CHAPTER 2

Copyright Law’s Role in Advocacy and Education for Open Access Policies on Campus

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Introduction

Over the past decade, colleges and universities have been adopting institutional open access (OA) policies that encourage, direct, or give rights to authors to make their research publicly available in institutional repositories (IRs). These networked databases are often created to serve these OA policies, distributing an author’s research to a global online audience. Without copyright law, these policies and the supporting IRs could not exist: copyright law is the engine of a successful OA policy and thereby a successful IR. In particular, US copyright law features a statute that allows creators to transfer rights for a work without actually giving up total control of it. These non-exclusive rights are the foundation of the OA movement in the US.

This chapter begins with a brief introduction to the benefits and management of OA policies, focusing on their basis in copyright law and
author rights. It continues with an examination of the ongoing disagreements among OA practitioners and publishers about what OA actually means and how the term “open access” can pose communication and workflow challenges for those working with institutional OA policies. Within this context, the authors describe common OA policy workflows and the activities librarians undertake to determine what version of an article can be deposited in an IR as well as how to communicate these nuances to campus stakeholders. It concludes with advice on how an IR can be used to advocate for author rights and comply with copyright law.

Open Access Policies

Definition and Benefits

The concept of OA is simple. In the words of OA advocate and scholar Peter Suber: “[O]pen access literature is digital, online, free of charge, and free from of most copyright and licensing restrictions.” OA literature increases “the visibility, retrievability, audience, impact, and usefulness of research,” says Suber.

Members of an academic community can be protected by and encouraged to distribute versions of their research through university OA policies. These institutionally or author-driven initiatives come in a number of varieties, which have been described at length in the guide to “Good Practices for University Open-Access Policies,” written by Shieber and Suber in 2012. At one end of the range is a comprehensive policy: an opt-out, faculty-sponsored policy where an institution is granted non-exclusive rights to research and authors are expected to deposit a range of scholarship in an IR. At the other falls an opt-in policy where authors are simply encouraged to deposit peer-reviewed journal articles. Under the former, authors are granted a set of rights to distribute and reuse the deposited version under their copyright; under the latter, an author must follow a publisher’s self-archiving policy, which may vary in degree of permissiveness and exclusivity of rights taken. All OA policies aim to make research as free and flexible as possible (in regards to cost and reuse) and are grounded in the protection of author rights within copyright law.
Copyright and Author Rights

The constitutional purpose of copyright is to promote the progress of science and art. This 225-year-old law has always sought a balance between the needs of the creator to reap rewards from the limited economic monopoly of their work and the needs of the public, once the limited economic monopoly rights have expired. Even as far back as 1783, a committee of the Continental Congress stated that “nothing is more properly a man’s own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius and to promote useful discoveries.” These words are very much in line with modern thoughts surrounding academic labor, which view the creation of articles, books, and other scholarly research as “fruit[s] of…study.”

The Copyright Act has been updated several times. Currently, copyright lasts for the entire lifetime of the creator, plus an additional seventy years after the creator has died. Typically, copyright law grants the creator a set of certain rights. These rights, codified in the US code at 17 U.S.C. 106, give creators the right to copy, modify, display, perform, and create other works modified from the original. These are typically referred to as the exclusive rights, or in common parlance, the “bundle” of rights. The creator automatically gains these bundled exclusive rights as long as the work is fixed and creative; no registration or other formality is required.

As the copyright holder, the author is, until or unless copyright is transferred, the sole possessor and decisionmaker about the use of these exclusive rights. Each of these rights is unique and can be transferred in whole or in part. For example, an author could transfer her right to distribute to an individual or organization. That individual or organization could then distribute the work as if they were the original author.

However, such decisions to transfer outright some or all of the bundle of copyright could prevent authors from exercising their rights. For example, if an author transferred all of his exclusive rights in one agreement—as is often the case with traditional scholarly publishing contracts—he might not be able to legally place the work on his own course website, make copies for colleagues, or upload the work into an IR. The law would view the new rightsholder as the original author for legal purposes.
Luckily, transferring copyright does not have to be an all or nothing agreement. The law allows you to transfer copyright while holding back rights for yourself and others. This is known as non-exclusive licensing and is the fuel for OA.

