

# Copyright: the immovable barrier that open access advocates underestimated

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20<sup>th</sup> February 2017

*In calling for research papers to be made freely available open access advocates promised that doing so would lead to a simpler, less costly, more democratic, and more effective scholarly communication system. To achieve their objectives they proposed two different ways of providing open access: green OA ([self-archiving](#)) and gold OA ([open access publishing](#)). However, while the OA movement has succeeded in persuading research institutions and funders of the merits of open access, it has failed to win the hearts and minds of most researchers. More importantly, it is not achieving its objectives. There are various reasons for this, but above all it is because OA advocates underestimated the extent to which copyright would subvert their cause. That is the argument I make in the text below, and I include a personal case study that demonstrates the kind of problems copyright poses for open access. I also argue that in underestimating the extent to which copyright would be a barrier to their objectives, OA advocates have enabled legacy publishers to appropriate the movement for their own benefit, rather than for the benefit of the research community, and to pervert both the practice and the concept of open access.*

If you would like to go direct to the Case Study, please click [here](#).



When in 2001 open access ([OA](#)) became a thing<sup>1</sup> two different methods were proposed for making research freely available on the Web. The first was to persuade researchers to deposit copies of the papers they publish in subscription journals in open repositories (aka self-archiving, or [green OA](#)). The second was to persuade scholarly publishers to adopt new business practices that would allow them to dismantle their subscription paywalls ([gold OA](#)).

OA advocates took the view that OA was a no-brainer in the age of the Internet, particularly green OA which, they argued, could see universal open access become a reality practically overnight (since, they said, self-archiving is entirely in the hands of the research community, not publishers). It was therefore expected that we would see a rapid transition to open access. Sixteen years later we can see that both varieties of OA have proved far more complex and difficult to implement than envisaged in 2001. They have also turned out to be considerably more expensive.

Since one of the main justifications OA advocates gave for transitioning to open access was that it would resolve the [affordability problem](#) that the research community has now

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<sup>1</sup> At the meeting where the Budapest Open Access Initiative, or [BOAI](#), was conceived.

been subject to for several decades the failure of OA to reduce costs is a significant setback.

In 2004, the then director of [SPARC](#) (the Scholarly Publishing and Academic Resources Coalition) Rick Johnson [predicted](#) “open access will break the impasse, sweep away the monopolistic elements of the current system, introduce new market forces more conducive to effective scholarly publishing, and reduce or at least stabilize overall system costs.”<sup>2</sup>

Others made even grander claims, promising that open access would significantly reduce the role of publishers in scholarly communication, and so force them to downsize and lower their prices, thereby pushing down the research community’s cost burden. This [argument](#) was made repeatedly in the early days. It is heard far less frequently today.

It turns out that there were flaws in the thinking of OA advocates. They failed to factor in, for instance, the extent to which since WWII the research community has outsourced most of its publishing activities to a small group of for-profit companies – referred to nowadays as the [publishing oligopoly](#). This has seen these publishers become sufficiently powerful that – absent government intervention – they appear to be incapable of being controlled or dislodged. They have become what one blogger has [described](#) as “the judge, jury and executioner” of researchers’ careers.

The power of this oligopoly is that much greater given that scholarly publishing [does not operate as a true market](#). The new competitive forces that Johnson predicted have, therefore, either failed to materialise or proved inadequate to challenge the status quo.<sup>3</sup> Consequently, publishers are able to continue making excessive (“[obscene](#)” even) profits out of the public purse, even in an OA environment.

That is, legacy publishers are effectively able to name their own price for the services they provide, so rather than experience a fall in their profits as a result of OA they have been able to ring-fence them, and even to increase them.

In introducing article-processing charges ([APCs](#)) for gold OA, for instance, publishers have set their prices not at levels that reflect their costs, but at levels designed to maintain their existing revenues, regardless of costs. And in introducing [hybrid OA](#) they have set their prices even higher, notwithstanding that hybrid OA allows them to earn both subscription revenues and APCs from the same journals – i.e. to “[double dip](#)”.

With regard to green OA, open access advocates mistakenly assumed that if universities created institutional repositories ([IRs](#)) faculty would rush to self-archive their papers in them. In practice, researchers have proved extremely reluctant to do this. In response, universities and funders have introduced a plethora of ever more oppressive (and frequently conflicting) open access policies to try and force them to do so. Even then researchers have continued to drag their feet and ignored the OA policies, leaving intermediaries (invariably librarians) with the difficult task of trying to track down and deposit copies of faculty papers, a time-consuming, error prone and [expensive](#) process.

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<sup>2</sup> See also [here](#) and [here](#).

<sup>3</sup> True, publishers were eventually persuaded to embrace open access, but only at the point when they realised it offered a new source of revenue, rather than a loss of existing revenue. [In the words](#) of publishing consultant Joseph Esposito, OA has proved to be additive rather than subtractive.

The upshot is that rather than seeing the costs associated with scholarly communication fall, the research community has seen them rise.<sup>4</sup> Meanwhile, the transition to open access is proving a slow, unpredictable, and at times self-defeating process.

Indeed, it would seem fair to say that the two-road strategy promulgated by the BOAI framers has worsened rather than improved scholarly communication. And not only have the research community's costs grown, but the flood of OA policies has increased the bureaucratic scrutiny to which researchers are subject. The most egregious example of this has been the decision by the UK Higher Education Funding Council for England ([HEFCE](#)) to tie open access to the Research Assessment Exercise ([REF](#)).<sup>5</sup> The high degree of coercion this involves is [antithetical to the very notion of openness](#) espoused by the movement, and more likely to alienate researchers from open access than persuade them of its virtues.

### Most significant oversight

Affordability aside, the main justification OA advocates gave for transitioning to open access was that in making research freely available for anyone to view, adapt and reuse the research community could create a system that had far less friction, and one more effective and democratic (*sans* paywalls). It is here we see the most significant oversight of the BOAI framers: they underestimated the barrier that copyright would place between them and their goal.

In doing so, they failed to realise that an artificial form of property whose workings, rules, and restrictions are fiendishly complicated (and little understood) would enable legacy publishers to manage the transition process in a way that benefited them rather than the research community.

It is this issue that I want to focus on in the rest of this document. I shall argue that copyright has proved to be an immovable barrier to achieving universal open access, certainly in the manner envisaged at BOAI.

Let's begin by reminding ourselves how the BOAI [declaration](#) defined open access:

*By “open access” to this literature, we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.*

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<sup>4</sup> Not least because institutions are having to pay for gold OA on top of their existing subscriptions.

<sup>5</sup> Counter-intuitively, for instance, university bureaucrats quickly appropriated the IR for their own management needs rather than to encourage OA. As the authors of a recent paper on IRs in Indonesia [put it](#), “many Indonesian IRs were conceived as a corporate information management system rather than as a genuine attempt to support open access.” We have seen the same trend everywhere.

How this was to be achieved in a world where copyright comes into existence the moment a new work is fixed in tangible form, and where researchers routinely and unthinkingly assign that copyright to publishers,<sup>6</sup> appears not to have been addressed by BOAI. Either way, it has meant that both gold and green OA have struggled to deliver on their promise, and publishers have been able to circumscribe, dilute and corrupt the objectives of open access.

The failure of the BOAI framers to give adequate thought to how they would achieve their goal also laid the ground for 16 years of debilitating bickering and confusion within the movement, not just over how to achieve open access, but what exactly it is!

It was in an attempt to address this latter problem that five years after BOAI two new definitions of OA were proposed – [gratis OA and libre OA](#).<sup>7</sup>

In reality, this was no more than an attempt to gloss over the fact that there is a [contradiction](#) at the heart of the OA movement – namely that while BOAI proposed self-archiving as one of the ways of achieving its objectives, green OA cannot actually meet BOAI's own definition of open access, not least because most self-archived papers will have been published in a subscription journal, and publishers will never allow papers from which they expect to earn subscriptions to be made freely available on the Web (or at least not before a lengthy embargo), and certainly not in the way BOAI called for – i.e. with reuse permitted.

Adding two new definitions of open access, therefore, changed little while drawing attention to the contradiction inherent in BOAI. It also served to further complicate and confuse discussions with researchers about OA, and intensified the long-standing conflict between OA cognoscenti over the respective merits of green and gold OA.

Today, OA purists continue to insist that only papers able to meet the definition of *libre* OA are open access, even though doing so disenfranchises the vast majority of papers available in open repositories – including 83% of the 4.1 million articles<sup>8</sup> currently deposited in [PubMed Central](#) as a result of the US National Institutes of Health ([NIH](#)) [public access policy](#).<sup>9</sup>

Further complicating the picture, OA purists now also insist that only content that has been made available with a [CC BY](#) licence attached can claim to be *libre*, and so classifiable as open access. Since at the time of the BOAI meeting the Creative Commons

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<sup>6</sup> Some publishers have stopped asking authors to sign a Copyright Transfer Form (CTF) in favour of a Copyright License Form (CLF). But as we shall see, this changes nothing significant.

<sup>7</sup> *Gratis* OA implies free of price barriers and *libre* OA implies free of some of the permission barriers automatically created by copyright. Wikipedia [describes](#) these as two “degrees” of open access.

<sup>8</sup> This figure includes historical data. For papers published since 2000 the percentage that is **not libre** is more like 76%

<sup>9</sup> OA advocates argue that NIH adopted the term “public access” rather than “open access” to signal that the bulk of papers in PMC are not OA. In reality, the choice reflects the fact that in order to promote their cause in the US, OA advocates argued that since *the public* pays for most research the public should have access to it – a sentiment summed up in the [Taxpayer Access](#) campaign. In any case, the two terms are used interchangeably by open access advocates, implying they believe them to be essentially the same thing. Note also that Wikipedia [describes](#) the NIH Policy as an “open access mandate”, and *Nature* as a [green OA policy](#). Consider also [this statement](#): “There are two types of public access—green and gold.”

([CC](#)) licences had not been released to the world this might seem to be an attempt to retrofit open access.<sup>10</sup>

True, the CC licences were released a year later, but it is far from clear that CC BY offers the solution that *libre* OA advocates claim it does, and its use has unpredictable and undesirable consequences.

Why do I say this? Because, leaving aside the fact that it is not possible to make green OA papers available CC BY, the licence cannot do what it claims to do, and most of the putative users in the research community do not appear to find it acceptable. As we shall see, when authors realise what the CC BY requires them to give up, and what impact its use may have, their reaction tends to be negative, if not downright hostile.

The use of Creative Commons licences has also increased the complexity of the copyright landscape confronting researchers, and so exacerbated the confusion that surrounds both open access and scholarly communication more generally.

One such confusion is the widespread belief that Creative Commons licences offer an alternative to traditional copyright. They do not: all they do is separate out the basket of rights automatically generated when a work comes into being so that creators can signal publicly that they are waiving some of those rights.<sup>11</sup> Amongst other things, this means that many of the access problems associated with copyright do not necessarily go away when CC licences are used, even while the licences complicate the situation.<sup>12</sup>

Unsurprisingly, therefore, Creative Commons licences are controversial, particularly CC BY. CC licences are also highly confusing, not just to scientists and the lay public, but lawyers as well.<sup>13</sup>

In passing we could note that when they defined open access, BOAI framers also failed to specify that OA should imply immediate and/or permanent free access, an omission that has further helped publishers to undermine, control, and dilute open access.

In 2006, when this omission became apparent, green OA advocate [Steven Harnad](#) tried to [persuade fellow BOAI signatories to fix the problem](#) by updating the definition. He failed

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<sup>10</sup> The Creative Commons licenses were released in [December 2002](#). Free and open source licences have, of course, been around at least since [Richard Stallman](#) wrote the [GPL](#) in 1989. Although such licences clearly influenced Creative Commons, they were developed for software, not text. And while Stallman's Free Software Foundation released the [GFDL](#) in 2000 to cater for text, the licence was intended for software manuals not research papers.

<sup>11</sup> All of the conditions expressed in the Creative Commons licences are available with traditional copyright, whose basket of rights can be broken out and bundled in different ways exactly as the CC licences do. What CC did was create off-the-shelf templates that allow rights holders to make their works available on a "some rights reserved" basis without the need to hire an expensive copyright lawyer. Given the complexity of copyright, however, this can be dangerous. It is certainly confusing.

<sup>12</sup> Most significantly, the [Berne Convention](#) did away with the need to register copyright, paving the way for today's "[orphan works](#)" problem, sometimes referred to as the [Berne Problem](#). This creates a very real access problem. One role CC was expected to play was that of alleviating the orphan works problem. It is not clear, however, that it has done this, or will do so, certainly as envisaged.

