



Licensing Revisited: Open Access Clauses in Practice

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Abstract

Open access increases the visibility and use of research outputs and promises to maximize the return on our public investment in research. However, only a minority of researchers will “spontaneously” deposit their articles into an open access repository. Even with the growing number of institutional and funding agency mandates requiring the deposit of papers into the university repository, deposit rates have remained stubbornly low. As a result, the responsibility for populating repositories often falls onto the shoulders of library staff and/or repository managers. Populating repositories in this way – which involves obtaining the articles, checking the rights, and depositing articles into the repository – is time consuming and resource intensive work.

The Confederation of Open Access Repositories (COAR), a global association of repository initiatives and networks, is promoting a new strategy for addressing some of the barriers to populating repositories, involving the use of open access archiving clauses in publisher licenses. These types of clauses are being considered by consortia and licensing agencies around the world as a way of ensuring that all the papers published by a given publisher are cleared for deposit into the institutional repository. This paper presents some use cases of open access archiving clauses, discusses the major barriers to implementing

archiving language into licenses, and describes some strategies that organizations can adopt in order to include such clauses into publisher licenses.

Key Words: licensing, open access, repositories, self-archiving

1. Introduction

For over a decade now, research libraries have been heavily engaged in licensing activities, involving complex negotiations with publishers to secure access to published content. Licenses are legal agreements that express the conditions under which access to content will be provided. These agreements, often negotiated by library consortia, have proven to be a very effective means for improving the buying power of institutions, enabling them to obtain access to larger collections at cheaper prices. In parallel to these ongoing licensing efforts, there has also been a steady increase in the momentum for open access, in which the library community has played a key role. The purpose of both of these activities is to improve access to knowledge. However, licensing and open access activities have rarely coalesced within the operations of the library, and indeed there are times when these two tracks can be seen to be working at cross-purposes.

Libraries hold significant power within the context of negotiating content licenses with publishers. These negotiations could be used as a forum for leveraging more fundamental changes to scholarly communication. Yet, to date, the primary focus has been on reducing the overall costs of access to publications. This is beginning to change and there is a growing recognition that there is an opportunity to further open access and other important library values through licensing negotiations. This paper reviews the efforts of several organizations to implement open access clauses within the context of their content licenses and discusses some of the challenges inherent in this activity.

2. Open access via institutional repositories

In terms of open access, many university libraries now have institutional repositories, with the aim of collecting and making available the research

output of faculty at their institution. It has been well documented that only a small percentage of published researchers will “spontaneously” deposit their articles into an open access repository (Swan & Brown, 2005). Over the last years, a growing number of institutional and funding agencies have introduced mandates requiring the deposit of papers into disciplinary or institutional repositories. However, deposit rates have not yet reached satisfying levels and research funders currently investigate additional monitoring and support measures (see for example: Times Higher Education, 2012).

Deposit of articles into repositories can be accomplished by authors, by someone else on their behalf, or as a combination of these two methods. However, in a study undertaken in 2011, it was reported that only 10% of all authors self-deposit their articles without assistance from the institution (Ramirez & Hanlon, 2011). Of course, there are variations in deposit rates by research area: authors from some fields such as physical sciences and mathematics and social sciences, humanities and arts are more likely to deposit a copy of the article themselves, compared to authors from the medical sciences which report that it is more common that articles were posted by someone else (Fry et al., 2011).

One of the major barriers to authors deposit is that many authors are concerned that if they deposit their articles into a repository, they will be infringing copyright. Authors are often unsure about their rights and the large diversity and lack of clarity of publisher policies regarding depositing into repositories can be extremely confusing (Fry et al., 2009).

In order to address this, librarians and repository managers in many institutions offer assistance in copyright clearance, using tools such as SHERPA/RoMEO, Dulcinea and the Society Copyright Policies in Japan.¹ As of May 2012, 58% of publishers listed in the SHERPA/RoMEO database allow authors to deposit a final author manuscript (post print or stage-2 version) into public repositories.² However, publishers’ policies can change over time and are not always clear. As such, many repository managers report that they directly contact publishers for asking permission to deposit material (Ramirez & Hanlon, 2011). This item-by-item approach is extremely time-consuming.

