Law Journals, Biomedical Journals, and Restraint of Trade

Health Policy Portal

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Abstract: Law journals permit submission of scholarly manuscripts to multiple journals concurrently, but biomedical journals strictly forbid submission of manuscripts to more than one journal at a time. Law journals may then compete for the publication of manuscripts. This article examines whether the single-submission requirement of biomedical journals may constitute restraint of trade in violation of Section 1 of the Sherman Antitrust Act.

As readers of the *Journal of Law, Medicine & Ethics* well know, when a legal scholar submits a manuscript to a law journal for consideration for publication, the author often submits the manuscript to multiple journals concurrently, commonly a dozen or more.[1] When the author receives an offer of acceptance of the manuscript from a journal, the author may either accept this offer or contact other journals to which the manuscript was submitted and request an "expedited" decision. Requests for expedited decisions may be made to journals that the author considers preferable (i.e., more highly ranked) to the journal that made the initial offer, based, for example, on the rankings of law journals maintained by Washington & Lee School of Law.[2] In this circumstance, the author may now be at a competitive advantage. Those journals — should they so choose — may issue counteroffers and thereby enter a "competition" to acquire the author's manuscript for publication, and the author may have the opportunity to select among several or more acceptances for publication.

The practice among law journals of multiple simultaneous manuscript submissions generally works to the author's advantage, allowing authors to negotiate with several or more law journals once they have an initial acceptance in hand. Multiple simultaneous submissions may also expedite manuscript acceptance and publication, as will be discussed subsequently. A potential disadvantage of this system is that lower ranked law journals may lose out when they make an offer (after investing the time and effort to conduct a careful review of the manuscript) but the author decides to accept an offer from a higher ranked journal. Still, on balance, the multiple submission policy has the advantage of allowing free and fair competition among journals, which determines the ultimate outcome of the manuscript selection process, and authors clearly may derive benefit from the opportunity to select among offers.

Friedman has provided a thoughtful critique of the editorial procedures and practices at law journals and has suggested revisions.[3] Among them is, "... limiting the number of simultaneous submissions, and — ultimately — requiring authors to accept the first offer that is extended." He concludes, "This would be a huge change in the culture, to be sure, but it is an appropriate one."[4] Friedman also points out that potential advantages, from authors' points of view, of the current law journal system are that most every article eventually finds an

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About This Column

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acceptable venue for publication and the process is reasonably expeditious.

As compared with scholarly law journals, the procedures for manuscript submission for scholarly biomedical journals are quite different. Biomedical journals generally require that manuscripts be submitted to only one journal at a time, and authors must attest upon submission that they have submitted the manuscript only to that journal. If the author fails to adhere to the policy of single submission and pursues duplicate submissions, the manuscript may be rejected by both journals.

Unlike authors of law journal manuscripts, authors submitting to biomedical journals do not derive the benefit of receiving competing offers of acceptance from multiple journals. Instead, they must wait for a decision from the journal of first submission, and if rejected, then move on to another journal. This procedure of sequential submissions (biomedical journals), as compared with simultaneous submissions (law journals), requires that the clock be reset at the time of each new submission to a biomedical journal. The process is therefore potentially quite time-consuming, and it may take months or even years to have a manuscript finally accepted and published in a scholarly biomedical journal. This is detrimental to the biomedical research community that may want to have timely access to the new research, as well as to the author's professional advancement. The sequential submission process is the principal reason that preprint servers, such as medRxiv (for biomedical science) and bioRxiv (for biological science), have been developed, are now being used more frequently, and are more widely accepted by the editors of traditional biomedical journals. Preprint posting, which is acceptable to law journal editors, has been a common practice for legal scholars for some time (the preprint server SSRN.com is often used). Posting a manuscript on a preprint server provides the manuscript for public access but does not constitute official publication.