OA Policies and Copyright

Underlying most OA policies across the US is the statute addressing non-exclusive rights. In § 205(e) of the U.S. Copyright Act:

A non-exclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or such owner’s duly authorized agent, and if—

(1) the license was taken before execution of the transfer; or

(2) the license was taken in good faith before recordation of the transfer and without notice of it.

As stated above, an author can transfer legal ownership to another party by granting an exclusive license. Thereafter, the author would no longer be considered the owner of that bundle of rights under the law. By contrast, the creator of the work does not transfer ownership of the copyright to the licensee when granting a non-exclusive license; the copyright owner simply permits the use of a copyrighted work in a particular manner. Granting non-exclusive rights to other parties still enables an author to grant, assign, or retain rights she had before. For example, an author might draft a piece of scholarship and send it to a pre-print repository, giving the repository a non-exclusive license to post the work. However, since the author still owns the copyright, he could again transfer rights to a journal or publisher for a future publication; there is no conflict under copyright law in that second transfer. This is the advantage of the non-exclusive license: it keeps the author in the driver’s seat, maintaining ownership and control of the exclusive rights.

Non-exclusive rights are sometimes viewed as “shared rights” since they drive and empower OA. Authors can share articles in repositories, they can publish openly licensed versions of their works on their own web
pages, and they can still contract with others. Non-exclusive licensing preserves the freedom of OA scholarship. Furthermore, this area of copyright law features two of the most advantageous presumptions offered by the Copyright Act—an affirmative defense to a claim of copyright infringement and the minimization of registration requirements.

First, the existence of a non-exclusive license is an affirmative defense to a claim of copyright infringement. Second, in contrast to an exclusive license, a “non-exclusive license may be granted orally or may even be implied from conduct.” Since non-exclusive licenses do not convey a transfer of ownership, there is no requirement that they be recorded to be valid. A non-exclusive license is, therefore, an exception to the writing requirement under the Copyright Act Section 204. It is further clear, looking at the legislative history of the Copyright Act, that Congress absolutely intended that this exception create and empower an interoperable system for non-exclusive licensing: “the impracticalities and burdens that would accompany any requirement of recordation of non-exclusive licenses outweigh the limited advantages of a statutory recordation system for them.” In retrospect, this Congressional mandate found in Section 204 made OA scholarship part of the core of protected copyrighted works, giving authors continued ownership of their copyright and offering publishers a viable alternative to continue their business of distribution without having to take any rights beyond the non-exclusive licenses.

**Implementation and Management**

In early 2008, two events changed the deposit rate among scholars around the world. Previously, the rate of deposit of OA articles—such as the 2005 request by the US National Institute of Health (NIH) that grant recipients voluntarily self-archive their articles to PubMed Central—was lower than 5 percent. First, NIH made self-archiving mandatory, and second, Harvard University’s Faculty of Arts and Sciences passed a faculty “self-mandate” utilizing their non-exclusive rights. These two policies were massive developments in the history of the OA movement and began a long drive by other government institutions, funders, and universities to pass similar OA mandates. The question became: How could this be accom-
plished at different institutions, both public and private, with differences in structure and faculty status?

Early in the OA movement, any previous university mandate merely required faculty to deposit their own articles online. This was true of the twelve other institutional mandates and three departmental mandates that preceded the Harvard vote in nine other countries: Australia, Belgium, France, India, Portugal, Russia, Switzerland, Turkey, and the United Kingdom. These efforts were sometimes referred to as deposit mandates, under which each faculty member had to expressly grant an institution non-exclusive license for each scholarly copyrighted article.