<sup>13</sup> For example, in 2009, Creative Commons undertook [a survey](#) into what people understood by "non-commercial" in the context of copyrighted material. It was clear there is plenty of confusion out there.

in this, and on the 10<sup>th</sup> Anniversary of BOAI the original definition was “[reaffirmed](#)”.<sup>14</sup> Harnad nevertheless went ahead and [published his own definition of open access](#) in which he specified both immediacy and permanency. Interestingly, at some point SPARC (the world’s most active OA advocacy organisation, and a signatory to BOAI) also quietly adopted an [alternative definition of open access](#) that likewise stipulates immediacy. What better evidence, were it needed, of the chaotic and unmanaged nature of the OA movement?

In summary, while the BOAI made an impassioned call to arms, and promised a better, more democratic, and more effective scholarly communication system<sup>15</sup>, it failed to outline a practical strategy for achieving this, or of reducing the monopolistic power of legacy publishers. Its greatest oversight was its failure to appreciate the extent to which copyright would be a barrier to achieving its goal.

## Practical consequences

But let’s look at some of the practical consequences of using CC BY, and the kind of problems the licence has introduced. These too only became apparent at a later stage – most notably in 2013, when it was discovered that a publisher called [Apple Academic Press](#) (in partnership with [CRC Press](#), an imprint of [Taylor & Francis](#)) had begun re-publishing and distributing CC BY articles that had been published by open access publishers like [PLOS ONE](#).<sup>16</sup>

The papers were being renamed<sup>17</sup> aggregated into book collections, and then sold for what many believed to be an extortionate price (e.g. \$100 apiece).

When [Christopher Schadt](#), a biomedical scientist at the [Oak Ridge National Laboratory](#), learned that one of his papers had been farmed in this way he was sufficiently aggrieved that he [blogged about it](#), listing 5 reasons why he was concerned about the use of CC BY for scholarly papers.

Schadt was unhappy, for instance, to discover that using CC BY allows third parties to profit from his freely given labour. He also expressed concern that readers of a republished work may be unaware they are reading a reprint and/or that the work may be republished in a way that discredits the original author(s). And he was disturbed to discover that CC BY works can be reused without the knowledge of the authors. “Neither I nor the corresponding author had any idea this [the paper] had been (re)published until after the fact”, he said.

It is worth noting that in objecting to this last characteristic of CC BY, Schadt is questioning the very *raison d’être* of Creative Commons licences. By allowing rights holders to attach a licence to their work (or a link to a licence) specifying what rights they have waived, Creative Commons licences were deliberately designed to dispense with

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<sup>14</sup> As it was [again](#) just recently for the 15 years’ anniversary.

<sup>15</sup> The first line of the BOAI Declaration [reads](#), “An old tradition and a new technology have converged to make possible an unprecedented public good” – words that excite OA advocates passions more than their judgement.

<sup>16</sup> PLOS papers appear to have been particularly targeted by such re-publishers. See also [here](#) for instance.

<sup>17</sup> Compare [this](#) with [this](#) for instance.

the time-consuming (and often impossible) task of tracking down the author(s) of a work in order to get permission to reuse it. Indeed, the licences are also made available in a machine-readable form so that CC-licensed content can be automatically identified and reused by machines, dispensing with the need for any human agency. As such, what Schadt views as a bug in CC licences is their most important feature.

On the other hand, Creative Commons licences *do* require that authors are appropriately cited and credited when their work is reused. Anyone doing so [must also](#) “provide a link to the license, and **indicate if changes were made**.”

The problem is that when reusing CC content most people appear not to know and/or care about the details of the terms of the licence. Schadt was not convinced, for instance, that Apple Academic Press had complied – a point also made by others when commenting on Schadt’s blog post (e.g. [here](#)).

This last point goes to what is surely a major problem when publishing research papers with a CC BY licence: policing compliance is nigh impossible. Quite apart from knowing whether a CC licence has been ignored or infringed, if authors have simply paid a publishing fee in order to have their paper peer reviewed and made freely available on the Web the publisher will likely have neither incentive nor (one might assume) authority to prevent or punish any infringing activity.<sup>18</sup> And authors have neither the time, the money, nor indeed the expertise, to do this themselves.<sup>19</sup>

Even had it existed in 2001, therefore, it is not clear that the CC BY licence would then have (or can now) assure researchers the rights expressed in BOAI.

Judging by the details of the Apple Academic Press [book on Amazon](#), for instance, the publisher would appear to have completely appropriated the CC BY content it republished.<sup>20</sup> That at least is what the copyright notice in the image below (extracted using Amazon’s Look Inside function) suggests, although we cannot know for sure as the book is [behind a £95 paywall](#). Certainly, if the authors were unaware that their work had been republished the publisher could not have acquired copyright in the papers, as its copyright notice seems to imply it has.<sup>21</sup>

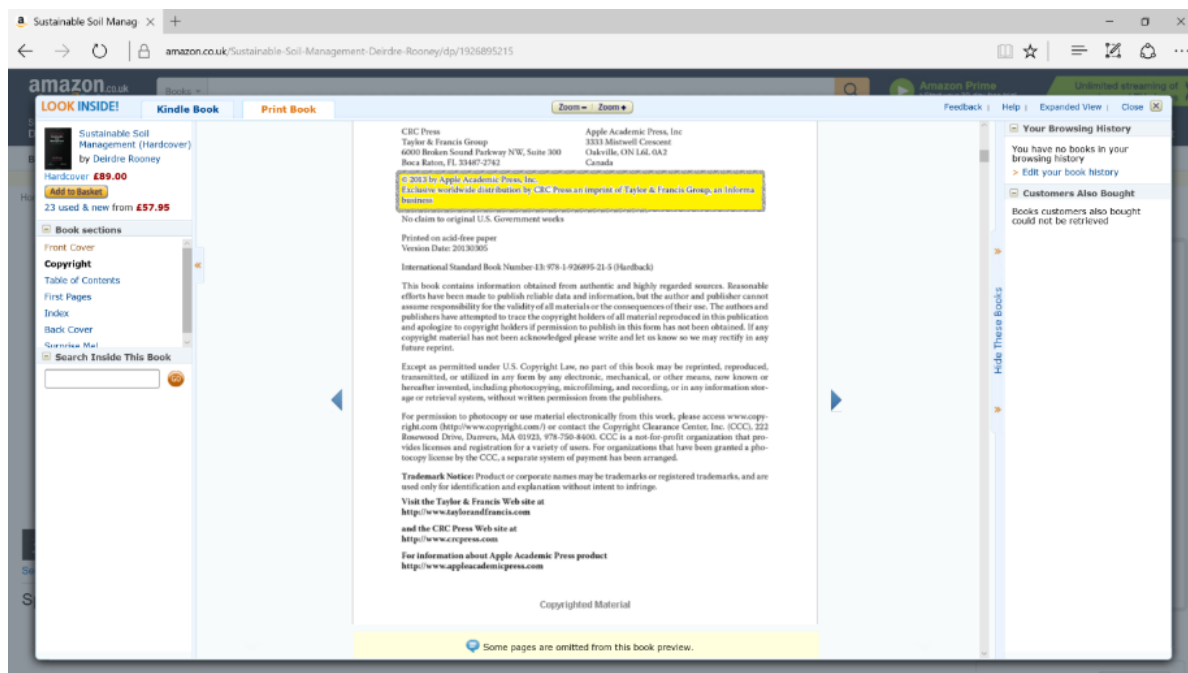
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<sup>18</sup> But see the discussion of CUP’s licence on page 13.

<sup>19</sup> A point also made by David Smith in the comments section of [this post](#).

<sup>20</sup> This is pretty worrying if we consider that the book is being distributed by an imprint of major scholarly publisher Taylor & Francis.

<sup>21</sup> We do know the authors have at least been attributed by name. But the book appears to imply that they have assigned their copyright to Apple Academic Press. It should presumably also have signalled that some changes have been made to the content – i.e. the titles.



Below is a close-up of the relevant section:

CRC Press  
Taylor & Francis Group  
6000 Broken Sound Parkway NW, Suite 300  
Boca Raton, FL 33487-2742

Apple Academic Press, Inc  
3333 Mistwell Crescent  
Oakville, ON L6L 0A2  
Canada

© 2013 by Apple Academic Press, Inc.  
Exclusive worldwide distribution by CRC Press an imprint of Taylor & Francis Group, an Informa business

No claim to original U.S. Government works

It is when they discover that a paper they submitted to an OA journal has subsequently been republished and is being sold by a commercial third-party, that researchers are particularly offended.<sup>22</sup> They are even more offended when they discover that the CC BY licence means that they have no say over whether, where, or how this is done. (See for instance [here](#) and [here](#)).

And “discover” is the operative word here, since many researchers are not aware of the licensing terms they are agreeing to when they publish in an OA journal – a point made by University of British Columbia genetics professor [Rosie Redfield here](#). When Redfield [surveyed](#) her colleagues, she found a high degree of ignorance about the terms of the CC BY licence, especially with regard to reuse. When this last point was explained to them, she added, “More than 40% of authors in the survey said that they would not have accepted the CC BY license if they had known this republication could happen.”

<sup>22</sup> See the distinction made [here](#): “If a user of a CC BY product is able to transform/modify/improve that work in some way and decides to monetize that subsequent work, I see that as a reasonable commercialization. If they’re simply directly selling the exact same content to end users who may not realize that this content is freely available elsewhere, that seems unreasonable.” The problem is that the latter cannot be prevented if the content has been made available CC BY.

Redfield added: “If nothing is done, these concerns will seriously hinder the spread of open access publishing.”

And when in 2013 Taylor & Francis [surveyed authors](#) about CC licences most respondents selected as their preference the most restrictive CC licence (CC BY-NC-ND), with CC BY the least preferred. Indeed, respondents preferred both exclusive licences and copyright assignment over the use of CC BY. (Page 10)

Consider also a [comment](#) made on a mailing list by OECD publisher [Toby Green](#) about the potential for “reputational risk” with CC BY: “[A]nyone can not only re-publish but also re-purpose one’s content in a format and manner that might be less than impressive.” He said. “We learned this the hard way when an e-book vendor grabbed a CC-BY PDF version of a book we’d published and transformed it very badly for e-book readers (their objective was to make some money, which I doubt they did). Our authors took exception to this poorly presented e-book and asked us to instruct the vendor to stop, which, because of CC BY, we couldn’t. Judging by the frustration our authors showed, I’m not surprised that some authors find CC BY a sticking point.”

Humanities scholars are particularly antagonistic towards CC BY, not least because their favoured publication medium is the long-form monograph, and they need to include third-party content in their work (e.g. photos and images). The latter is often not possible with CC BY. See also [the concerns](#) raised in 2014 by Cambridge historian [Peter Mandler](#).<sup>23</sup>

We should not doubt that reuse and crediting are sensitive issues for researchers. When I attended a scholarly meeting in Cambridge last year a researcher related how an external group had reused a template that he and his colleagues had produced and made publicly available. While the third-party group had cited the creators, he complained, it was done so minimally as to be insulting.

By way of contrast, another scientist attending the event told delegates that his research group’s work had also been reused. In this case, suitable credit *had* been given but the third-party group’s work was so bad that the creators had been embarrassed to be associated with it.<sup>24</sup>

It was not clear whether the above works had had a Creative Commons licence attached, but I think we can say this: 1) researchers have a strong sense of ownership of their work and so expect to be adequately credited when others make use of or reuse it. It is not clear that CC licences can assure this will happen; 2) while they may be happy to see their work reused, most researchers believe they ought to have a say and some control over how, when and where this is done. At the very least, they feel they ought to be informed when reuse takes place. CC licences do not require this; 3) policing copyright is extremely difficult (and expensive) and not something researchers are able to do

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<sup>23</sup> Amongst other things, Mandler said: “CC BY is an ‘attribution’ licence – it requires acknowledgement *that* the original work has been altered, but not *how*: thus it is enough to say, ‘this is a work by [Simon Schama](#), adapted by Peter Mandler’. Often it is very difficult to work out how the work has been changed, and meanwhile the new work acquires authority not only from the name but from the words of the original author.”

<sup>24</sup> This reminds us of Toby Green’s “reputational risk” and Schadt’s concern that by permitting third parties to reuse content without notifying the originators, CC BY increases the likelihood of the original author(s) being discredited.

effectively on their own. If they use a CC licence they are more likely to have only their own resources to fall back on.