To ease the process of rights checking, some institutions have undertaken to negotiate directly with publishers in order to secure blanket deposition rights

for all of the authors affiliated with their organization. These agreements may simply state in clear language what already exists in the terms and conditions in the publisher's existing policy on self-deposit; or they may allow for greater deposit rights than are currently stated by the publisher.

3. Licensing as an instrument for securing basic rights

Until now, the majority of negotiations for authors' rights to deposit into open access repositories are exercised in the context of authors (or publication) agreements signed by authors at the moment the article is submitted for publication. A number of model authors' addenda have been developed for use by authors to ensure that they retain the right to deposit and reuse their research articles. However, it is unlikely that this approach will be adopted widely and result in widespread open access to articles via repositories. In 2009, *The Research Libraries Issues* (#263) published an article outlining efforts by the Max Plank Society and the California Digital Library to include author rights language into content licensing. The article points out, "Library content license negotiations offer a pre-existing tool to serve this purpose. While individual author agreements can amount to thousands of individual transactions each year at a single institution, library-publisher agreements are annual or multi-year arrangements with a broader compass, covering many journals in a single transaction" (Duranceau & Anderson, 2009, p. 34).

Content licenses define the rights of users of a given institution or institutions. Therefore, it would be a "logical extension to expand these licenses to cover author and university rights to the work included in content that is authored at that institution" (Duranceau & Anderson, 2009, p. 34). By inserting specific language in agreements with publishers, libraries can seek to secure basic author rights to deposit articles in repositories. The language would allow a given institutions authors' articles that are published by the specific publisher to be posted in an open access repository (or in another open access environment). These types of agreements with publishers can take the form of specific clauses inserted into traditional content licenses; they can be distinct and separate agreements between an organization and a publisher; or they can be negotiated in the context of hybrid open access contracts. We will focus here specifically on self-archiving language within the context of traditional content licenses.³

4. Model licenses and clauses

4.1 Stand-alone model clauses

The idea of a special clause to secure authors' self-deposit rights is not new. Some institutions and consortia have already tried to implement such language, including Ohiolink, MIT and Harvard. Typically, the approach has been used to request a change in author's publishing contracts in some cases through content licenses (for the JISC NESLi2 model license: see below).

In a 2009 meeting hosted by the Association of Research Libraries (ARL) on policy development for open access repositories, it was proposed that model language for inclusion in library content licenses be created. Based on this, an ad hoc working group of licensing experts formed in October 2009 released the following model language:

Authors' Rights To Use Their Own Work (Version 0.8, April 2010)⁴:
"Notwithstanding any terms or conditions to the contrary in any author agreement between Authors and Licensor, Authors affiliated with Licensee whose work ("Content") is accepted for publication within the Licensed Materials shall retain the non-exclusive, irrevocable, royalty-free right to use their Content for scholarly and educational purposes, including self-archiving or depositing the Content in institutional, subject-based, national or other open repositories or archives (including the author's own web pages or departmental servers), and to comply with all grant or institutional requirements associated with the Content.
For the avoidance of doubt, it is the intent of the parties to this agreement that Authors are third party beneficiaries of this provision of the Agreement."

To date, however, a review of licensing language for open access has not identified any organizations in North America that have implemented this model language into their existing licenses.

4.2 Model licenses and negotiation guidelines developed by national consortia

Over the last years, a number of collaborative negotiations have taken place at a national level in order to secure conditions for open access within journal license agreements.

4.2.1 UK NESLi model licenses: From deposition to text mining

In 2009, the NESLi2 model license had a specific clause allowing for the deposit of articles on websites and in institutional repositories:

3.1.3.13 save and/or deposit in perpetuity parts of the Licensed Material of which they are the authors on any network including networks open to the public and to communicate to the public such parts via any electronic network, including without limitation the Internet and the World Wide Web, and any other distribution medium now in existence or hereinafter created.

