
**OPEN ACCESS CLAUSES IN PUBLISHERS' LICENSES
CURRENT STATE AND LESSONS LEARNED**

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Produced by the **OPEN ACCESS AGREEMENTS AND LICENSES TASK FORCE**

Initiated and supported by



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ABOUT THE TASK FORCE

Open Access Agreements and Licensing Task Force is a multi-stakeholder group initiated and supported by COAR (Confederation of Open Access Repositories), with members representing a number of different types of organizations (libraries, licensing agencies, library associations, and open access groups) who have a common interest in promoting sustainable and effective practices for open access.

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INTRODUCTION

Open access (OA) is the “free and unrestricted online availability”¹ of scholarly literature. OA has been growing steadily since the first major public declaration of support in 2002 through the Budapest Open Access Initiative. Most recent developments, including OA policies and laws in the United States, European Commission, Latin America and elsewhere, suggest that OA will likely become the default means for delivery of scholarly content in the coming years. As OA becomes increasingly pervasive, the scholarly community is shifting its efforts away from advocacy and towards implementation and support.

Open access is realized through two primary means: open access journals and open access repositories. Open access repositories (the “green road”) provide open access to articles, often subscription-based articles, through their deposit into a digital repository. OA journals (the “gold road”) provide direct open access to the articles they publish. This report is primarily concerned with the green route and addresses some of the inherent barriers involved with deposit into OA repositories.

Despite the implementation of OA mandates, the diversity and lack of clarity of publishers' policies can be a significant barrier to author compliance of OA policies (COAR 2013). In May 2013, the Global Research Council issued an “Action Plan towards Open Access Publications”. The plan outlines specific activities for funding agencies to help promote and expand open access. One of their recommendations is that agencies “negotiate publisher services to facilitate open access repositories” and urges them to “discuss with publishers whether and under which conditions they are willing to automatically transfer publications into designated open access repositories”.² Improving workflows for deposit into repositories is also one of the objectives of the Confederation of Open Access Repositories (COAR)³.

Perhaps the players best placed to secure the rights for deposit into repositories are the libraries or library consortia that carry out licensing activities. Libraries (or groups of libraries) routinely negotiate licenses that express the terms of access to content and usage rights for journal articles and have become a major force in the acquisition process of scholarly journals. In the context of these negotiations, libraries and consortia wield significant power and licenses can be an effective apparatus for guaranteeing authors or institutional rights to re-use articles and/or deposit articles into repositories.

In 2012, the Open Access Agreements and Licenses Task Force was launched by COAR to monitor, evaluate and promote the implementation of effective open access agreements and licenses. The task force has members from the repository, licensing and OA communities who share an interest in promoting sustainable and effective practices for open access. In 2012/2013 the task force undertook an environmental scan of the licensing language for article deposit into repositories. This report presents the result of the review and some lessons learned from organizations that have been successful in implementing OA clauses in publisher licenses.

¹ OA as coined by the Budapest Open Access Initiative in 2002: <http://www.budapestopenaccessinitiative.org/read>

² Global Research Council, pg. 4

³ Confederation of Open Access Repositories: <http://www.coar-repositories.org/>

THE ROLE OF LICENSING IN OPEN ACCESS

One of the well-recognised challenges to providing OA through repositories is the lack of clarity of publishers' permissions and policies in regards to dissemination and usage rights implied by the term "open access" (Schmidt and Shearer 2013). As of October 6, 2013 the SHERPA-RoMEO service indicated that 70% of publishers currently allow posting of a version of their journal articles (pre- and/or post-print) into an OA repository.⁴ However details of policies differ significantly between journals and publishers and policies do not remain static and are subject to change. Therefore, checking deposit rights on an article-by-article basis has become standard operating procedure for repository managers and authors when they are submitting articles into an open access repository.

Authors' rights and other OA language can be inserted into traditional content licenses or can take the form of a separate arrangement between the institution and the publisher. The language clarifies the rights of the institution or author to re-use content in the broadest cases, or more narrowly to deposit articles authored by faculty into an open access repository.

The concept of securing authors rights via licenses is not new. A number of authors' addenda have been developed for use by authors to retain their rights when they are submitting articles for publication. However it is unclear whether there has been widespread uptake of these addenda by authors. At the other end of the publication lifecycle, licensing language have been created that secures authors' or deposit rights at the time the journal publications are being purchased by libraries.