However, given the benefits they claim that open access provides OA advocates routinely dismiss such concerns as irrelevant. In doing so they are denying legitimate concerns.

As we have seen, most researchers prefer more restrictive licences. It seems likely, therefore, that as the implications of using CC BY become more evident we will see growing pushback against the licence, both in frequency and stridency, and many researchers will likely reject it altogether (if they are able to). Indeed, this appears already to be happening: a recent [blog post](#) reported a decline in the use of CC BY at the biological preprint server [bioRxiv](#). “I looked to see whether *bioRxiv* preprints were becoming more open over time,” the author reported. “They weren’t. In fact, the proportion of CC BY licenses has been in decline since mid-2014”.

## Larger problem

But there is a larger problem here, which is that most researchers know little or nothing about copyright, and care even less. Their only goal is to be published in as prestigious a journal (or with as prestigious a publisher) as possible, or indeed *any* journal or publisher when they are in a hurry to publish, or desperate to bulk up their CV in preparation for internal assessment/evaluation.

Ignorance and lack of concern about copyright are therefore nothing new. The issue today is that open access and the use of Creative Commons licences has made the copyright landscape considerably more complex, even as the consequences of this ignorance are becoming more serious, and as funders and institutions start to make CC BY mandatory.<sup>25</sup>

Some argue that publishers need to do more to educate researchers in these matters. As *The Scholarly Kitchen* blog [put it](#) last year: “The single most important thing for publishers to recognize is that researchers have little interest in, and even less understanding of, copyright and licenses, which is a challenge, since they are getting increasingly complex. Finding ways to explain the key elements and simplify the process during publication is very important.”

But can publishers be relied upon to provide objective advice about copyright? As we shall see, it is not in the interests of legacy publishers to do so. For their part, OA publishers are too committed to *the cause* to offer objective advice. For them *the cause* is far more important than the needs of researchers, which is why they [offer authors no choice](#) but to use CC BY. Consider, for instance, the *fait accompli* confronting PLOS authors [here](#).

In other words, both groups of publishers have a particular view about the role of copyright in scholarly publishing, and in both cases their interests and objectives diverge from (or are not fully compatible with) the interests of their authors. While the goal of

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<sup>25</sup> For instance, Wellcome Trust now [requires](#) that when an APC is paid to publish an article reporting on research that it has funded that paper must be made available CC BY. Research Councils UK (RCUK) made CC BY [a requirement](#) for pay-to-publish articles in 2013. And in 2015 both the Gates Foundation and the Ford Foundation made [the use of CC BY mandatory](#) for papers arising from research they fund.

publishers is to monetise research and/or promulgate a specific view of the world, what researchers really need (but may not currently realise it) is greater control over their work, and over how their papers are used/reused. This is something neither type of publisher (each in their different way) appears willing to provide.

Thus, while both legacy and OA publishers *do* provide information about copyright on their sites, it is inevitably biased towards their needs and objectives, not the needs and/or objectives of their authors.

## Proprietary systems, proprietary mind-sets

As such, publishers are not the right people to be advising researchers about copyright, particularly as the world transitions to open access. OA publishers will only countenance CC BY, regardless of the needs or desires of researchers. For their part, since CC licences threaten their revenues, and their historic control of scholarly communication, legacy publishers prefer to appropriate research papers using traditional copyright licences. It is also not clear that either legacy or OA publishers fully understand how copyright operates in an open access environment – as [this list](#) of publisher copyright confusions, contradictions and illogicalities demonstrates.

That legacy publishers are finding it very hard to give up their proprietary habits doubtless explains why they have been noticeably tardy in adapting their online platforms for the new world. Since these systems were designed for a proprietary world, re-engineering them for OA should have been a priority. Yet on repeated occasions OA papers have ended up behind a paywall – e.g. [here](#), [here](#) and [here](#). Moreover, when challenged publishers demonstrate a surprising indifference – characterising such incidents, for instance, as no more than “[bumps on the road](#)”,<sup>26</sup> and the problem [remains](#) four years after OA advocates [first drew attention to it](#).

As one might expect, funders take a less sanguine view of these matters. In March 2015, The Wellcome Trust’s Robert Kiley [reported](#) that 13% of the papers for which the funder had paid an APC had failed to be deposited in PubMed Central (as Wellcome’s [OA policy](#) requires). Moreover, 5% of these papers were not freely available on the publisher’s site either.

“[E]ven if we assume that all the early view papers will be deposited, this still means that 237 papers, available in final published form, for which APCs totalling over £480,000 have been paid, are not available in [Europe PMC](#),” complained Kiley. “This is unacceptable.”

Let’s be clear about what is going on here: despite Wellcome and/or its fundees paying a hefty fee to ensure their research papers are made freely available on the Internet, publishers are nevertheless placing some of them behind a paywall, or otherwise failing to abide by the conditions specified by funders when agreeing to pay for OA.<sup>27</sup> Not only

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<sup>26</sup> [This 2014 post](#) on [Peter Murray-Rust’s](#) blog demonstrates some of the issues that are arising, and the kind of response that [publishers](#) make when challenged.

<sup>27</sup> Wellcome is far from being an insignificant player in the scholarly communication field. Wikipedia [describes](#) it as “the UK’s largest provider of non-governmental funding for scientific research and one of

would this seem to be a breach of contract, but as the papers concerned are invariably being published in hybrid journals it means that publishers are earning both publishing fees and subscription fees from them, and yet still not making them OA. This can only be described as “money for old rope”.<sup>28</sup>

As the foot dragging has continued so funders have become increasingly frustrated. Last September, therefore, Wellcome issued [new OA requirements for publishers](#). Explaining why this had become necessary, Kiley commented: “Just in the last year our analysis shows 30% of Wellcome and [COAF](#) member articles for which an APC was paid didn’t comply with our open access policies.”

Cynics might (justifiably) conclude that the underlying issue here has less to do with outdated publishing systems, more to do with intransigence. Legacy publishers just don’t want to give up their proprietary *modus operandi*.

Why else, after all, would they be pressurising authors to opt for non-commercial CC licences rather than CC BY when publishing OA. And why else have some publishers chosen to charge \$1,000 more ([\\$4,000 rather than \\$3,000](#)) when authors nevertheless insist on (or are required to choose) CC BY?

## Distorted the concept of open access

But the most telling evidence that legacy publishers are determined to cling to the past is that when authors choose to pay a fee to make their papers open access they are increasingly being told they still must assign exclusive rights to the publisher.

Once again, few realised what was happening until last year, when [Heather Morrison](#), assistant professor at the University of Ottawa, posted a message to the [GOAL mailing list drawing attention](#) to Elsevier’s [copyright page](#). Even when they pay to publish, she noted, Elsevier’s authors must “sign an exclusive license agreement, where authors have copyright but license exclusive rights in their article to the publisher.”

Expanding on Morrison’s point [on his blog](#), PLOS co-founder [Michael Eisen](#) wrote “To put it simply, Elsevier have distorted the widely recognized concept of open access, in which authors retain copyright in their work and give others permission to reuse it, and where publishers are a vehicle authors use to distribute their work, into ‘Elsevier access’ in which Elsevier, and not authors, retain all rights not granted by the license.”

Eisen continued, “Thus, despite highlighting the ‘fact’ that authors retain copyright, they have ceded all decisions about how their work is used, if and when to pursue legal action for misuse of their work and, crucially, if they use a non-commercial license they are making Elsevier the sole beneficiary of commercial reuse of their ‘open access’ content.”

But while Elsevier is an easy (and large) target for such criticism, it is far from being the only publisher to take this approach. Moreover, it is not just large publishers, or for-profit publishers, who are insisting that authors assign exclusive rights to them when publishing

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the largest providers in the world.” This would seem to demonstrate just how impregnable publishers believe themselves to be, and how little they care about their customers.

<sup>28</sup> Note, this is not just an issue with Elsevier. Both [Springer](#) and [Wiley](#) have been guilty too.

open access. Last year, for instance, I discovered that [MIT Press](#) has adopted a [similar approach](#) today with its journals.

When I tweeted about MIT, [INLEXIO](#) co-founder [Dugald McGlashan](#) decided to look at other publishers' practices, and shared his findings with the world [here](#). Amongst those who now insist on exclusive rights, reported McGlashan, is BMJ – a subsidiary of the [British Medical Association](#), and which describes itself as the trade union and professional body for doctors in the UK. Elsewhere, at Wiley and Taylor & Francis, McGlashan reported, practices currently vary from journal to journal.<sup>29</sup> But I think we can see which way the wind is blowing here.

Subsequently, for instance, I learned that Cambridge University Press ([CUP](#)) is another publisher that has decided to take a proprietary approach. When I asked CUP why they insist on having exclusive rights even when authors pay to make their work open access a spokesperson replied that it was necessary in order to “maintain the academic record” and allow “unique citations for the final published article, not letting Journal Y duplicate the content of Journal X etc.”

CUP's response is noteworthy for a number of reasons. First, it might seem to address some of the concerns raised by researchers who fear that if they allow their papers to be reused (or simply duplicated) it will lead to reader confusion and/or author embarrassment, because if publishers acquire the rights one might assume they would act to prevent or punish infringing activity.<sup>30</sup>

On the other hand, this approach runs counter to the *raison d'être* of open access, which assumes publishers cease appropriating intellectual property and downsize to become managers of peer review and research distribution channels alone. The implication of the BOAI vision (as Eisen indicates) is that once a publisher has overseen their peer review, papers are set free on the open Web, to float where they will, and be used as the licence attached to them specifies.

CUP's response also implies that a 350-year-old publishing model developed for a print world (the journal) will (and should) continue to exist in a world where articles are able to break free from the legacy packaging that journals have become.<sup>31</sup>

Speculating as to why publishers are proving so unwilling to give up their proprietary habits McGlashan [suggested](#) “It may be that control – and the wider implications and fears around losing it – [is] the real driver.”

But this is surely only part of the story. An important reason why publishers do not want to give up control is because if they did so their ability to continue monetising research papers would be threatened. By insisting on exclusivity, for instance, the CUP contract is able to deny authors a share of any income collected by organisations like the Copyright Licensing Agency ([CLA](#)) and Copyright Clearance Center ([CCC](#)) – e.g. from photocopying activity. The CUP contract explains: “[A]ny proceeds received by Cambridge from such licenses, together with any proceeds resulting from sales of

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<sup>29</sup> See also the PNAS licence [here](#); and the copyright transfer agreement for the OA journal *JSLIS* [here](#).

<sup>30</sup> Although as Toby Green points out if CC BY is used author embarrassment cannot be guarded against.

<sup>31</sup> In fact, some believe that the article itself is in some cases now redundant. See David Worlock's comments [here](#) for instance.

subsidiary rights in the Contribution shall be used to support the continuing publication of the Journal.”

Again, this conflicts with the gold OA premise that publishers recoup all their costs by charging a one-off OA fee for providing publishing services and leave all the rights with the author(s). Instead, legacy publishers are now charging a publishing fee but continuing to demand exclusive rights, with the clear aim of also earning rent from OA papers.

[Commenting on](#) a 2014 blog post discussing Elsevier’s proprietary approach Thomas Munro pointed out that legacy publishers prefer CC BY-NC-ND, and they do so, he said, because it allows them to earn reprint income.<sup>32</sup>

So, this is not *simply* a case of proprietary habits dying hard. There is a compelling commercial logic for clinging to exclusivity.

Elsevier implicitly acknowledges this on its [“journal author rights” table](#) (where it explains that authors are expected to assign exclusive rights the publisher) by adding a footnote that reads: “This includes the right for the publisher to make and authorize commercial use.”

In the hope of maximising the commercial benefits from such activity Elsevier has also created [its own OA licence](#), which [further restricts](#) reuse rights.<sup>33</sup>

This was not anticipated by BOAI framers because – as we noted – they gave far too little thought to the pragmatics of how open access would work (or even what it is!). They also somewhat naively failed to see how legacy publishers would be likely to respond to the threat that CC licences pose for them.

## The OA movement’s next battleground

But the strangest aspect of legacy publishers’ response to gold open access is their insistence that authors assign exclusive rights to them even when a CC BY licence is used. This might certainly seem to be evidence of an inability (or refusal) to break with the past, since it is hard to see what commercial benefit can accrue to a publisher by insisting on exclusive rights to articles made available CC BY. They might argue that in doing so they can protect authors from infringing activity, but how likely is it that a publisher would go after infringers if there were no financial benefit in doing so? They might also, like CUP, argue that it avoids articles being duplicated, but this begs the question of how that is possible when a paper has been published CC BY. As Schadt and the OECD authors cited by Toby Green discovered it is not possible to prevent this.