This clause has since been removed and replaced by the following clause, “Authorized Users for Educational Purposes only”⁵:

3.1.6.7 save and/or deposit in perpetuity parts of the Licensed Material in electronic repositories operated by the Licensee and/or by an Authorised User on a Secure Network. Access to and use of such repositories shall be limited to Authorised Users

3.1.6.8 use the Licensed Material to perform and engage in text mining/data mining activities for academic research and other Educational Purposes.

And, except where the License states otherwise, the Institution and Authorised Users may not:

4.1.4 display or distribute any part of the Licensed Material on any electronic network, including the internet other than by a Secure Network;

While the 2012 clause extends the rights of authorized users to allow them to use machines for digesting and further analyzing information from the subscribed literature, it no longer contains language that would secure the rights to deposit copies of the institutions’ articles in repositories. A recent report commissioned by JISC puts forward the argument for importance of securing rights for text and data mining. In particular, it notes that “text mining is currently extremely limited within UKFHE, in part at least due to the current licensing arrangements. A text mining exception, if it were to be implemented, would remove a key barrier, thus better enabling service solutions supporting text mining to emerge from the market.” (JISC, 2012).

4.2.2 Couperin Consortium in France

In 2011, the Couperin consortium, which is responsible for negotiating licenses on behalf of higher education institutions in France, has been moving towards a more systematic approach to the inclusion of open access clauses in their national licenses. Their approach is to push for greater usage rights in exchange for license renewals, including the right to archive papers in open access repositories. Couperin has developed a set of guidelines for negotiations with publishers in terms of deposit of articles into open access repositories. The guidelines urge negotiators to push for the right to archive papers in repositories in the context of national content licenses. In particular, the guidelines recommend the following model language related to open access⁶:

Publishers will permit the deposit of content into any type of open access archive (institutional, central / national, or disciplinary). If publishers wish to restrict to a specific type of archive, negotiators should push for deposit into the centralized archive, HAL, which can then deposit items into disciplinary archives such as ArXiv and PubMed Central. Ideally, there would be no embargo period for making this content open access via the repository. However, if there is to be an embargo period, it should be no longer than 12 months, and the embargo should apply to when articles can be made open access, rather than when the articles can be deposited into the repository. The guidelines also state negotiators should aim for the publishers' final pdf version and should not agree to pay an added fee for allowing open access via repositories.

At the time of writing this paper, the guidelines were still in draft format, but the final version should be available soon.

4.2.3 National licensing in Germany

Since 2004, a number of national licenses in Germany have aimed to acquire the rights to archive back-collections of journals and databases. In 2010, a "National Licensing" working group was formed within the framework of the "Digital Information" initiative of the Alliance of German Science Organisations⁷. The group agreed on common guidelines and carried out licensing negotiations for current journals and databases.⁸ Three aspects were of special importance in these negotiations:

- Pricing models that at least hold the perspective of replacing historic turnover volumes.
- An archival and moving wall condition, that secures ongoing archive development during the contract term. This condition would become available to all authorised institutions in Germany, usually after one year (moving wall) via a national license.
- An open access condition that ensures that authors of all authorized institutions, at no extra cost, can deposit their articles in a repository of their choice and make them available in open access.

The “Guidelines for the Purchase of Licences within the Framework of the Alliance Initiative ‘Digital Information’” contains the following recommendation:⁹

Authors from authorised institutions are permitted free of charge to promptly store their articles appearing in licensed journals generally in the form published by the publisher (e.g. PDF) in an (institutional or discipline-specific) repository of their choice and to make them available in Open Access. Authorised institutions to which the respective authors belong have the same right. An agreement by which the publisher itself stores articles written by authors from authorised institutions in a repository may also be reached.