Why have these two disparate manuscript submission procedures been adopted by law and biomedical journals? A possible explanation lies with the Sherman Antitrust Act of 1890 (15 U.S.C. § 1),[5] with which law journal editors — but not necessarily biomedical journal editors — are closely familiar. A persuasive argument may be made that the single manuscript submission procedure required by biomedical journal editors constitutes a form of restraint of trade, possibly in violation of Section 1 of the Sherman Act. Section 1 is applicable specifically to restraint of trade within US interstate commerce, and the fact that biomedical journals typically publish research manuscripts submitted from every state throughout the US (and indeed throughout the world) — and are distributed to and read by individuals in every state — unquestionably places biomedical journals squarely within interstate commerce. The single submission rule interferes with competition and restrains authors' rights to negotiate freely with multiple biomedical journals. The fact that authors have the right to submit manuscripts to the journals of their first choice does not mitigate the disadvantage resulting from elimination of competition in the process of manuscript selection. The single submission rule may violate Section 1 of the Sherman Act, but (to my knowledge) causes of action have not been filed on this matter. This could soon change.

Single Submission Policies and the Ingelfinger Rule

In 1978, a small group of self-selected editors of international general medical journals met together to form the Vancouver Group (the location of the Group's first meeting), an organization now known as the International Committee of Medical Journal Editors (ICMJE).[6] This group of editors currently represent 13 international biomedical journals and 2 additional scholarly organizations: *Annals of Internal Medicine*, *BMJ* (*British Medical Journal*), *Bulletin of the World Health Organization*, *Deutsches Ärzteblatt* (*German Medical Journal*), *Ethiopian Journal of Health Sciences*, *JAMA* (*Journal of the American Medical Association*), *Journal of Korean Medical Science*, *Nature Medicine*, *New England Journal of Medicine*, *New Zealand Medical Journal*, *The Lancet*, *Revista Médica de Chile* (*Medical Journal of Chile*), *Ugeskrift for Laeger* (*Danish Medical Journal*), the US National Library of Medicine, and the World Association of Medical Editors. Of the 13 member journals, the 3 US journals (*Annals of Internal Medicine*, *JAMA*, and the *New England Journal of Medicine*) are founding members. The Committee maintains the ICMJE Recommendations, also called "The Uniform Requirements for Manuscripts Submitted to Biomedical Journals."[7] This document is a comprehensive listing of requirements for all aspects of manuscript preparation, review, editing, and publication for biomedical journals. Although the core membership of the ICMJE numbers only 15 journals and organizations (with some periodic rotation of member journals/organizations), numerous other biomedical journals are listed as following the ICMJE Recommendations/Uniform Requirements.[8] A biomedical journal that does not follow the ICMJE Recommendations runs the risk of being marginalized among the endorsing cohort of international journals, and therefore there is "peer pressure" for journals to follow the Recommendations, many of which are valuable in setting consistent editorial standards for editorial manuscript review and publication.

Among the specific ICMJE Recommendations is the statement in Section IIID1 about submission timing practices:

> Authors should not submit the same manuscript, in the same or different languages, simultaneously to more than one journal. The rationale for this standard is the potential for disagreement when two (or more) journals claim the right to publish a manuscript that has been submitted simultaneously to more than one journal, and the possibility that two or more journals will unknowingly and unnecessarily undertake the work of

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> peer review, edit the same manuscript, and publish the same article.[9] (emphasis added)

The fact that this section of the ICMJE Recommendations notes, "the potential of disagreement when two (or more) journals claim the right to publish a manuscript" on its face may reflect the editors' misunderstanding of US antitrust doctrine (which would apply only to US journals and their editors). When two (or more) journals offer acceptances to an author and compete for a manuscript, as happens regularly with law journals, the author may benefit from having the opportunity to make a choice of where to publish. The key text of the ICMJE Requirements that "Authors should not submit the same manuscript…to more than one journal" may not withstand scrutiny based on an analysis of anti-competitive conduct according to Section 1 of the Sherman Act.[10] Also, on the basis of longstanding precedent at law journals, it is evident that offers of acceptance by more than one journal are a matter that many law journals have incorporated into their routine editorial procedures and is in the best interest of authors. Most scholarly law journals allow the practice of multiple simultaneous submissions of manuscripts and conduct their editorial work successfully within this framework.