For authors and the public, however, publishers’ obsession with exclusivity comes at a potentially high price. That at least is the view of Morrison, who argues that in insisting

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<sup>32</sup> Selling reprints of journal articles, especially medical articles, can generate a great deal of additional revenue. See [here](#) for instance.

<sup>33</sup> [ACS](#) too has created its own (non-commercial) open licence – see [here](#). This includes the statement: “Except as otherwise specifically noted, ACS is the owner of all right, title and interest in the content of this ACS article, including, without limitations, graphs, charts, tables illustrations, and copyrightable supporting information.”

on authors assigning the rights in CC-licensed material to them publishers are creating an environment in which OA content might cease to be freely available, either because it is subsequently appropriated by private interests, or because it is simply lost.

Morrison's argument is that CC licences place obligations on downstream users (licensees), not on the licensor. "If the publisher, not the author, is the real rights holder and hence Licensor for CC purposes, the Licensor has no obligations to continue to make a work available under a particular license," [she says](#).

And we cannot assume, she adds, that publishers will continue to provide open access over time. In addition, journals are periodically discontinued, and sometimes publishers go out of business. Certainly we have seen OA journals close (e.g. [here](#) and [here](#)), and they appear to be particularly vulnerable. When, for instance, Walt Crawford was researching APC prices he [discovered](#) that many [Bentham Open](#) journals had disappeared from their original URLs, while others had apparently fallen off the edge of the world. He explained, "So far, of the first 10 tried, the five that had already ceased have simply disappeared, while the other five can now be reached from the parent site at [benthamopen.com](#)".<sup>34</sup>

Preservation and archiving are in any case very important issues in the online-only world that most OA journals inhabit. In the print world, the task of preserving journals fell to libraries. They bought print journals and stored them in the library, or in off-site storage sites.<sup>35</sup> They also banded together to share the preservation burden.<sup>36</sup> In the digital environment, however, libraries no longer buy journals, but rent access to them, so preservation is not something they can do effectively anymore. It also means that there is not a strong preservation culture amongst scholarly publishers. And while in theory preservation should be easier in an OA environment – on the basis that digital files can be copied and shared with the click of a mouse (the "lots of copies keep stuff safe" principle), this is not proving to be the case. And publishers continuing proprietary approach can only make the situation more insecure for OA articles.

True, third-party preservation services like [LOCKSS](#) and [Portico](#) have emerged. However, these remain incomplete solutions<sup>37</sup> and they view open access journals as low priority. As LOCKSS [puts it](#), "Every day, open access publishers contact the LOCKSS Program requesting preservation services. Publisher participation in the Global LOCKSS Network preservation is free and thus is an attractive archiving option for small organizations. Unfortunately, at the moment, we are accepting very few open access publishers into the Global LOCKSS Network."<sup>38</sup>

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<sup>34</sup> Consider also the *Libertas Academica* journal *Theoretical Biology Insights*, which seems to have disappeared from the world despite being CC BY – see [this blog post](#). See [here](#) for the dead link to another lost journal, called *Pharmacologia*. Consider too the situation where the original papers published by Apple Academic Publishing disappeared. The only remaining copies would be behind a publisher's paywall.

<sup>35</sup> Preservation was [not a serious issue in the print world](#) because libraries could buy physical copies of journals and store them indefinitely.

<sup>36</sup> I.e. on the basis "If we commit to holding copies of this journal, will you commit to preserving this journal".

<sup>37</sup> In 2007, Rutgers [estimated](#) that just "fifty percent of our purchased content is available on one or the other [LOCKSS and Portico]."

<sup>38</sup> LOCKSS goes on to say, "The Global LOCKSS Network accepts for preservation content of interest to most of our participating libraries. Librarians prioritize expending preservation resources to ensure post-cancellation access to 'toll walled' content. They presume open access content 'will be always there'. It's

For these (and other) reasons the open access movement's next struggle might be recovering lost, or appropriated, content. As we have seen, OA journals can just disappear. They can also slip behind paywalls (e.g. [here](#)). And both these trends will likely accelerate going forward. The good news is that German archivist and historian [Klaus Graf](#) has begun to [highlight the issue and catalogue the losses](#).

This issue is not *just* a consequence of CC licensing, but if publishers insist on acquiring exclusive publishing rights, the copying and sharing activity that is vital in the digital environment if content is to persist over time will be challenged.

In light of these risks Morrison [suggests](#) that open access policies should “always require green OA archiving deposit, even if the policy-maker wishes to support transition to OA publishing.”<sup>39</sup> She explains: “The license for a downstream CC licensed work cannot be revoked even if the publisher prefers not to continue to make the work available under those terms. This provides backup, as well as a disincentive to potential future backsliding on rights.”

The implication would seem to be that if the research community wants to ensure articles for which it has paid an OA publishing fee remain freely available it will need to do the preservation work itself. Currently this seems to mean incurring the additional costs associated with depositing and maintaining copies of all OA research papers in thousands of institutional repositories around the world. We know that the costs and difficulties associated with this are significant.

Morrison's proposal is a logical response to an illogical situation, and demonstrates once again how unthought through was the journey the OA movement embarked on in 2001. Green and gold OA were seen as alternatives – research papers took one or the other route to open access, not both.

But is there a contradiction here? I said earlier that the open access model implied publishers would peer review papers and then release them into the world to float where they will. Am I now saying that they should commit to preserving them indefinitely? Not necessarily. My point is that publishers want to have their cake and eat it. They expect not only to be able to levy a hefty publishing fee to make papers OA, but to also acquire exclusive rights in the hope of earning rent from them, and yet not take responsibility for preservation. This suggests that if at some point the rental value of a journal was deemed nugatory the publisher might simply abandon it – threatening the “scholarly record” ([the curated account of past scholarly endeavour](#)) that is so important to the research endeavour. Publishers want it all ways.

Recall that double dipping emerged with [hybrid OA](#), when legacy publishers began to levy APCs on papers published in subscription journals. The offer to researchers is that they can continue to publish in their preferred (subscription) journals but make individual papers open access by paying a fee. Now publishers want to double-dip with pure gold OA too. For the research community it portends a future in which it will have to pay high

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a conundrum; the expensive subscription content whose preservation is in most demand is exactly the content at the lowest risk of disappearing.”

<sup>39</sup> I.e. gold OA.

publishing fees while still assigning exclusive rights to publishers. And if it wants those papers to remain freely available over time to also bear the costs of preserving them.<sup>40</sup>

In an ideal world, publishers would lower their APCs (or be forced to), and cease insisting on exclusive rights to OA papers. But given government reluctance to intervene in the putative “market” for scholarly communication, this seems highly unlikely.<sup>41</sup> The best way forward for the research community, therefore, would seem to be to put all its efforts into establishing and supporting high-quality, central, collectively-funded, subject-based repositories like [PubMed Central](#), [arXiv](#) and [SocArXiv](#), rather than thousands of mediocre, underfunded, half-empty institutional repositories whose records often consist of bibliographic data alone, not the underlying documents.

Importantly, central repositories can do more than just provide access and preservation services. They can also act as publishing platforms – with new scholar-led, community-owned overlay journals like [Discrete Analysis](#) and [Quantum](#) operating over them. Even if doing this did not finally force publishers to downsize and reduce their prices, the research community would have created the necessary tools, and developed the necessary skills, to allow them to cut publishers entirely out of the loop and take back control of scholarly communication. The good news is that the [newly reinvigorated preprint server movement](#) could provide the seeds for such a revolution.

But before this could happen, researchers would need to cease turning to publishers for advice, especially on copyright matters. Much as consumers are routinely told to treat advice from used-car salesmen with a large grain of salt, so authors need to become sceptical about advice from publishers – a point exemplified in [this commentary](#) by Executive Director of the Authors Alliance [Mike Wolfe](#).

## Who owns the copyright is not the issue, Dude

So, *to whom* can authors turn for advice and guidance about copyright if not publishers, and what *do* they need to know? After all, most authors will feel they have neither the time nor the brain space to become experts in what is a hugely complex area of law.

One thing they certainly *do* need to understand is that retaining ownership of their copyright counts for very little if they then assign exclusive rights to the publisher. They might just as well hand over the copyright itself.

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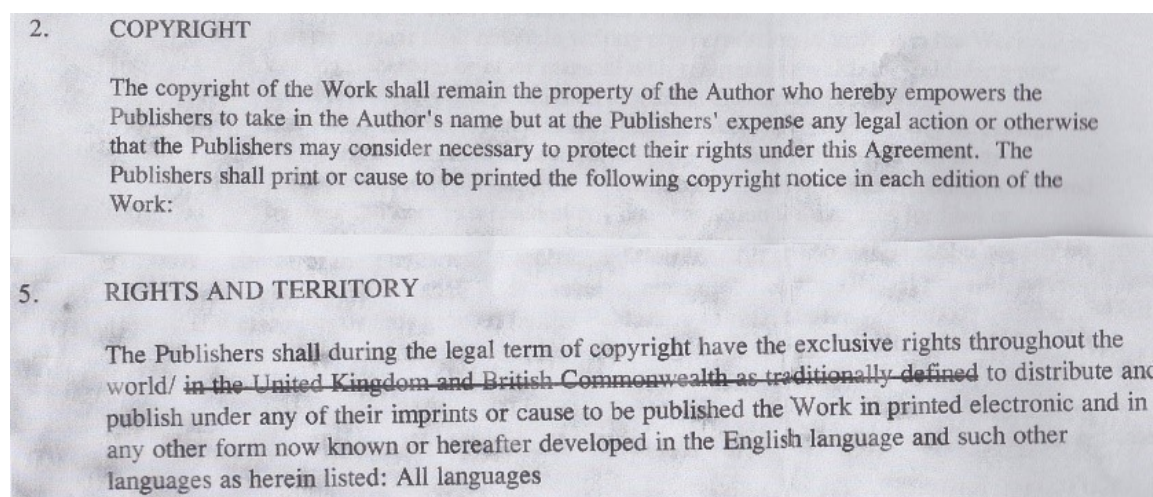
<sup>40</sup> Publishers can of course also expect to continue earning rent on all the subscription papers they acquired historically or at least until the (long) copyright terms ends (now generally for the life of the author plus 70 years). “Money for old rope”.

<sup>41</sup> The last time any government thought seriously about intervening was in 2001, when in [clearing the acquisition](#) of Harcourt General by Reed Elsevier, the UK Competition Commission invited the Office of Fair Trading (OFT) to consider whether a wider review was needed. In response, the OFT published a statement saying, “We believe that there is evidence that the market for STM journals may not be working well. In the light of the developments noted in chapter 7 above, this does not, however, appear to the OFT to be a matter warranting further investigation on our part at this stage. However, if competition fails to improve, or should additional significant information come to light, we may consider further action.” Unfortunately, the developments listed by the OFT in chapter 7 have come to nothing, so the problems continue to exist. Yet there is little sign of governmental appetite for intervention.

Anyone who has ever published an academic monograph should (but actually may not) know this, because it is standard practice for book contracts to state that the copyright will remain the property of the author(s), but control of the work pass to the publisher. As a result, authors have little or no say over when and how their work is published, marketed and sold, and to whom and on what basis it is sub-licensed.

What do authors get in return? Actually, very little. In the case of a scholarly monograph they will likely get some derisory royalties, usually in the form of a small advance. When publishing a scholarly paper with a legacy publisher (both under the traditional subscription system and increasingly with OA) they will invariably have to cede complete control over their work to the publisher, including the right to profit from it financially.<sup>42</sup> In return they get zero, zip, zilch, nada.<sup>43</sup>

The two paragraphs below from an agreement to publish a scholarly monograph demonstrate how this works:



As can be seen, Paragraph 2 states that the author retains ownership of the copyright of the work, but Paragraph 5 then proceeds to moot this by giving the publisher an exclusive right to exploit it.

But how many researchers do read their author agreements? When I was sent a copy of CUP's journal publishing contract I found a significant typo in it. This had apparently gone unnoticed not just by CUP staff, but by the many, many authors who will have signed it!