The license is used by a nation-wide opt-in consortium co-funded by the German Research Foundation. All institutions continue to pay basic subscription fees and a share of the additional fees. The negotiations for the licensing period 2011–2013 resulted in 12 journal collections, one database and one e-book collection. All but one journal collection allowed the deposit of publishers’ PDF after a certain embargo period (an average of 6.5 months). Further products were negotiated in 2011 (Cambridge University Press journals and others) and are under review for forthcoming negotiations. Many of these also allow open access archiving after an embargo period. More details of the current agreements and open access clauses in Germany are available at the German national licensing website.¹⁰

Overall, the German Alliance licenses have been successful in securing basic rights to deposit final publications (publisher’s PDF) into institutional and disciplinary repositories. In particular, this means that users are allowed to read and download these articles from public repositories, but are not

necessarily granted the full range of rights as described in the Budapest-Bethesda-Berlin open access definitions (such as further dissemination, automated text and data mining etc.). The licenses basically allow institutions and authors to download articles from publishers' websites and deposit these copies into repositories of their choice. Institutions can now easily decide when and where to deposit publications on behalf of their authors.

To support the implementation of the open access clauses at the institutional level, an overview of the various publisher rights has been made available through the central website and guidelines for repository managers have been published in April 2012 (in German only). Workflows to identify authors, select and deposit content in repositories are currently explored. To improve the efficiency of procedures, it would be desirable to enable automatic selection and deposition of content in repositories. Workflows and technical solutions from various projects should be evaluated for reuse (for example SWORD, PEER, OpenAIRE).¹¹

4.3 Concerns and caveats

Introducing special clauses in content licenses provides opportunities to further the implementation of open access. However, there are also a number of concerns that have been expressed about the impact of this new approach to securing author rights. For example, some have expressed misgivings that open access clauses will become an additional service for which publishers will eventually seek financial compensation, leading to an increase in the prices for content licenses. In addition, licensing agencies will need to be aware of the current publisher "self-archiving" policies during licensing negotiations in order to ensure that they are not relinquishing rights that have already been bestowed by the publisher.

Others question whether these clauses will actually result in a greater number of open access articles, without an accompanying agreement with publishers that they will directly deposit the articles into repositories. Perhaps, to be effective, open access clauses need to be supplemented with automatic deposit services to deposit services provided by the publisher. While such services and workflows have not been widely established yet, this has been investigated in the context of the European PEER project and may be pursued further.

5. COAR initiates Open Access Agreements and Licenses Task Force

The Confederation of Open Access Repositories (COAR)¹² aims to support open access through a global network of digital repositories. COAR was launched in 2009 and represents over 90 institutions from 24 countries from throughout Europe, Latin America, Asia, and North America. One of COAR's major objectives is to develop and promote strategies that increase the volume of research papers in open access repositories worldwide.

It is apparent that the use of clauses to secure the rights to deposit articles into repositories is a strategy being considered by a growing number of licensing agencies around the world as a way of ensuring that all the papers published by a given institution be made openly accessible. However, there is currently no formal mechanism for exchanging information about these types of activities. In addition, this is a rapidly evolving environment in which publishers' approaches are subject to change. To that end, in the spring of 2012, the Confederation of Open Access Repositories (COAR) launched a multi-stakeholder Task Force, with members representing a number of different types of organizations (libraries, licensing agencies, library associations, and open access groups) with a common interest in promoting sustainable and effective practices for open access.

The purpose of the Task Force will be to monitor, evaluate and promote the implementation of effective open access agreements and licenses in order to improve access to research papers globally. The Task Force will be reviewing a broad range of open access agreements between research institutions and publishers including an assessment of the Licensing language that allows authors and/or institutions to retain rights to deposit copies of publications ("self-archive") in open access repositories (disciplinary and/or institutional). In addition, the Task Force will seek to gather information about the successful implementation of open access archiving language and what types of barriers have been encountered in the course of negotiations.

6. Conclusions

Libraries and consortia, as customers, have a significant power during the license negotiation process. Through licensing, they can exercise

this power to influence scholarly communication to create an environment that better reflects the underlying values of libraries, such as open and equal access to information. Some organizations have begun to look beyond the aim of negotiating simply for the greatest amount of content for the lowest price. They are looking to secure greater usage rights for the content they are licensing, such as the right to re-use, text and data mine, as well as to deposit their affiliated authors' papers into an open access repository.