The single submission policy for biomedical manuscripts mandated by the ICMJE had its origins in the Ingelfinger Rule, which was established in 1969 by then editor of the *New England Journal of Medicine*, Franz J. Ingelfinger. Because of his insistence that the *New England Journal of Medicine* retain priority in the publication of research articles submitted to the *Journal*, Ingelfinger formulated the following rule:

> Papers are submitted to the *Journal* with the understanding that they, or their essential substance, have been neither published nor submitted elsewhere.[11] (emphasis added)

Though the Ingelfinger Rule, which currently remains an established policy of the *New England Journal of Medicine*, applies broadly to most forms of pre-publication/dissemination of manuscripts prior to official publication in the *Journal* (exempting meeting abstract presentations), the specific focus in this article is on Ingelfinger's proscription of multiple concurrent submissions. Ingelfinger regularly rejected papers when authors were not in compliance with the rule, as did his successor, Arnold S. Relman.[12] Both were long-term leaders of the *New England Journal of Medicine*, and they consistently enforced the rule during their respective tenures. It continues to be enforced today. As the *New England Journal of Medicine* was among the founding biomedical publications of the ICMJE, the substance of the original Ingelfinger Rule was also incorporated into the original Uniform Requirements of the ICMJE (and has been retained in later versions the ICMJE Recommendations).

For many years, the *New England Journal of Medicine* and other prestigious biomedical journals have benefited from the single submission requirement. Since authors are more likely to submit their manuscripts to the most prestigious journals (generally reflected by a journal's impact factor)[13] on the initial round of submission, journals such as the *New England Journal of Medicine*, *JAMA*, and *Annals of Internal Medicine* receive priority in the selection of manuscripts for publication. Unlike the multiple submission policy at law journals, upon submission to the first biomedical journal, there is no competition with that journal in the selection process for publication. Only if the journal of first submission decides to pass on the manuscript does the next journal in the author's preference list get an opportunity to consider the manuscript. Thus, due in part to the lack of competition in the process, the most prestigious journals, which may select first, have the upper hand in choosing those manuscripts that are most likely to sustain their high impact factors and preserve their top positions in the hierarchy of scholarly biomedical journals.

Neither the multiple submission policy followed by law journals, nor the single submission policy followed by biomedical journals is a perfect solution — as a matter of editorial policy — to the management of the selection process for scholarly articles. Nevertheless, in establishing any publication policy, it is mandatory to abide by the law.

Given that the journal receiving the first manuscript submission has no competition for that manuscript from other journals — unless and until the editors of the first journal decide to reject the manuscript — there is also little incentive for editors to pursue an expeditious review process, and this may introduce further delays. As mentioned previously, the *ad seriatim* manuscript review process inherent in the single submission policy (i.e., moving from one journal to the next) may result in a slow pathway to publication. The lack of incentive for medical journal editors to execute an efficient manuscript review procedure may add further delay to an already unhurried process. While it is important to the editorial decision that manuscript reviews be performed deliberately, it is in the interest of neither the author nor the wider research community for review procedures to be excessively protracted.

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Antitrust Analysis

In establishing the single submission requirement in Section IIID1 of the ICMJE Recommendations, the ICMJE member editors collaborated in the development of a presumptively anti-competitive policy. Section 1 of the Sherman Act reads[14]:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

In the single submission policy, the ICMJE editors have not only created an anti-competitive arrangement, but they have also collaborated in the creation of the practice, another potential violation of Section 1 of the Sherman Act. Of course, US antitrust doctrine, as set out in the Sherman Act, would be applicable only to US journals, though other countries have their own antitrust laws that could also be applicable to the single submission policy.