In 2009, *Research Libraries Issues* #263 published an article outlining efforts by the Max Plank Society and the California Digital Library to include authors' rights language into content licensing. The article states, "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 and Anderson 2009, pg. 34) Following this, ARL produced model language for inclusion in library content licenses entitled Authors' Rights To Use Their Own Work.⁵ Similarly, the NESLi2 model licence (from the UK) included a specific clause allowing for the deposit of articles on websites and in institutional repositories.⁶

⁴ <http://www.sherpa.ac.uk/romeo/statistics.php?la=en&flDnum=|&mode=simple>

⁵ <http://authorrights.wordpress.com/>

⁶ <http://www.jisc-collections.ac.uk/Help-and-information/How-Model-Licences-work/NESLi2-Model-Licence/>

PROGRESS TO DATE

Since 2009, a number of institutions and licensing consortia have attempted to negotiate clauses in their licenses that secure the rights of authors or their delegates to deposit their articles into an OA repository. These clauses not only address the confusion around policies and remove the need to undertake resource intensive rights checking, but they also signal that open access is a growing priority for libraries and research institutions.

Our review found several licensing consortia that have successfully negotiated language that allows deposit of articles into an open access repository in their content licenses. The Alliance of German Science Organizations, which undertakes licensing negotiations on behalf of a number of German research organizations and universities, has negotiated the right to deposit published articles into repositories in over 12 of their licenses to date. The BIBSAM Consortium in Sweden has implemented OA clauses in a number of its licenses, as has the FinELib Consortium in Finland.

In addition, some individual organizations have also been successful in negotiating self-deposit rights with publishers. One of these is the World Bank, which recently adopted an OA mandate requiring that all publications be made available through their Open Knowledge Repository. The Bank's institutional posting agreement secures the rights for employees that publish in journals to be able to comply with their OA policy. The Bank has secured agreements with four publishers to date and is in negotiations with five others. Similarly, the National Research Council (NRC) in Canada has also entered into specific agreements with publishers to enable their authors to comply with the NRC OA policy.⁷

DECONSTRUCTING THE CLAUSES

Our review identified a variety of clauses and agreements that have been implemented by organizations around the world. To better understand these clauses, we have chosen four licenses that reflect the range of rights being secured and deconstructed them into the following five elements:

1. Who is being granted the licence? (e.g. author or institution)
2. What rights are being granted?
3. What versions of articles can be deposited?
4. Where can articles be made OA?
5. For how long are articles embargoed?

The full text of each clause is documented in the Appendix of this report.

⁷ http://cisti-icist.nrc-cnrc.gc.ca/obj/cisti-icist/doc/nparc/NPArC-Statement-of-Responsibilities_e.pdf

1. Who is being granted the rights?	
Organization	Excerpt from licensing clause
Alliance of German Science Organizations/12 publishers	<i>Authors from authorised institutions</i>
BIBSAM/Springer	<i>Authors affiliated with Licensee</i>
FinELib/Emerald	<i>Users working at Licensee institutions (listed in Schedule 1) who are Emerald authors</i>
World Bank/4 publishers	<i>The WORLD BANK shall retain all its rights with respect to the Works</i>

2. What rights are being granted?	
Organization	Excerpt from licensing clause
Alliance of German Science Organizations/12 publishers	<i>free of charge to promptly store their articles appearing in licensed journals (institutions are entitled to act on behalf of the authors)</i>
BIBSAM/Springer	<i>self-archive (authors can deposit in OA repositories)</i>
FinELib/Emerald	<i>save and/or deposit (no embargo) in OA repositories</i>
World Bank/4 publishers	<i>upload and store a digital "Author's Original Manuscript" copy and "Author's Accepted Manuscript" copy</i>

3. What versions of articles can be deposited?	
Organization	Excerpt from licensing clause
Alliance of German Science Organizations/12 publishers	<i>(Typically) the form published by the publisher (e.g. PDF)</i>
BIBSAM/Springer	<i>Springer's PDF version, which is posted on www.springerlink.com</i>
FinELib/Emerald	<i>non-Emerald branded version of their article... A non-Emerald version may have all of the editorial changes but it must be in a different format – i.e. different font, different layout etc. and must not have any Emerald logos or branding. A link must be to the journal homepage at www.emeraldinsight.com must be included.</i>
World Bank/4 publishers	<i>digital “Author’s Original Manuscript” copy of each Work (pre-print); digital “Author’s Accepted Manuscript” of each Work (peer reviewed version)</i>


4. Where can articles be made OA?	
Organization	Excerpt from licensing clause
Alliance of German Science Organizations/12 publishers	<i>(institutional or discipline-specific) repository of their choice and to make them available in Open Access</i>
BIBSAM/Springer	<i>his/her own website and or in his/her institutional repository. He/she may also deposit this version on his/her funder's or funder's designated repository at the funder's request or as a result of a legal obligation</i>
FinELib/Emerald	<i>current institution’s website/institutional repository or a subject repository for public access</i>
World Bank/4 publishers	<i>(World Bank) database or other searchable archive system now known or hereafter developed</i>