Were they to read the agreements they sign, researchers would realise that they are invariably being asked to alienate themselves from their own labour. Even if they understand and accept that the publisher will be getting an exclusive right to benefit financially, they may not realise the extent and degree to which they are giving up control. As we shall see, for instance, some authors mistakenly believe that if the copyright remains in their name they still have control over how their work is used.

<sup>42</sup> In some cases, this will involve the author assigning copyright to the publisher, in others exclusive publishing rights. But my point is that there is no meaningful difference here.

<sup>43</sup> Neither royalties nor advances are paid on scholarly papers. Beyond seeing their name in a digital file, therefore, the author gets no more than another line in their CV.

To put this more demotically, who owns the copyright is not the issue, Dude; the issue is who controls the work and who earns rent from it.

Making this distinction last year OA advocate [Peter Murray-Rust commented](#), “There is a difference between the author of a work and the owner.”

In fact, Murray-Rust’s characterisation is not strictly accurate. As we saw above, publishing contracts will likely state that the work remains the property of the author, but that s/he gives up all control over it. It might be more accurate, therefore, to say that authors remain the owner in name only. Morrison [calls this](#) “author nominal copyright”. That is, the copyright remains in the name of the author but the rights under that copyright are transferred to the publisher for their exclusive use. As such, “authors become third parties with respect to their own works,” says Morrison.

The point is that OA advocates never anticipated that a contractual model developed for the subscription world, and based on exclusivity, would become the norm for OA journals too.

In short, if when paying to publish their OA papers authors assign exclusive rights to the publisher they will have no more control over their work than if they had published in a subscription journal. Is this a fair exchange for a publishing fee that [can be as high as \\$5,000](#)?<sup>44</sup>

We might also wonder how transferring exclusive rights in a paper fits with the BOAI assertion that the “only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.”

What is not in doubt is that publishers have become extremely adept at acquiring and monetising copyright for their own benefit. It is far less clear that they are as skilful or assiduous when it comes to advancing the interests and rights of the authors whose labour they appropriate, or of explaining to them in a fair and balanced way the nature of the power relationship embodied in the author’s agreement, and what this requires them to give up.

As publishers relocate their proprietary practices into the new OA environment there must therefore be considerable doubt that they are committed to promoting and furthering the freedoms articulated in the BOAI, or indeed those implicit in the Creative Commons licences that [Larry Lessig et al](#) created. However much they may now be willing to talk the talk on OA, in practice publishers seem bent on offering an increasingly diluted form of open access.<sup>45</sup>

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<sup>44</sup> The sum total of their control seems to be the ability to choose which CC licence is used.

<sup>45</sup> Note also that legacy publishers are now acquiring pure OA publishers – e.g. Springer [purchased BioMed Central](#) in 2008, Wolters Kluwer [acquired MedKnow](#) in 2011 and Sage [purchased Libertas Academica](#) in 2016. It might therefore seem reasonable to expect that the same process of OA dilution will occur over time with pure-play OA publishers.

## Green OA: a better option?

Given the way that gold OA is being diluted, might researchers not be advised to opt for green OA instead – that is, to continue publishing in subscription journals, and then self-archive their papers (or more likely, allow librarians to self-archive them) in an open repository?

In other words, if despite paying for gold OA researchers are still expected to assign exclusive rights to the publisher then would they not be just as well sticking to the traditional subscription-based model? This does not require paying a hefty publishing fee and papers can still be made OA. In fact, most of the papers freely available in repositories today will have been published in a subscription journal.<sup>46</sup>

The problem with green OA, however, is that since publishers really don't want researchers to take this route, they have over time introduced ever greater restrictions on self-archiving. The process of making a paper OA in this way is therefore now very complicated, and subject to considerable delay.

So, for instance, publishers now insist on an embargo before a self-archived paper can be made freely available. They also invariably only allow a pre-print version of the paper to be deposited in a repository (not the publisher's version), and they usually prohibit papers from being deposited on commercial paper sharing sites.<sup>47</sup>

The resultant complexity and confusion is exacerbated by the fact that open access policies vary from publisher to publisher, and from journal to journal,<sup>48</sup> so establishing the green OA rules for any particular journal can be extremely difficult, particularly when trying to work out what version can be made freely available, and when. For a sense of the bureaucratic nightmare that open access has become see [this presentation](#).

The rules of engagement are not just complex, confusing, and publisher-dependent, but subject to constant change, often without any public notice that a change has occurred.<sup>49</sup>

Establishing which version of a paper can be self-archived is further complicated by the fact that there are many potential versions, and little or no agreement on how these different versions relate to and/or differ from one another. The [NISO recommendations](#) list seven different versions of a paper, while the [CrossRef list](#) contains so many possible versions that my eyes began to water as I was trying to make sense of them. OA advocates insist that most publishers will allow authors to self-archive the AAM (Author's Accepted Manuscript), but there is little agreement on what exactly an AAM is (as we shall see).

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<sup>46</sup> Although, as we have noted, OA purists deny that that these papers are open access.

<sup>47</sup> In other words, publishers' OA policies may allow deposit in an institutional repository, but not on commercial services like [Academia.edu](#) and [ResearchGate](#).

<sup>48</sup> For a taste of the complexity, see [this list](#) of Elsevier's current embargoes alone.

<sup>49</sup> Services like [SHERPA](#) have been created to monitor and publish the different rules, but since OA policies are constantly changing these services struggle (unsuccessfully) to keep up to date.

On a similar theme, OA advocates will tell you there are just [six CC licences](#) to choose from when publishing OA.<sup>50</sup> Yet CrossRef reports that publishers have registered with it [232 different open licences](#).<sup>51</sup>

Doubtless because of these complexities (and the widespread ignorance about copyright) authors who do decide to share their work online often pay little attention to the rules (even if they know about them). And since commercial paper-sharing sites are far more user-friendly, and offer vastly superior functionality to anything any institutional repository is able to offer, researchers will spurn local solutions in favour of sites like [ResearchGate](#) and [Academia.edu](#). In doing so they tend to post the publisher's pdf (the Version of Record, or [VoR](#) containing the publisher's typeface etc.), which is inevitably prohibited by the publisher. We have, therefore, seen mass [take-down notices](#) being issued.

When I asked one senior researcher why he refuses to deposit his papers in his institutional repository, and yet routinely posts them on Academia.edu he replied: "I know it is probably illegal, but I have no idea which version of any of my works counts as a legal deposit, and I have absolutely no desire to have any dealings with the bureaucrats that run the repository."<sup>52</sup>

The bureaucrats he refers to, of course, are librarians – the people who now manage institutional repositories, make deposits on behalf of researchers, and who have become the OA police. Indeed, many researchers are so alienated from their institutional repository that librarians are also having to fulfil the ["copy requests"](#) that external researchers have to make if they want access to a paper hosted in a repository that is still under publisher embargo.<sup>53</sup>

To go back to our question of whom researchers can turn to for advice on copyright, or indeed on open access and scholarly communication more generally: We have seen why publishers are not a good choice; what about librarians?

Librarians have certainly started to market themselves as the go-to people here. And it is not hard to see why. As a *Times Higher* [story](#) highlighted when covering a [recent report](#) on library usage,<sup>54</sup> librarians' traditional role is under growing threat. "The report says that it finds 'bad news for libraries' because they 'seem to have lost all their visibility,'" wrote the *Times Higher*. "Lots of early career researchers have not gone to the library for years."

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<sup>50</sup> See also [here](#).

<sup>51</sup> See also the [chaos over licencing](#) in the OA monograph world.

<sup>52</sup> See also this [blog post](#) on the illegal paper sharing site Sci-Hub, including the comment from Professor Jordan Pober of Yale, who says he doesn't mind that many people download his papers for free "since he didn't make money from its publication." The point here is that the exploitative nature of researchers' relationship with publishers means that they don't view the sharing of research articles as piracy, or even undesirable. A *Science* survey [found](#) "88% overall [of researchers surveyed] said it was not wrong to download pirated papers."

<sup>53</sup> The copy-request, or ["Request eprint" button](#), works on the principle that copyright law permits researchers to share their papers with one another privately. Whether librarians can legally do this on behalf of researchers, or indeed whether the button itself is legal, is [open to doubt](#).

<sup>54</sup> The report is called *Early Career Researchers: The Harbingers of Change?*

While details of this report have been challenged,<sup>55</sup> there is no doubting that librarians are keen to insert themselves directly into the scholarly communication process, and they see open access as an opportunity to do that. Conscious that their traditional role as gatekeepers of subscription content is in decline they have started creating gold OA funds, publishing advice pages on scholarly communication, and putting together guides on [predatory publishing](#). As noted, they are also becoming the OA police, and the more adventurous have begun [leveraging their institutional repositories as publishing platforms](#), or [offering other publishing services](#).<sup>56</sup> But above all, librarians are now promoting themselves as copyright experts.

With this last goal in mind, the University of South Florida, Tampa, last year commissioned [Ithaka S+R](#) to conduct a Faculty Survey on scholarly communication. Reporting on the survey in [a blog post](#), Ithaka's [Christine Wolff](#) noted, "faculty members expressed a need for additional assistance with matters specifically related to copyright and intellectual property."

She added: "This reinforced the previous hiring [by the University of South Florida Libraries] of a Scholarly Communications Librarian and a Copyright Librarian to better support these faculty members' activities."

Since the survey was commissioned by the library, sceptics might wonder if the objective was more to promote the library than establish the needs of faculty.

Either way, the survey found librarians are some of the last people researchers turn to when they want advice on copyright and/or scholarly publishing, a point conceded by Wolff, who expressed it this way: "A sizable share of faculty members were unaware of available library services".

Unaware, or just plain unwilling to turn to libraries? In any case, page 74 of the report ([here](#)) notes that when they were asked if they have "ever gone to any of the following sources"<sup>57</sup> for assistance with negotiating author agreements or determining how to license your scholarly publications?" only 15% of respondents said they turn to a librarian for guidance (likewise for the campus attorney). By contrast, most ask colleagues for advice, and **70%** turn to a publisher.

One might, therefore, venture to suggest that the most significant finding of the survey was that faculty don't view librarians as the natural people to turn to on these matters, and perhaps have no wish to. So the University of South Florida might have been better to wait for the results of the survey before hiring scholarly communications and copyright librarians. Was this not putting the cart before the horse?

On the other hand, it is worrying that researchers still view publishers as a key source of advice on copyright, so it might be no bad thing if librarians were to reinvent themselves as scholarly communication and/or copyright experts.

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<sup>55</sup> See [here](#) for instance.

<sup>56</sup> The management of university presses are also increasingly being taken over by the library – e.g. [at the University of Michigan](#).

<sup>57</sup> The list included their campus librarian, their publisher, a campus attorney or legal counsel, a colleague or colleagues in their department, a colleague or colleagues outside their department, web-based resources (such as online guides or tutorials), and "other".

The problem is that they do not start from a good place. Long viewed as defenders of publishers' copyright in and around the photocopier and digitisation initiatives, librarians have a reputation for being the copyright police.<sup>58</sup>

The long-standing and increasingly bitter dispute between research institutions and publishers over journal prices is not helping librarians improve their image with researchers, as is evident from the sometimes-heated discussions that take place between the two groups when the topic comes up. Indeed, these discussions can quickly deteriorate into name calling and insult swapping.<sup>59</sup>

Add to this librarians' new role as the OA police and we might wonder how many researchers will ever feel comfortable seeking advice about copyright and scholarly communication from them.

More pertinently, perhaps, it is not clear that librarians are as knowledgeable about copyright and scholarly communication as they might like to think. Last year a post on the blog of the Office of Scholarly Communication at Cambridge University, for instance, [complained](#) "there is a systematic lack of education on scholarly communication issues available to those entering the library profession."

But is this knowledge deficit confined to those entering the profession? I suspect not, especially now that open access has made the scholarly communication landscape far more complex.

A recent experience I had would seem to support this conclusion. Let me explain.

## Case study

On July 31<sup>st</sup> last year I came across a paper published in the *Journal of Librarianship and Information Science* ([JoLIS](#)) and decided I would like to write about it on my blog. In order to do so, I wanted to include two of the images from the paper. However, it was not immediately clear to me whether or not I needed permission to use them. In my attempts to find out I fell down a deep and confusing rabbit hole, leaving me convinced that no one really understands (or at least is able to agree on) how copyright works (or ought to work) in an open access environment, including librarians.

The journal in question is published by [Sage](#), and the [article](#) I was interested in is called *What does 'green' open access mean? Tracking twelve years of changes to journal publisher self-archiving policies*.