In July 2021, President Biden signed an ambitious Executive Order that encouraged several federal agencies, including the Federal Trade Commission and the Department of Justice, to promote competition in the US economy and established a White House Competition Council within the Executive Office of the President.[15] The purpose of this initiative was to ensure fair competition throughout the US economy. The Competition Order directed executive agencies to implement policies promoting that objective through rulemaking and litigation, the latter being the traditional approach to addressing antitrust violations. In this context, rulemaking, proposed by Chopra and Khan, is a novel intervention.[16] The release of the Competition Order should have alerted US biomedical journals to re-examine their single submission policies for manuscripts, which may be at variance with US antitrust law.

If the single submission policy of biomedical journals were to be subjected to antitrust scrutiny, how might this analysis proceed? To state a claim for a horizontal restraint on trade under Section 1 of the Sherman Act, there must be [1] an agreement, and [2] an anti-competitive restraint on trade. With the single manuscript submission requirement, there is clearly an agreement based on the codified rule. Under the second element, restraints may be analyzed as either [A] per se violations (i.e., categorically unlawful), or [B] under the rule of reason," which requires balancing the pro- and anti-competitive effects of the restraint. In the case of single manuscript submissions, the restraint would likely fall under the rule of reason. A relevant precedent occurred in *Polk Bros. v. Forest City Enterprises*, 776 F.2d 185 (7th Cir. 1985).[17] In the opinion written by Seventh Circuit Judge Frank Easterbrook, if the restraint is "ancillary" insofar as it contributes to the success of a cooperative venture, promising greater productivity/output, the restraint falls under the rule of reason.[18] It may be argued that the single submission restraint contributes to productivity by avoiding the duplication of peer review costs while incentivizing journals to compete to attract first submissions.[19] However, productivity may be enhanced in other ways, such as the sharing of peer reviews among journals (another form of cooperation that is already currently practiced). It may also be argued that the anti-competitive effects nonetheless outweigh this potential benefit given that the rule incentivizes authors to submit their manuscripts first to the highest-ranked journals, which further entrenches the journal rankings. The single submission mandate also eliminates direct competition among journals for manuscripts, which arguably would benefit authors.

If a restraint-of-trade complaint were brought regarding the single submission procedure, the outcome would be determined by a court, and attempting to forecast the outcome is not the intent of this article. The principal argument being made here is that the matter of a single submission policy for biomedical journals, versus a multiple submission policy for law journals, raises an incontrovertible question about a potential antitrust violation that should be addressed and answered in an appropriate legal venue and/or by scholarly debate. The issue is not whether multiple submissions should become the standard for biomedical journals, but whether such a policy should be an option for biomedical authors. Were this option to be offered to authors, additional adjustments to the editorial process would be needed, but it is beyond the scope of this article to explore these details.

Conclusion

Neither the multiple submission policy followed by law journals, nor the single submission policy followed by biomedical journals is a perfect solution — as a matter of editorial policy — to the management of the selection process for scholarly articles. Nevertheless, in establishing any publication policy, it is mandatory to abide by the law. For many years, biomedical journals have collaborated to implement a potentially anti-competitive single submission requirement for manuscripts that may be in violation of the Sherman Act, and it is overdue that this matter be addressed. The Ingelfinger Rule may have been in violation of federal law when it was first adopted in 1969, and its recodification in Section IIID1 of the ICMJE Recommendations may be in violation today. In view of the Biden Administration's initiative on competition in the US economy,[20] the US biomedical journals that were involved in establishing and are today involved in maintaining an anti-competitive submission policy may be well advised to carefully reappraise this matter and, if necessary, consider appropriate revisions to their manuscript submission policies.

Note

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18. Another recent relevant antitrust analysis is: *National College Athletic Association v. Alston*, 594 U.S.___ (2021), in which college athletes prevailed against the NCAA in their antitrust case argued before the Supreme Court.
19. Justia US Law, *supra* note 17.
20. The White House, *supra* note 15.

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