Conversely, the Harvard mandate automatically grants the institution a non-exclusive license to archive and distribute every scholarly article produced by its faculty. This is, of course, subject to a waiver provision, where a faculty member may expressly opt out of the policy for an individual article. The policy was voted on by Harvard’s entire Faculty of Arts and Sciences, and the decision was unanimous. As the OA policy spread at Harvard from school to school, the faculty were voting to let the university automatically acquire a prospective non-exclusive license to archive and distribute the scholarly works created by the faculty. Each vote noted the date of birth of the policy, as the license was not applicable to articles retroactively. Overall, the faculty body that voted at each school empowered that school to proactively archive articles under the broad, institutional, non-exclusive license to exercise the copyright rights. This has been called a permission mandate because it merely switches the default: instead of requiring every individual faculty member to expressly grant the school a non-exclusive license, the institution receives that license automatically via the vote and resulting policy. Many institutions now require this exact style of adoption at their institutions—a faculty vote.

A faculty vote is often necessary to dispel any myth surrounding the controversy of top-down OA mandates. Certainly, if a president or provost at a university or other institution compels faculty to submit to an OA policy, this feels less like an organic process and could be interpreted, especially by OA skeptics, as a form of requisition of the copyrighted author’s rights. OA is designed to keep the author and creator of these copyrighted works in the driver’s seat and maintain control over their own copyrighted works. Therefore, a grassroots-style adoption by faculty vote—by the
very authors and creators of the copyrighted works subject to the policy—has a much greater legal foundation: the institutions will have an express license from the original copyright creators to archive and disseminate copies of these works. These faculty authors are choosing to share the bundle and adopt an OA policy.

Policies modeled after the Harvard-style OA Policy, for example, require two things of faculty: (1) that they give the university non-exclusive permission “to exercise any and all rights under copyright” over their scholarly articles, which includes permission to disseminate OA copies through the IR, and (2) that they send digital copies of their articles to an office designated to handle the policy. This office is often the library.

Disagreement among OA Practitioners and Publishers

Common OA Policy Workflows

Libraries tasked with OA policy implementation often pursue a wide range of activities to promote the policy and to solicit and deposit publications. Although early OA policy adopters hoped that authors would actively engage with the policy and deposit publications without library assistance, the reality is that many libraries play an active role in the deposit process. Not only do libraries need to make authors and their proxies aware of policies, they need to facilitate deposit of publications in an IR.

In their analysis of data from the Coalition of Open Access Policy Institutions (COAPI), Duranceau and Kriegsman found that OA policy implementation activities related to soliciting IR content generally fall into one or more of four models: “systematic recruitment; targeted or opportunistic outreach; use of a faculty profile tool; and harvesting from other sites.” Libraries typically adopt workflows and tools that best fit their resources and unique campus culture. Many libraries survey institutional publications and faculty CVs to identify relevant publications for deposit. Others use bibliographic databases like Scopus and Web of Science to capture citations for applicable publications. These databases can also
be integrated into faculty information systems such as Symplectic Elements, which permit institutions to automate the process of identifying publications and notifying authors that they need to deposit in the IR. Some libraries leverage institutional publisher memberships, like BioMed Central, to automatically harvest OA publications directly to an IR.21 Others take a hands-on approach, working closely with individual departments and faculty to capture publications.22

Both Harvard University and Rice University use a combination of the aforementioned activities. Staff at the Harvard Library Office for Scholarly Communication (OSC), as well as participants in a distributed-deposit program that partners with OA liaisons, faculty assistants, and recruited depositors, work with authors to identify works and deposit them via a webform. Author self-deposit is also possible and common. OSC also offers CV Scraping, a mediated deposit service, in addition to other benefits, including direct outreach to authors, monthly download statistics emails, and reader feedback stories. Harvard’s open access repository, Digital Access to Scholarship at Harvard (DASH), also harvests the various faculty activity reports and the OA-subset from PubMed Central. Similarly, Rice University’s Fondren Library is actively engaged in article solicitation and deposit. Library staff monitor faculty publications via Web of Science, Scopus, and Google Scholar, depositing OA publications in Rice’s IR, Rice Digital Scholarship Archive, and contacting authors for copies of other articles. Fondren also leverages its BioMed Central membership to automatically deposit of publications with Rice-affiliated authors.