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<sup>58</sup> Here it is also worth noting that some librarians are more than willing [to assert rights](#) they don't have on their own collections. And while they have long been at the forefront of the OA movement, they have never been good at practising what they preach – see [this article](#) for instance. (See also [this](#)).

<sup>59</sup> Consider this [recent statement](#) from a librarian for instance: "faculty are selfish, ignorant blame-spewing prima donnas who invariably blame the librarians." Or this [mailing list post](#) from a researcher, "let their librarians keep whinging incoherently about 'double-payment' for yet another decade of lost research access and impact..."

Unsurprisingly – given the name of the journal – the authors of the paper are both librarians. Moreover, they are librarians one would assume to be knowledgeable about copyright. [Elizabeth Gadd](#) is [Research Policy Manager \(Publications\) at Loughborough University](#) and [Denise Troll Covey](#) is a [scholarly communications librarian](#). [The Carnegie Mellon web site](#) lists Troll Covey’s fields of expertise as “laws, policies, practices and standards relevant to digital libraries”, and “research on acquiring copyright permission to digitize and provide open access to books”.

As the paper in question was freely available on the Sage website I initially presumed that the authors had paid an APC to make it open access.<sup>60</sup> In the event, it turned out that no APC had been paid. Rather, Sage had unilaterally decided to make the paper OA on a temporary basis (a practice some refer to as “peek-a-boo open access”), and the article was later [put behind](#) a paywall.

Assuming it would be the quickest way of establishing whether I needed permission to reuse the images, I [tweeted](#) Gadd, who replied that while she and her co-author had not paid an APC they had retained copyright in the paper and so could grant me permission. To support her claim, she cited Sage’s [self-archiving policy](#). She said, however, that she would confirm that the publisher agreed.

Gadd also told me she had self-archived a copy of the paper in the [Loughborough University Repository](#) on a [CC BY-NC-ND 4.0](#) basis, which implied to me that there was no need to obtain permission to reuse the images, as I run a non-commercial blog, and I do not have any ads on the site.

However, there was no indication on the publisher’s site that the article was available on a CC BY-NC-ND basis. Moreover, the paper included a notice saying that Reprints and Permission Requests must be directed to the publisher via [RightsLink](#).

So on August 1<sup>st</sup> I filled in a RightsLink [permission request form](#), triggering a protracted asynchronous conversation with a Sage representative. During that conversation, I was asked what I planned to do with the images, the nature of the audience I would be addressing etc. etc. The interchange culminated some four weeks with the following message:

*Because these figures from a recent article will be openly accessible online with a potentially large audience, the fee for this reuse will be \$2,500 for one year. Rights granted will be non-exclusive, electronic (openly accessible blog/twitter) format, worldwide, in the English language for one year. Permission may be re-requested to continue reusing the material once the duration has expired.*

I have no idea how Sage arrived at a figure of \$2,500, but it is worth noting that at the time the journal’s web site indicated that the [annual institutional subscription](#) for *JoLIS* was £457 for e-access and £498 for print (£508 for both e- and print).<sup>61</sup> As such, I was being asked to pay over four times the annual subscription to reuse two images from one of its articles. These images occupy at most a quarter of a page of a 17-page document. And remember, this was for use on a non-commercial blog.

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<sup>60</sup> *JoLIS* is a subscription journal but offers a hybrid OA option.

<sup>61</sup> Since then the prices have increased by 7% to £490, £533 and £544.

Since *JoLIS* has a hybrid option I was aware that Gadd and Troll Covey could choose to make the paper open access retrospectively. Moreover, they could do this at a discounted rate. When Gadd asked Sage how much it would cost she was told that while the standard APC for *JoLIS* is £1,600, since Loughborough is a member of [NESLi](#) they would need pay only £400.

Yet I was being asked to pay \$2,500 for using two images from the article.

Sage also told Gadd that authors are not able to give permission to others to reuse their papers, or images from them, even if the authors have retained copyright.

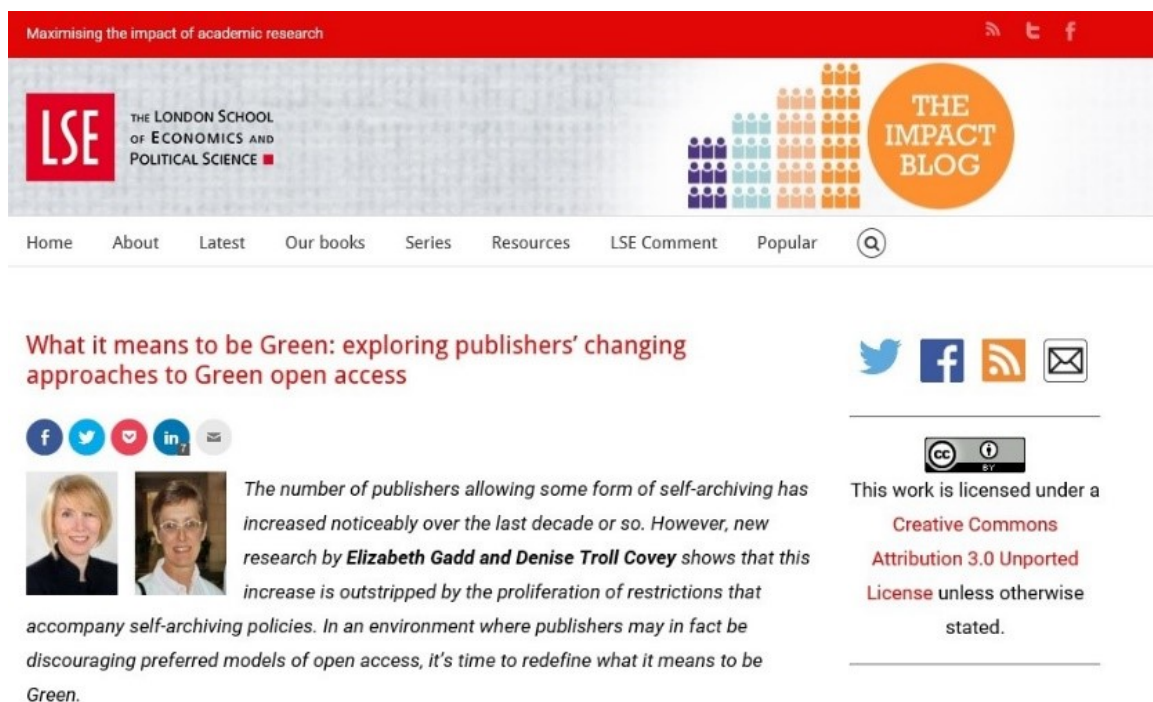
When I was told that Gadd and Troll Covey could make their paper OA at a discounted rate I (mistakenly) assumed that they were planning to do so. I was also conscious by now that *both* authors had made the paper available in their respective institutional repositories using a CC BY-NC-ND licence (Gadd initially posted what was referred to as “version 7” [here](#) and Troll Covey posted a version [here](#)). So I went back to Sage to ask if it was still insisting I pay a \$2,500 reuse fee.

Sage replied that it too had noticed the paper was available in several places with a CC licence attached, but that it should not have been since Sage has exclusive publishing rights.<sup>62</sup>

Adding further noise to the discussion, on 19<sup>th</sup> September the authors [blogged about their paper](#) on the London School of Economics [Impact Blog](#), and this included an image from the paper. What seemed striking to me about this was that all the content on the LSE blog is made available on a CC BY basis “unless otherwise stated” (see below). Since there was no copyright notice attached to the Sage image on the LSE blog it seemed reasonable to conclude that it was now available under the most liberal CC licence, which permits anyone to reuse the material without permission, even for commercial purposes. So the image appeared to have transitioned from all rights reserved status, through CC BY-NC-ND, to CC BY.

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<sup>62</sup> Which I assume means that Sage had published it on an all rights reserved basis.



Once more I emailed Sage. Since one of the images in the Gadd/Troll Covey paper was now available CC BY, I asked, was I *now* able to reuse two of the other images on a non-profit blog without having to pay \$2,500 for the privilege?

The Sage representative replied: “I am not certain where or how LSE received permission to reprint this figure (or if permission was ever requested) as I cannot find a manual record of any such agreement with them. We’ll need to look into this and see if any steps need to be taken.”

In a subsequent email, he said, “The journal editorial staff and our Open Access team were able to clear up this confusion with our authors. Evidently it was author error regarding the material and the terms of reuse, and the article is currently not under a Creative Commons license.”

The email added: “With regards to the copies within the Loughborough and Carnegie Mellon repositories, it appears that these institutions have posted what we refer to as ‘Version 2’ (the pre-published version) of the article, which is permitted under our Author Reuse Guidelines (which follow the [RoMEO](#) Green guidelines), though these papers will need to be updated to indicate that they are not actually under a Creative Commons license and that any reuse of the material does require permission from Sage Publishing.”<sup>63</sup>

The good news was that Sage was now willing to give me permission to reuse the images without payment. “[W]hile we cannot grant reuse permission under a Creative Commons license, I did inform the journal editors of your intended reuse and they are happy on this occasion to waive any fees and possible time limitations, so you may reuse the requested material free of charge.”

<sup>63</sup> In point of fact, Troll Covey appeared to have simply uploaded the publisher’s pdf to her repository and attached a CC BY-NC-ND licence to it in the process.

As we shall see, it is not clear that Gadd and Troll Covey have even now complied with all the conditions demanded by Sage. For instance when I last looked, neither version ([here](#) and [here](#)), appeared to indicate that permission for reuse must be directed to Sage. The Troll Covey version also did not seem to indicate that the paper had been published in *JoLIS*. This may be because in an email to me Gadd said that she does not accept that Sage has a claim on the preprint (which in insisting that the CC licence be removed from the repository version, Sage would appear to believe). To support her assertion, Gadd again cited the Sage [open access policy](#) – which *inter alia* says “You may do whatever you wish with the version of the article you submitted to the journal – version 1”).

Gadd explained, “There is nothing in the agreement that says we have to explicitly state that re-use goes through Sage – we only need to add a link to the DOI which we have done. The challenge with all this is that the preprint and postprint in this case are virtually identical. I have used the chart from the preprint in the blog piece with which I can ‘do whatever I wish’. I have also tweeted another chart with no comeback from Sage. I am promoting their journal and our article with this social media activity – as a result our paper has the highest [Altmetric](#) score of any published in *JoLIS*.”

Further complicating the picture, while the Sage Policy refers to Version 1, in his interchange with me the Sage employee used the terms Version 1 and Version 2 interchangeably, implying that they were the same thing. If that is right, why not just use a single term?

Gadd also maintained that she and Troll Covey *are* entitled to give reuse permission to others. And she said her Loughborough library colleagues take the same view.

### What about the contract?

But might it be that that Gadd and her Loughborough colleagues are too focused on the wording of Sage’s OA policy? A more relevant document surely is the contract that she and Troll Covey agreed to in submitting their paper to Sage. Below is the relevant paragraph of that agreement, which would seem to support Sage’s claim that only *it* has the right to give reuse permissions.

In consideration for publication in the above Journal, of the above Contribution, I hereby grant to SAGE Publications Ltd ('SAGE') the sole and exclusive right and licence to produce, publish and make available and to further sub-license the Contribution and the abstract prepared by me to accompany the Contribution for the full legal term of copyright and any renewals thereof throughout the world in all languages and in all formats, and through any medium of communication now known or later conceived or developed.

And might it be that Gadd did not think to refer to the publishing agreement because she and Troll Covey did not sign it? I ask this because when authors submit papers to *JoLIS* they are not asked to sign anything, but merely to check a tick box as part of the “publishing workflow”. Indeed, this appears to be a growing practice in scholarly publishing, and has doubtless been influenced by the use of the controversial “[click-wrap](#)” licence by software companies. It is not clear to me that the legal status of such “contracts” has been fully tested in the courts.

When I asked the LSE why it had not obtained permission from Sage before republishing one of their images on its blog a spokesperson replied: “The LSE Impact Blog team have sought and received confirmation that the authors retain the rights to reuse this figure in any other of their authored works. As the figure is identical to that included in Version 1 of their journal article, they “may do whatever [they] wish” with it, as described in their agreement with SAGE. They have not received any communication from SAGE that contradicts this position.”

This implies that the LSE also failed to consider the contract that Gadd/Troll Covey have with Sage. Since the [managing editor](#) of the Impact blog ([Kieran Booluck](#)) is a former managing editor and publisher with 8 years’ experience working for [Emerald Group Publishing](#) this seems most odd.

