial body of writing about self-plagiarism in other, non-legal academic contexts. *See id.* at 645–46. After extended analysis, Professor Blackman concludes, as do I, that self-plagiarism is for several significant reasons entirely appropriate, particularly if disclosed to the editors and readers of the republished articles. *See id.* at 649.

2. Ian Ramsey, *SSRN and Law Journals – Rivals or Allies*, 40 INT’L J. LEGAL INFO. 134, 135 (2012).

3. *See* Blackman, *supra* note 1, at 653–54 (explaining the unnecessary burden that such mandated and often purely stylistic revisions can impose on authors).

especially for peer-reviewed journals—and eventual publication.⁴ Second, it allows the authors to obtain timely and valuable feedback from others in their fields of scholarship so that the articles can be improved prior to their later formal journal publication, sometimes significantly.⁵ And perhaps most importantly, the readers of the articles benefit from the more rapid dissemination of the author's results and insights.⁶ For some topics for which the level of knowledge or the state of informed debate is evolving rapidly, the usual substantial publication delay after journal submission before the article appears in a print journal renders an article much less useful to its readers.

On the other hand, some persons who devote time to reading an article that they thought contained wholly novel research or insights might not have done so had they been told by the article that the work had previously been published elsewhere. In addition, academic authors seeking tenure or promotion may attempt to deceptively inflate their publication records, at least with regard to evaluators who do only a cursory review of their work, by seeking multiple publications of essentially the same article.⁷

These considerations taken together lead me to conclude that prepublication of an article through posting on SSRN and/or university working paper websites prior to its formal journal publication should be allowed and even encouraged and not be regarded by editors as disqualifying the article from later journal publication even if it is in essentially identical form, particularly if this prepublication website posting is disclosed to those journal editors and to their readers by the author.

This growing prevalence of online prepublication also has important implications for the operation of the law school journals. These journals traditionally serve several important functions. They disseminate scholarship to a much wider audience than only those persons who communicate directly with the author, screen scholarship for its quality and often provide authors with useful edits and improved citation accuracy and comprehensiveness, provide reputational benefits to their sponsoring law school, and provide an important professional credential and valuable training for the law students who edit those journals.⁸

The increasing use of SSRN and university working paper website prepublication prior to journal submission, however, sharply undercuts the value of the law journals' scholarship dissemination function, since SSRN and working paper website postings provide the same widespread availability for interested readers as the journals and do so more rapidly than print and even most online law journals. SSRN, however, does not edit articles or bluebook their citations for accuracy and comprehensiveness. Moreover, it does not screen

4. Ramsay, *supra* note 2, at 138.

5. *Id.* at 139.

6. *Id.* at 138.

7. *Id.* at 138.

8. *Id.* at 141.

articles for quality, and the review process for most university working paper websites is minimal at best.⁹

I am well aware that the extensive literature critiquing law journals over the past century is littered with seemingly sensible suggestions for reforms that were never adopted. The glacial inertia that characterizes the legal system generally and legal education in particular appears to be especially powerful in this context. Nevertheless, I will here make the probably quixotic effort to offer my suggestions regarding how law journal procedures could, and perhaps should, be rather substantially changed in light of the growing prevalence of online SSRN and university working paper postings.

Law journals should continue to review the articles submitted to them for their novelty, importance, thoroughness, and other established indicia of good scholarship. I suggest, however, that the journals stop editing and then providing their readers with the full text of the articles that they deem meriting publication in a journal of their stature, but merely provide readers with the articles' SSRN and/or working paper website links, along with a summary abstract of the article that they have prepared.¹⁰ The author would then be responsible for the final editing and proper documentation of their work and for the appropriate scope and formatting of the article's citations on those websites, perhaps benefitting from confidential comments provided to them by the publishing journal's editorial staff who have reviewed and approved the article.

Under this new approach, there would no longer be any need for the law journals to incur the significant expense of providing printed copies of their issues to their subscribers. In our era of financial stringency faced by most law schools, the potential saving of thousands or even perhaps tens of thousands of dollars per year in publication costs in excess of subscription revenues for a typical law school print journal should not be ignored. Online journal issues containing these abstracts and website links, and also the abstracts and website links for any student notes or comments that the journal deems also merit dissemination, would clearly suffice for interested persons who could then easily download the text of articles that interested them and could be prepared and made available to subscribers at a much lower cost than print journal distribution. Moreover, the journal staffs would now be able to review, “accept,” and provide this article abstract and website information for a significantly larger number of articles than they now are able to do while financially constrained by their publication page limits.¹¹

With this new format, law journals and their associated law schools would retain the current prestige benefits of providing a suitably discerning filtering

9. *Id.* at 140.

10. This abstract would presumably be provided by the author, edited by the journal, and perhaps also accompanied by additional journal staff comments.