Activities Librarians Undertake to Determine Versioning

Copyright and author rights issues play a significant role in OA policy workflows. Because in many cases institutional OA policies leverage institutional copyright policies, successful policy outreach and implementation depend on an understanding of copyright and author rights issues by both library staff and authors. As discussed previously in this chapter, author rights are the rights controlled by an author unless copyright has been transferred to a publisher. Relevant to institutional OA policies, publication agreements often outline where authors can post copies of their articles and in what version. Much of the work related to depositing
focuses on identifying what version of an article can be deposited (known as versioning) and if embargoes are required.

Many institutional OA policies direct authors to make publications available in an IR immediately upon publication. Although publishers may instruct authors to embargo manuscripts for a set amount of time, some institutions, including Harvard, interpret the OA policy as taking precedence: assuming that the OA policy was passed before an author signed a copyright transfer agreement, and assuming that the publication did not require a policy waiver, the author is free to deposit the manuscript immediately. However, other institutions, such as Rice, accommodate embargo deadlines in response to author concerns about journal self-archiving policies. This necessitates that library staff check embargo guidelines (typically, via SHERPA/RoMEO and publisher web pages) in addition to versioning. Such work adds additional challenges to library workflows. In her 2017 article, Leila Sterman perfectly captures the process that goes into this work:

Green open access policies are often buried on publisher’s websites or only mentioned in contracts. This practice obfuscates important information, increasing both the time library staff spend searching for that information and author’s obliviousness to the opportunities and restrictions of green open access. Searching for and complying with journal’s unique green open access policies increases the effort required to post articles in repositories and decreases the perceived barriers to post on academic social media sites or personal pages as the restrictions are not obvious or visible. Embargo lengths are not always clear, even in resources like Sherpa/Romeo, which are devoted to maintenance of this information. Further, even if an embargo is clearly stated, does the embargo period start at the time of online publication, assignment of volume and issue, print publication, or some other date? This lack of clarity opens to unnecessary risk for even diligent librarians attempting to comply.

Sterman explains that these challenges, along with publisher-required “set statements” (language required by a publisher to accompany a deposit) and confusing policies differentiating IRs and other websites, create further barriers to OA policy compliance.
Communication with Campus Stakeholders

Effectively communicating the nuanced nature of an institutional OA policy, publisher self-archiving policies, and article versioning is key to author participation. Additionally, library staff engaged with OA policy work must also navigate the wide-ranging and often differing understanding and opinions of OA by library colleagues, authors, and publishers. Is it simply making content freely available online? Does OA imply freely available content with no restrictions on reuse? Because the OA community is so diverse, there is little consensus as to what OA is. In addition, many faculty continue to be wary of OA publishing, surrounded by numerous off-putting reports and anecdotes of predatory journals and lack of peer review as well as a common business model where authors pay fees (author processing charges, or APCs). It is important for library staff engaged in OA policy implementation to understand these preconceptions about OA when preparing outreach material and be able to answer questions and challenges.

Using the IR for Copyright Advocacy and Education

There are numerous advantages for authors who deposit research into an IR in addition to making works freely available. Research suggests that OA works are cited more frequently than works that follow a traditional publishing model; the latter often fall behind paywalls. IRs typically provide substantial metrics and reader feedback, directly connecting authors to researchers and providing a sense of where their scholarship is being read. Finally, IRs typically contain robust metadata, enabling more thorough search engine indexing, and provide static permanent links to scholarship.