When I put LSE’s response to Sage the spokesperson replied “Under SAGE Publishing’s author reuse guidelines, the authors are correct – they are permitted to reuse ‘Version 1’ (the original submitted manuscript) however they wish. However, under the terms of their contributor agreement with the journal, they have granted SAGE Publishing the sole and exclusive rights to their material.<sup>64</sup> This means that while the authors are free to reuse their Version 1 material themselves, they are not able to grant the reuse rights to the material to others (in this instance, LSE). Permission for any reuse by third parties must be made through SAGE Publishing.”

He added, “SAGE has since been in contact with the LSE blog, and we have informed them that we are happy for them to draw upon the article and to reuse the figure as they have done. However, we have requested that they include a prominent reference to the original *JoLIS* article and a citation to the figure, as well as include a link to the journal’s website.” Several weeks later the LSE blog complied with Sage’s request.

So where does this leave us? I think my experience demonstrates a number of things, not least the fact that when copyright in a work is retained by the author(s), the question of who has what control over the work is a confused and contested issue, a point I shall return to below.

## Bigger picture

But the bigger picture is that open access has significantly complicated the scholarly communication landscape, especially as concerns copyright. Not only has copyright become more complex in the OA environment, but it is allowing publishers to continue to exercise a surprising degree of control over access to research, not just with green OA but also when researchers pay to make their work freely available by means of gold OA. Given that one of the primary justifications for open access was that it would reduce the ability of publishers to control scholarly communication (and gouge the public purse), this represents a major failure of the OA movement.

As we’ve seen, subscription publishers have always insisted on acquiring exclusive rights in the papers they publish. This has allowed them to emasculate green OA, not least by insisting on ever more complex and changeable rules over what, when, and where

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<sup>64</sup> This is a point that the Executive Director of The Authors Alliance has [made](#). “journal policies are not what bind authors, but rather their individual negotiated agreements.”

researchers can make their work freely available. In now starting to insist that authors assign exclusive rights to them even when paying an APC, publishers appear to be determined to also control gold OA, and in ways not dreamt of by OA advocates.

However, what is most striking is publishers' claim that when authors assign exclusive rights to a publisher they effectively transfer ownership not just of the published version of a paper (the Version of Record), but of all upstream versions too, theoretically from the moment the author first hits the keyboard. This allows publishers to assert that authors are only able to self-archive their papers if and when the publisher agrees to grant back to them the limited (publisher-specified) rights to do so. In other words, publishers believe that if they have exclusive rights in a work they have power and control over all versions of it, including the preprint,<sup>65</sup> even if the author(s) have retained ownership of the copyright in it.

As one might expect, OA advocates dispute this, as a reading of [this post](#) by [Charles Oppenheim](#) – along with the comments beneath it – demonstrates.

However, given the monopolistic power scholarly publishers have acquired they are usually able to call the tune. After all, both Gadd and Troll Covey agreed to remove the CC licence from their self-archived papers, even though Gadd disputes Sage's right to insist on it, or its claim that it has an exclusive right to authorise reuse.

Also worth noting: while Gadd had the CC licence removed from the copy of her paper in the Loughborough repository – replacing version 7 (formerly [here](#)) with version 6 ([here](#)) – it is not clear how either of these versions relate to the Versions 1 and 2 cited by Sage in its conversation with me, or that Sage's Version 1, or 2, are the same thing as an AAM, which OA advocates insist all publishers allow authors to self-archive.<sup>66</sup>

To complicate the picture further there is also considerable confusion over what reuse rights any particular publisher permits authors. Publishers' sites are far from clear on this – a point the Head of Scholarly Communication at the University of Cambridge Danny Kingsley [made](#) on a mailing list last year. Kingsley complained in particular about the lack of clarity over reuse rights on the web site of the Wiley-published journal [Learned Publishing](#).<sup>67</sup>

But here is the thing: when it comes to the rules and regulations around open access the more confusing the situation is, the more control publishers will have, if only because the less researchers understand what is and is not permitted, the more likely they are to let the publisher dictate to them. Likewise, the more complicated the rules and processes of self-archiving, the more likely it is that researchers will opt for the simpler (but expensive) route provided by gold OA.

The upshot is that despite the OA movement's liberation aspirations, legacy publishers are still very much in the driving seat, and managing the transition to open access in a way that suit them more than the research community.

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<sup>65</sup> It is worth thinking about this in the context of the claim [here](#) that "Typically preprints are not encumbered by copyright restrictions or paywalls, and thus they can be mined to better comprehend and utilize the knowledge presented." Would Sage (and most legacy publishers) agree with this? I doubt it.

<sup>66</sup> See also the bullet points on page 2 of [this](#) paper.

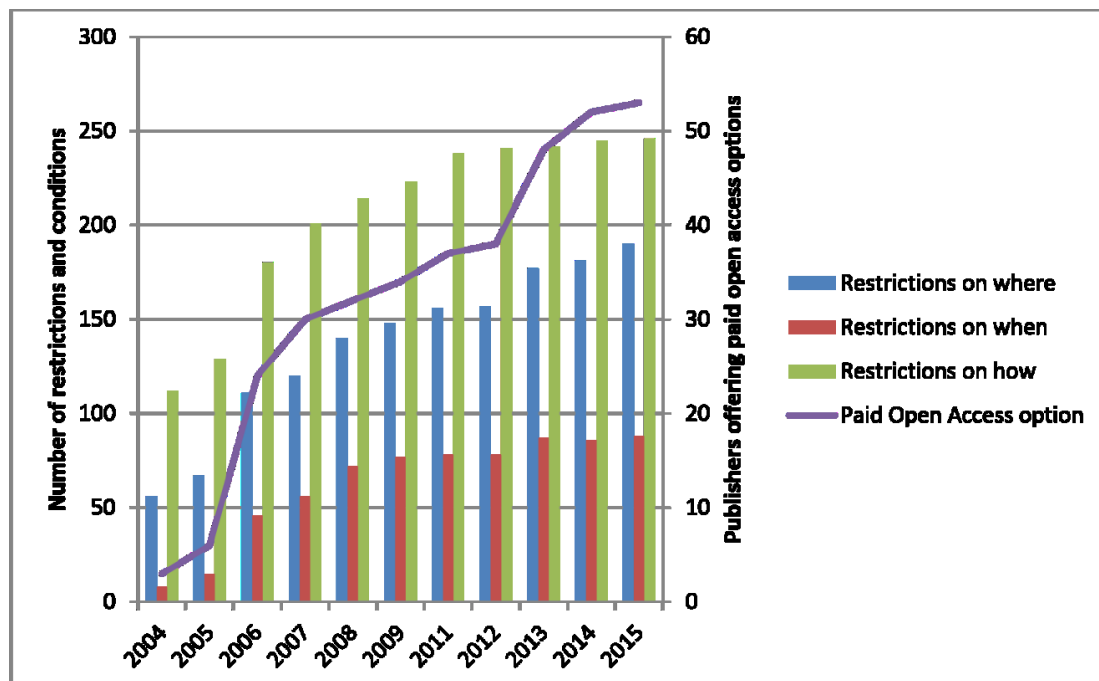
<sup>67</sup> See also the comment about Taylor & Francis [here](#).

It is the way that publishers are doing this that the Gadd/Troll Covey paper explores. As a reading of the paper makes clear, publishers' strategy consists of persuading researchers to opt for pay-to-publish gold OA (which provides publishers with a new revenue stream)<sup>68</sup> while disincentivising them from choosing green OA (which threatens publishers' revenues).

The paper demonstrates this by tracing how the self-archiving policies of the original 107 publishers listed on the [SHERPA/RoMEO](#) database have changed over the past 12 years. In doing so it finds a significant positive correlation between the increase in self-archiving restrictions and the introduction of gold pay-to-publish open access options. The authors explain: "[W]hile the volume of publishers allowing some form of self-archiving (pre-print, post-print or both) has increased by 12% over the 12 years [2004-2015], the volume of restrictions around *how*, *where* and *when* self-archiving may take place has increased 119%, 190% and 1000% respectively."

The authors also report that the growth in the number of imposed embargos was rapid until 2008, and thereafter held steady until 2012, when it began to accelerate again. "After a fairly even split between 6 month and 12 month embargoes in 2005, by 2015, 62% of embargos were for 12 months."

These findings are shown graphically in the two images below, the images I had such difficulty obtaining permission to reuse.<sup>69</sup>

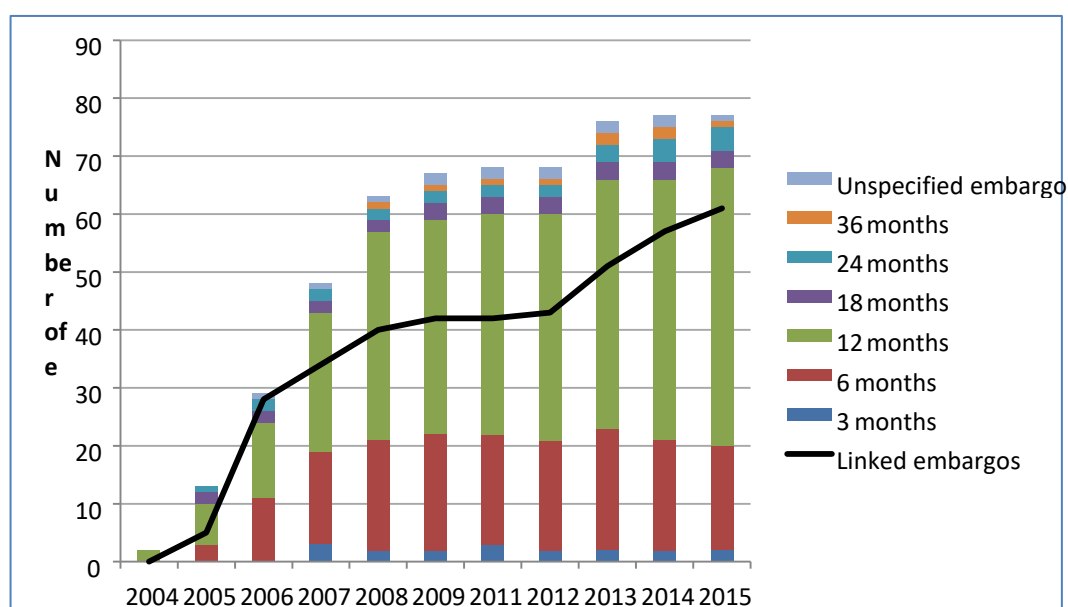


*Introduction of restrictions and conditions over time\* mapped against the introduction of a paid open access option*

<sup>68</sup> Gadd and Troll Covey were themselves repeatedly invited to opt for gold OA during the process of submitting their paper, and it was not CC BY they were encouraged to choose.

<sup>69</sup> N.B. as noted earlier, these images are courtesy of Sage, and *not* available under a Creative Commons licence.

\*No data was available for 2010.



### *Growth of embargo periods over time*

Gadd and Troll Covey also point out that this has seen the very definition of “green OA” diluted over time. For this reason, they call on “open access advocates, funders, institutions and authors to redefine what ‘green’ means to better reflect a publisher’s commitment to self-archiving.”

In short, as publishers have begun to offer gold OA the rules and prohibitions surrounding green OA have become increasingly complex. In addition, the rules change constantly. This means that process of providing green OA has become increasingly difficult to navigate – for authors, for funders and for library intermediaries. In the process, the very meaning of green OA has been corrupted. Where my case study demonstrates this in a qualitative way (if you like), the Gadd/Troll Covey paper demonstrates it in a quantitative way. What is not in doubt is that the whole process is being driven by legacy publishers’ determination to retain and extend their control of scholarly communication into the OA environment and to ring-fence their revenues in the process. This inevitably means promoting gold OA and emasculating green OA.<sup>70</sup>

“[B]y imposing more conditions and restrictions on green open access – conditions and restrictions that vary across publishers, publishers seek to discourage green OA,” Troll Covey emailed me. “Their clear preference is for gold OA, which is their response to the seemingly unstoppable open access movement, i.e., their effort to monetize open access.”<sup>71</sup>

<sup>70</sup> And the research community now seems happy [to go along with this](#) by means of so-called journal “flipping” initiatives, and negotiating to new-style big deals in which today’s high subscription costs are transplanted into the new OA model – [here](#) and [here](#).

<sup>71</sup> Remember too that pure OA publishers offer no green alternative, so as OA grows so it will be harder for researchers to avoid paying to publish.