11. The leading print journals currently have to select approximately a dozen or so articles annually for publication out of literally thousands of submissions, which, as a practical matter, requires the rejection of many fine pieces without close reading and review. Under my approach, journals would have the capability of more seriously reviewing a significantly larger number of articles, and perhaps also endorsing more of those articles than they do now as meeting their standards, if they chose to do so.

and assessment of current scholarship. The leading journals could continue to be highly selective in their endorsements. There may be some question, however, whether the longer-term benefits for law students of the academic credential provided by law journal membership and educational advantages resulting from their editing, comment and case note writing, and managerial journal duties, would remain as substantial and as attractive as they are now. In particular, would the practically important “sorting function” prestige aspects of law journal membership for students be retained under this format? If not, this could be disruptive to the journals. The perceived prestige of journal membership in the eyes of later potential employers may unfortunately be necessary to encourage adequate interest in such membership and willingness to discharge its substantial duties for law schools to be able to fully staff their journals with talented students.¹²

I believe that the high prestige of law journal membership and its attractiveness to students would remain under this new format. The students could continue to be selected for journal membership after completing their first year of studies through some combination of high class grades and demonstrated writing proficiency, as they generally are now, and they could still be required to produce during their membership some substantial academic writing of comments and/or case notes that they could later show employers. They would continue to manage the journal’s affairs and select and train their successors, as they do now. The students staffing the journals would still spend much of their time reviewing submitted articles and doing the research necessary to properly assess the merits of those articles but would now no longer have to spend so much of their efforts editing, cite-checking, and bluebooking articles once they were deemed to merit publication.¹³ Instead, they could devote more of their efforts to their own writing, to closely reading and evaluating more of the submitted articles, to helping those authors selected for publication edit the articles if asked, and to preparing informative summary abstracts. I would expect that most student law journal members would welcome such a redirection of their efforts away from the grueling fare of cite-checking and bluebooking.¹⁴ For these reasons, journal membership would still therefore likely be highly regarded by potential employers, and thereby remain attractive to students for this reason, perhaps even more so than now.

One concern that comes to mind is that this new journal article selection and dissemination approach, if widely followed, could create the incentive for authors to try to obtain multiple “certifications” by different journals of the quality of their work and publication of the website links to their articles. Authors whose articles have been certified as meriting publication by one journal might attempt to seek additional certifications from one or more

12. This “sorting function” feature of law journal membership as a means of facilitating employer discrimination among law school graduates when making hiring decisions is arguably somewhat problematic—a question for another day.

13. Cite-checking and bluebooking are the most grueling, unpleasant, and time-pressured of their current duties, by all accounts!

14. *See id.*

comparable or higher ranked journals, in a manner similar to the current widely bemoaned but commonly pursued “expedited review” process. This practice of seeking multiple certifications of one’s work, if it was allowed at all, would probably have to be regulated in some way to avoid overly burdening the journals’ article review processes.

That is my general suggestion as to how law journals should adjust their procedures to reflect the growing prevalence of SSRN and university working paper website prepublication of later journal submissions. I think that this new journal format would provide some potential advantages for authors and especially for law journals, both for their members and their finances, and on balance, for the world at large. Despite these advantages, this proposal, if seriously considered, would probably encounter the usual collective action problem that greatly hinders all manner of legal education reforms.

The dean of any law school whose flagship journal was considering taking this new approach might well fear that the journal would thereby somehow lose stature relative to the other law journals published by the schools that are their most direct competitors. This concern might be particularly pronounced if those competing journals continued their traditional procedures of editing and publishing full articles, thus imperiling both the relative ranking of the law journal that took this new approach and, more importantly, the U.S. News & World Report overall ranking of the law school with which it was associated. Such decanal concerns could probably only be allayed if a significant number of other equally well-regarded law schools were simultaneously making the same changes for their journals, or if at least the Harvards and Yales of the world were taking this tact.

I would like to see some law journal(s) try something along the general lines of this new approach that I here suggest, I really would. The fact that recently a significant number of the leading law schools have withdrawn from submitting information for the annual U.S. News & World Report¹⁵ ranking efforts suggests that effective collective action may also be possible with regard to other ossified aspects of legal education that need to be changed, which I believe include law journal procedures, given the growing prevalence of SSRN and university website article postings. But given the inertia of legal education since the nineteenth century, I will not hold my breath waiting for this to happen.

15. Adway S. Wadekar, *Duke School of Law Withdraws from US News and World Report’s Rankings* (Nov. 21, 2022), <https://www.dukechronicle.com/article/2022/11/duke-law-school-withdraw-from-us-news-and-world-reports-best-law-schools-ranking-yale-harvard-columbia-stanford-georgetown> [https://perma.cc/P5SX-ZK6B].