5. For how long are articles embargoed?	
Organization	Expert from licensing clause
Alliance of German Science Organizations/12 publishers	<i>Immediate deposit, 0 to 36 months embargo for OA</i>
BIBSAM/Springer	<i>12 months</i>
FinELib/Emerald	<i>None</i>
World Bank/4 publishers	<i>Immediate deposit, 0 for Author Original Manuscript, 18 months on average for Author Accepted Manuscript</i>

THE OPENNESS SPECTRUM

Based on the five elements outlined above, we have created an Open Access Spectrum for publisher licenses. The Spectrum, modeled on the SPARC/OASPA/PLOS Open Access Spectrum⁸, is a rough guide that organizations can use to help identify negotiating goals. The checkmarks in the spectrum indicate where existing clauses fall in the spectrum. As you can see, there is significant heterogeneity in the language being adopted by organizations and publishers, especially in terms of embargo periods and versions of articles that can be archived.

TABLE I: OPENNESS SPECTRUM FOR OA IN LICENSES

Degree of openness	Who can deposit the article?	What rights are being granted?	What version of the article	Where to deposit	Embargo periods
Full Open Access 	Automated deposit directly into repositories	Full re-use rights for users of content	Publishers' final version √√	All repositories and authors have copyright	No embargo √
	Authors and their affiliated institutions deposit √√√√	Access to content, but not CC-BY √√√√	Post-print √√	Institutional or discipline-based repository √√√	6-months √
	Authors only can deposit		Pre-print of article	Specified repository √	12 months or greater √√√
Closed Access	Fee-based access				

⁸ http://www.plos.org/wp-content/uploads/2012/10/OAS_English_web.pdf

LESSONS LEARNED

Our review found that open access clauses offer a feasible option for institutions to address some of the barriers to article deposit into repositories and potentially adherence to OA policies. However, many publishers are reluctant to implement these clauses and will only do so when it is clear that this is a priority for the organization. In fact, several organizations reported that they had dropped the OA clause from their negotiations in favour of other aspects such as price reductions. Below we have documented a number of lessons learned from others in order to assist organizations in successfully implemented OA agreements.

Provide evidence that OA archiving does not lead to subscription cancellation

Many publishers assert that allowing deposit of articles into OA repositories will lead to cancellation of subscriptions.⁹ However there is no strong evidence to date that supports this claim. Indeed studies show that libraries cancel subscriptions for many other reasons including subscription costs, low usage and relevance of journal content and not because articles are available through OA repositories (Publishers Communication Group 2012). It is helpful to have this kind of evidence on hand when entering into negotiations, as it counters the publishers' major objection to adopting such language.

Look for incentives and other forms of leverage

Ideally negotiating staff should have a basic knowledge of OA including the existing policy landscape. Many publishers already have a self-archiving policy that allows deposit of articles into a repository. An OA licensing clause, therefore, is simply further formalizing a practice that has already been approved by the publisher. In advance of negotiations, be sure to document the publisher's self-archiving policy (many of which can be found using the SHERPA-RoMEO service¹⁰). Furthermore, a growing number of funding agencies now require open access. If researchers at affiliated institution(s) receive grants from funders with open access policies, this can be another incentive for publishers to agree to include such a clause. Funding agency policies can also help libraries determine specific negotiating goals. For example, if funders have a 6-month embargo in their policy, this would be a valid reason to request a 6-month embargo period in the license. Negotiating staff should also be familiar with the open access policies of relevant research funders in advance of sitting down at the negotiating table (available via the SHERPA-JULIET service¹¹). And finally, there are very compelling 'moral' arguments for public access to research papers which can also be put forward during negotiations (see SPARC resources, for example¹²). Put together, this information can provide a compelling case for including an OA clause in the publisher license.

⁹ See this blog post by Joseph Esposito on Scholarly Kitchen for a more detailed view of this position: <http://scholarlykitchen.sspnet.org/2013/09/26/when-it-comes-to-green-oa-nice-guys-finish-last/>

¹⁰ <http://www.sherpa.ac.uk/romeo/>

¹¹ <http://www.sherpa.ac.uk/juliet/>

¹² <http://www.sparc.arl.org/resources/open-access/why-oa>

Be flexible but firm on your negotiation goals

The fullest form of open access is always the most desirable, however, if it becomes apparent that you are not able to achieve this, then it is helpful to determine in advance the points on which you are willing to negotiate and those on which you will stand firm. For example, you may be willing to accept a longer embargo time in exchange for receiving the publishers' final version of the article. The World Bank found it almost impossible to get publishers to agree to make the Author Accepted Manuscript available to the public upon acceptance under CC BY (since publishers are interested in exploiting the content commercially). However, publishers were quite willing to allow access to the working paper version (pre-print or Author Original Manuscript) under CC BY. Therefore, the Bank adopted a two-stage approach whereby they make the pre-print available immediately under CC BY and Author's Accepted Manuscript following embargo under CC BY-NC-ND.