Given the current budget pressures in many regions, priorities for licensing agencies could easily remain as the status quo and focus on price reductions, while other "less important" issues are put on hold until economic times are better. On the other hand, libraries and licensing agencies could use this time as opportunity to further their aims for open access and have a more profound impact on the nature of scholarly communications.

Based on our review of current efforts and existing licensing language, the following early recommendations can be made:

- Aim for securing rights to release the works under the most liberal CC license (CC-BY)
- Embargo periods should not exceed already existing terms as given in publishing contracts and publishers' policies (compare SHERPA/RoMEO)
- Secure institutional rights to act on behalf of authors – compatible with individual publishing agreements but without the need to ask authors for consent
- Aim for automatic selection and transfer processes right from the beginning of the agreement (in particular secure text and data mining rights to enable these processes)
- Identify technical partners, who can support these processes.

The Open Access Agreements and Licenses Task Force will look into further measures to support the implementation of open access agreements and investigate the efficacy of open access clauses in content licenses. The results and outcomes of this work will be made publicly available via reports, presentations at community events, and partner websites in the coming months.

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- <http://scpj.tulips.tsukuba.ac.jp>.

ARL <http://www.arl.org/resources/pubs/rli/archive/rli263.shtml>.

<http://authorrights.wordpress.com/>.

JISC NESLi2 Model licenses <http://www.jisc-collections.ac.uk/Help-and-information/How-Model-Licences-work/NESLi2-Model-Licence-/>.

German Research Foundation (DFG) http://www.dfg.de/foerderung/programme/infrastruktur/lis/formulare_merkblaetter/index.jsp, download form 12.18 e, No. 23.

National Licenses in Germany <http://www.nationallizenzen.de/tools/open-access-rechte.xls/view>.

SWORD <http://swordapp.org/>.

PEER <http://www.peerproject.eu/>.

OpenAIRE www.openaire.eu.

Notes

¹ <http://www.sherpa.ac.uk/romeo>, <http://www.accesoabierto.net/dulcinea>, <http://scpj.tulips.tsukuba.ac.jp>

² <http://www.sherpa.ac.uk/romeo/statistics>

³ There are other variations of content licenses that are outside the scope of this paper, such as hybrid open access supplements subscriptions by an option to publish in open access, typically based on a large deal and/or additional fees. For example, Springer entered into a number of open access pilots with UKB, the Dutch consortium (2007–June 2012), University of Göttingen (from August 2007), Max Planck Society (2008–2009), the University of California (2009–2011), and others. The majority of these pilot agreements have since been discontinued by Springer with the following explanation, “The Board of Springer decided late 2009 not to enter into new (pilot) projects for Springer Open Choice. We believe Open Access Gold seems to be the way forward and therefore Springer has launched Springer Open.”

⁴ <http://authorrights.wordpress.com/>

⁵ <http://www.jisc-collections.ac.uk/Help-and-information/How-Model-Licences-work/NESLi2-Model-Licence-/>

⁶ The text for the guidelines is based on private communication with Couperin and has been translated into English for the purposes of this paper. The translation may not be an exact representation of the text in French.

⁷ Alexander von Humboldt Foundation, the German Research Foundation, the Fraunhofer Gesellschaft, the German Academic Exchange Service (DAAD), the German Rectors' Conference, the Helmholtz Association, the Leibniz Association, the Max Planck Society and the German Council of Science and Humanities.

⁸ This section summarizes the finding of the COAR Case Study 'National Licenses and Open Access in Germany', compare Schmidt (2012).

⁹ <http://www.dfg.de/foerderung/programme/infrastruktur/lis/formulare/merkblaetter/index.jsp>, download form 12.18 e, No. 23.

¹⁰ <http://www.nationallizenzen.de/tools/open-access-rechte.xls/view>.

¹¹ <http://swordapp.org/>, <http://www.peerproject.eu/>, www.openaire.eu.

¹² <http://www.coar-repositories.org>.