However, IRs also provide benefits to librarians and information professionals. An IR’s workflows and requirements offer librarians opportunities to discuss complicated or abstract issues, including copyright, fair use, licensing, and author rights, in practical terms. These scenarios include questions surrounding the appropriate version of a work, waiving author rights under an OA policy, and IR licensing.
Versioning

The primary point of contact between an author and the IR occurs when a work is submitted, either by author self-deposit or mediated deposit. The complexity around versioning presents a favorable opportunity to educate authors on copyright. During the author deposit process, repository managers face a common scenario: authors often submit a version under publisher copyright that cannot be included in the repository. IRs typically request or seek the accepted author manuscript (AAM) as this is the version that is covered by an OA policy or allowed by a publisher to be posted under self-archiving policies. The pinch point in determining the correct version to deposit gives librarians or repository managers an opportunity to explain the basics of copyright, the rights an author may have signed away to a publisher, and the rights an author retains if covered under an OA policy.

A conversation with an author about versioning can also include education on publishing contracts and negotiations of those contracts. Authors covered by an OA policy retain the right to distribute an AAM in an IR. Those who are not covered must turn to the author self-archiving policies set forth by a publisher. Self-archiving policies vary: while many publishers do allow for some reuse in an IR, others allow no provision at all. Education around the concepts of self-archiving and the sharing of tools to differentiate publisher policies can help an author make choices over which publishers to use in the future; it also empowers authors to negotiate for certain rights or provisions in future contracts.

Waivers

A waiver request represents a speed bump for authors during the publisher negotiation process and provides another opportunity for librarians or repository managers to discuss copyright and author rights. Some OA policies contain a waiver option: a waiver is executed when a publisher requests an author waive their rights under an OA policy due to a conflict with the publisher’s licensing or business model. The institution then agrees not to assert the rights it has been given under the OA policy and the author and/or repository manager must follow publisher self-archiving policies (which often include an embargo) to determine
how a work can be distributed in an IR. In other words, waivers limit or restrict an author’s ability to reuse or redistribute their work even though the author is covered under an OA policy. While the waiver option gives authors the freedom to publish where they see fit, an author may choose to bypass a publisher that would require them to waive their rights. Waivers often provide the impetus for an author to pause and consider their rights, contract, and licensing.

**IR Licensing Authorization**

Librarians and repository managers are often tasked with determining the licenses under which works are distributed in IRs. This process is facilitated when authors designate librarians or repository managers as proxies. These authorizations usually precede an author’s deposits to the IR and do two things: re-assert an existing OA policy and give proxies the ability to make repository-specific licensing decisions on the author’s behalf. However, the authorizations, which contain legal language, can confuse authors as to their purpose. As a result, these authorizations provide another opportunity for education around copyright, licensing, and author’s rights. Librarians and repository managers reiterate the benefits of OA and an OA policy and explain the impact of different licensing within the IR as related to copyright.

**Conclusion**

OA policies are rooted in US copyright law and prioritize authors’ rights. The policies can be complex and require librarians and repository managers who are versed in copyright to help authors understand their rights. The tendency for institutions to develop their own unique policies and workflows for deposit further complicates the landscape and can be confusing for authors. However, the conversations that occur between authors and librarians or repository managers during the publisher negotiation phase and the deposit process result in the dissemination of copyright knowledge throughout the campus community. This enables and empowers scholars to advocate for their own rights facilitated by copyright law.
Endnotes

7. Registration, although not required, does have certain benefits, and many legal systems, including the United States, encourage registration of copyrighted works. Registration creates a legal documentation of the ownership and is a prerequisite to filing a copyright lawsuit.
8. Pre-print repositories differ from IRs in that they exist to share and elicit feedback on initial drafts of scholarship. Some examples of pre-print archives are ArXiv (physics) and BioArXiv (biology).


23. Green OA is where an author makes a version of their work available through a repository.


27. Within the academic library community, OA practitioners tend to use the Scholarly Publishing and Academic Resources Coalition’s (SPARC) OA definition: https://sparcopen.org/open-access/. However, it should be noted that even within the library community, there is tension; for example, see Paul Royster, “Up from Under the ‘Open Access’ Bus,” Journal of Librarianship and Scholarly Communication 1(2), p.eP1045 (2012), http://doi.org/10.7710/2162-3309.1045.


Bibliography