In addition, many publishers prefer to use their own licensing agreements and so library negotiators should be prepared to spend time on negotiating changes to pre-existing publisher templates, rather than implementing new clauses. Publishers' negotiators can also be unfamiliar with open access or do not have the authority implement such a change to their licence. It is helpful to request the presence of someone with knowledge of OA and is senior enough to make appropriate changes.

Share your experiences with others

Don't sign nondisclosure clauses. Scholarly publishing is undergoing rapid changes and learning from the experiences of others can help to significantly mitigate risks and reduce the work involved in adopting new models, processes and services. Consider adopting a policy that promotes openness around licensing, such as the one at Cornell University, which states, "Cornell University Library will not enter into vendor contracts that require nondisclosure of pricing information or other information that does not constitute a trade secret"¹³. The International Coalition of Library Consortia's (ICOLC) supports this approach and asserts, "Non-disclosure language should not be required for any licensing agreement, particularly language that would preclude library consortia from sharing pricing and other significant terms and conditions with other consortia"¹⁴.

In terms of implementation, to date there is little information about the impact of OA licenses on the repository; whether they have resulted in significant increases in repository content at participating institutions; and what are the resources required by repositories and libraries to support their adoption. An important next step will be to gather evidence that justifies these negotiating efforts and demonstrates that these clauses result in increased adherence to OA policies and increased deposits into the repository.

¹³ <http://www.library.cornell.edu/aboutus/nondisclosure>

¹⁴ <http://legacy.icolc.net/statement.html>

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SPARC, PLoS, OASPA (2013): *How Open Is It? Open Access Spectrum*. Available at: http://sparc.arl.org/sites/default/files/hoii_guide_rev4_web.pdf.

APPENDIX: FULL TEXT OF LICENSING LANGUAGE

Organization	Licensing clauses or agreements
<p>Alliance of German Science Organisations</p>	<p>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.</p> <p>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.</p>
<p>Adopters listed on website (http://authorrights.wordpress.com/adopters/):</p> <p>Boston Library Consortium (BLC) (USA)</p> <p>LYRISIS (USA): Consortium has added the language to their model license (January 2011)</p> <p>NorthEast Research Libraries (NERL) (USA): Consortium added the language to their model license (Fall 2010)</p>	<p>Association of Research Libraries' (ARL's) Model Language</p> <p>Authors' Rights To Use Their Own Work (Version 0.8, April 2010): "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."</p> <p>Linked from http://www.library.yale.edu/NERLpublic/licensingprinciples.html and specifically at: http://www.library.yale.edu/NERLpublic/NERLGenericLicenseRev092410.pdf</p>
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<p>Bayerische Staatsbibliothek (Germany)</p>	<p>§ 2 Licence grant, Rights Holder obligations</p> <p>I. The Rights Holder grants BSB the right to fully digitise the works, to make them digitally accessible at the level of the work, the table of contents and the full text using OCR and indexing and store them permanently in an electronic database. In this context, BSB acts as "producer of databases" [Datenbankhersteller] within the</p>

	<p>meaning of Sec.87 of the German Copyright Act [Urheberrechtsgesetz – UrhG].</p> <p>Moreover, the Rights Holder grants the right to make the works thus stored available free of charge to any third party for access on an individual basis via Internet, i.e. make them publicly available, and to allow such third party reproduction in non-physical form and download for its own personal use.</p> <p>Apart from that, the Rights Holder grants BSB the right to incorporate the digitised versions in the offerings of BSB and include the search engine index built from the metadata and full texts in external library portals.</p>
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Vrije Universiteit Brussel (Belgium)	<p>Elsevier and Vrije Universiteit Brussel have developed an agreement to enable the local archiving of articles published by the Vrije Universiteit Brussel to their repository. This archive is not intended for external use, but is developed to enable the university to maintain a PDF archive from ScienceDirect licensed content for its own internal use.</p>
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FinELib Consortium (Finland)	<p>"Authorises Users working at Licensee institutions (listed in Schedule I) who are Emerald authors may save and/or deposit (no embargo) in perpetuity a non-Emerald branded version of their article within that current institution's website/institutional repository or a subject repository for public access. A non-Emerald version may have all of the editorial changes but it must be in a different format – i.e. different font, different layout etc. and must not have any Emerald logos or branding. A link must be to the journal homepage at www.emeraldinsight.com must be included. This clause will take precedence over a conflicting provision in</p>

	individual author agreements regarding such saving and/or depositing.”
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