As if things were not confused enough, when I last checked (13<sup>th</sup> February), the Gadd/Troll Covey [paper](#) was once again outside the paywall. Canadian librarian Ryan Regier [suggests](#) that type of peek-a-boo open access is not uncommon, and counter-intuitively is designed to bolster the subscription system rather than increase open access.

## All experts, all confused

I've covered a lot of ground, but my core argument is that the greatest obstacle to open access is and always has been copyright and the OA movement's failure to appreciate this, or offer an effective strategy for achieving open access, has played into the hands of legacy publishers. This has enabled them to co-opt the movement and so manage the transition for their own benefit. In the process, the two primary goals of the OA movement have been significantly compromised: open access is being circumscribed, perverted, and diluted; and the affordability problem is worsening rather than improving.

What better demonstration of how publishers are still able to set the agenda than researchers' willingness to assign exclusive rights to them even when paying for open access, and when choosing the most liberal CC licence? What publishers hope to gain from this is not entirely clear<sup>72</sup> but, as we have seen, it means that even when an APC has been paid, publicly-funded research is vulnerable to slipping behind a paywall,<sup>73</sup> or simply being lost.

The OA movement maintained that use of CC licences would prevent publishers from continuing to appropriate publicly-funded research. It is not clear that this is proving the case. The licences have, however, served to exacerbate the confusion and chaos surrounding scholarly communication. And as we've seen, it is far from clear that OA advocates' favourite licence (CC BY) delivers on its promise, even as it strips rights from researchers. As this becomes more evident, we are likely to see complaints that there is little difference between Elsevier profiting from their freely-given work and new CC BY farmers like Apple Academic Press doing so.<sup>74</sup>

Most worryingly, open access has created such a confused situation that everyone appears to be flailing. As my experience with *JoLLIS* reveals, authors are confused, repository managers are confused, librarians are confused, and publishers are confused. At the end

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<sup>72</sup> Here is one possible scenario: Today one can search Elsevier's [ScienceDirect](#) without charge, but it is necessary to pay to access the content (e.g. one can locate this [article](#) by OA advocate Peter Suber for free, but it will cost \$35.95 to read it). In a world of universal OA, Elsevier might flip this model: charging users to search ScienceDirect, but offering free access to the papers discovered. But what if ScienceDirect turned out to be the only source of the content in an OA journal (because no one had duplicated and/or deposited the papers elsewhere)? As the sole source of that content could not Elsevier at some point start charging for access too? Foreshadowing this, we can see that publishers are already exploitatively [selling articles that long ago entered the public domain](#). [Please see Peter Suber's comments on this [here](#)]

<sup>73</sup> See the first example [here](#) for instance.

<sup>74</sup> Indeed, this is exactly the pointed that Janice Pilch seemed to be [making](#) on the Scholcomm mailing list recently. When others insisted that CC BY is an unmitigated good (even though it allows content to be duplicated and sold by third-parties), and so should be compulsory, Pilch responded: "Someone mentioned: 'We have to be prepared to accept commercial resale.' Then why criticize traditional publishers for selling scholarly publications? What is wrong with assigning one's copyright to a publisher for commercial resale? By this logic, apparently, nothing, and the OA movement can fold up its circus tent."

of our exchange the Sage representative I spoke to commented: “I must admit it’s been quite an interesting experience for myself!” For “interesting” here I read “confusing”.<sup>75</sup>

“This whole conversation shows why OA has never really taken off. All experts, all confused”, [commented](#) Monash University Research Director [David Groenewegen](#) after reading the Twitter exchange I had with Gadd:<sup>76</sup>

Gadd is not only confused, she is intensely frustrated. So too, she says, are her Loughborough colleagues. “Our IR team sound equally exasperated about the re-use requirements of publishers, their inter-publisher variability and intra-publisher fluidity over time,” Gadd emailed me. “They are equally challenged by the lack of a definitive description of an AAM. They default to the HEFCE [definition](#) as HEFCE ‘pays the piper’, but it does not leave IRs without doubts.”<sup>77</sup>

Gadd added, “My suspicion is that what publishers fear they are losing through open access they hope to gain through re-use fees. It would be great if we could move to a system where publishers make it clear what re-use licences they expect to be applied to green open access works, and what the situation is where the preprint (which we can “do whatever we wish” with) is virtually identical to the AAM.”

As noted, however, publishers can only benefit from this confusion. So clarity on these matters may be unforthcoming.

## New danger emerging

Whom do we blame for the chaos that open access has unleashed upon the world? OA advocates invariably point the finger at publishers, routinely berating them for being greedy and exploitative.<sup>78</sup> I am suggesting that OA advocates should pull the beam out of their own eye before seeking to cast out the mote in the eye of publishers. They need to take responsibility for having made impassioned and emotional pleas for open access without offering a realistic strategy for achieving it.

In the end, however, the buck has to stop with the entire research community, especially research funders and institutions, who should have known better. They have introduced ever more draconian OA policies, and are now forcing pay-to-publish OA and CC BY on researchers without due diligence. They have slavishly followed OA advocates down a primrose path without giving sufficient thought to the practicalities of how the Promised Land would be arrived at. Mesmerised by a vision of free access and lower costs they failed to ask enough questions, or even to ask the right questions, about how it could work in practice.

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<sup>75</sup> See the many copyright anomalies listed by Morrison [here](#).

<sup>76</sup> Consider, for instance, [this torturous discussion](#) over how and whether an author can use his own image on his own web site.

<sup>77</sup> Indeed, the HEFCE definition appears to be of no real assistance here.

<sup>78</sup> Of course, publishers are only doing what capitalism (and their shareholders) expect them to do: to maximise their profits. The real issue is whether capitalism and the market economy is appropriate, or even workable, in the scholarly communication space today.

But whomever one chooses to blame, it is has to be acknowledge that scholarly communication is in a worse state today than in 2001, when the OA movement emerged. But here is the strangest part of this story: all the raw material that fills scholarly journals begins life as the sole property of researchers. As such, everything hangs on what they do or do not do with that property. The oddity is that they have been more than willing to give it away for free, or at least hand over total control of it, to publishers. And they continue to do this in the new pay-to-publish model without a second thought as to the implications of so doing. So, the irony here is that publishers' ability to control scholarly communication is a direct consequence of authors freely, routinely and unthinkingly signing away their rights. Researchers have the ultimate power, but they have consistently failed to exercise that power.

The failure of OA advocates was that they did not anticipate or guard against this. Now the problem is evident, they are advocating universal use of CC BY. But just as no one thought through the pros and cons of the pay-to-publish model<sup>79</sup>, or of introducing draconian OA policies, so little thought is being given to how effective the CC BY strategy is likely to prove, or what unintended consequences it could give rise to over time.

The only commentator I am aware of who has been trying to persuade the community of the need to give greater thought to CC licensing and the current drive to make it mandatory is [Rick Anderson](#), Associate Dean for Collections and Scholarly Communication in the J. Willard Marriott Library at the University of Utah. Anderson [wrote](#) recently “While the availability of CC licensing is a great benefit to authors who choose to abdicate some or all of their exclusive copyright prerogatives, it is important to know that there are individuals and organizations hard at work to take that choice away from authors, with increasing success. For example, in 2014 the Gates Foundation [announced](#) that it would require CC BY licensing of all publications resulting from research that it funds.<sup>80</sup> The Ford Foundation [followed suit](#) in early 2015.”<sup>81</sup>

For this reason if no other, Anderson [added](#), all authors “should be familiar with the relevant issues and controversies currently playing out in the world of scholarly communication, no matter one’s opinions about OA, copyright reform, and intellectual freedom. The resolution of these issues will have significant impacts on the rights and prerogatives of authors in the future.”

This suggest that, if they cannot rely on publishers or librarians to guide them effectively on these matters, researchers are going to have to become copyright literate themselves. Currently most remain in blissful ignorance. “Many authors and institutions remain unaware of, or unconcerned about, the importance of copyright ownership to the future use and reuse of their work”, [points out](#) McGlashan. “Publishing agreements – such as license to publish or copyright forms – contain meaningful words, such as ‘rights’, ‘exclusive’ and ‘irrevocable’, that require careful assessment. Understanding a publisher’s requirements and their implications should be an important part of the authors’ decision on where to publish their work.”

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<sup>79</sup> Not least [predatory publishing](#).

<sup>80</sup> The Gates Foundation has now persuaded [AAAS](#) to go along with this, [but it will cost Gates \\$6,000 - \\$10,000 per article for the privilege](#).

<sup>81</sup> See also the 2014 [decision](#) by the Hewlett Packard Foundation.

Sadly, just as with pay-to-publish and OA mandates, the CC BY bandwagon is being driven not by rational thought but by simplistic slogans and impassioned calls for action. And like OA policies the mandatory use of CC BY is likely to further erode researchers' independence.

Why do I say this? Because as we have seen, when researchers ignored the calls to embrace open access, funders introduced ever more intrusive and punitive OA policies requiring them to.<sup>82</sup> This has seen the bureaucratic scrutiny that researchers are subject to increase significantly. The degree to which this threatens [academic independence and intellectual freedom](#) is contested, but it is a potential threat we should not dismiss out of hand. With the current obsession with CC BY comes a new danger. If researchers don't become *au fait* with copyright, and use that knowledge to contain and control publishers – by, for instance, refusing to assign copyright/exclusive rights to them, and insisting that a proper assessment of the pros and cons, and possible unintended consequences, of wide-scale use of CC BY is undertaken – then universities are likely to impose new restrictions and rules on them, further eroding their independence and freedoms.

As publishers continue to appropriate research – by, for instance, demanding exclusive rights even when authors pay to publish – funders and research institutions will surely at some point decide to intervene. Using the US “[work for hire](#)” law as a model, for instance, universities might assert ownership of faculty copyright.

As it happens, the much-lauded Harvard [open access policy](#) contains the seeds for such a development.<sup>83</sup> This includes wording along the lines of: “each faculty member grants to the school a nonexclusive copyright for all of his/her scholarly articles.” A rational next step would be for schools to appropriate faculty copyright all together. This would be a way of preventing publishers from doing so, and it would have the added benefit of avoiding the legal uncertainty some see in the Harvard policies.<sup>84</sup> Importantly, it would be a top-down diktat rather than a bottom-up approach.<sup>85</sup> Since currently researchers can request a no-questions-asked opt-out, and publishers have learned that they can bully researchers into requesting that opt-out, the objective of the Harvard OA policies is in any case subverted.<sup>86</sup> **[Please see Peter Suber's subsequent comments on this [here](#)]**

Most university employment contracts may already allow for this. Today, for instance, they invariably require that the bulk of any income generated from patents filed by faculty is paid to the university. One could imagine this same principle being extended to claim

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<sup>82</sup> Notably in the UK, but also in the US with the NIH Public Access Policy, and elsewhere – i.e. at [Université de Liège](#).

<sup>83</sup> Currently [over 60 universities](#) have adopted the Harvard model, even while the possible copyright issues have never really been tested in court.

<sup>84</sup> See for instance, this [paper](#) by Ilya Kapovich, and this [debate](#) between Peter Suber and Elsevier General Council Mark Seeley over whether the NIH Public Access Policy (and policies like it) violate the US Copyright Act. **[Please see Peter Suber's subsequent comments on this [here](#)]**

<sup>85</sup> That said, all new faculty face the new policy as a *fait accompli* so the extent of voluntarism these policies boast of is temporary at most.

<sup>86</sup> We can see a dress rehearsal of this kind of face off in the struggle between the Gates Foundation and leading journals like *Nature*, *Science* and *PNAS* over the Foundation's new OA policy, which requires immediate open access – see [here](#). The Gates Foundation has now persuaded [AAAS](#) to go along with this, [but it will cost Gates \\$6,000 - \\$10,000 per article for the privilege](#).

ownership of faculty-generated research papers.<sup>87</sup> Ironically, this seems to be the direction some librarians are now pushing. Gadd, for instance, suggests that copyright be jointly owned by the author and his/her university. As with the Harvard Policy this would likely prove the first step towards an end-point where faculty copyright is completely appropriated by universities (and perhaps funders). It would also be consonant with the growing [proletarianisation of academic labour](#) that we are seeing.

Was this really the end game desired or anticipated by open access advocates, or one they would be comfortable with?<sup>88</sup> Either way, the greatest danger OA now poses for researchers is a further loss of their independence and rights. Since the root cause of all these problems is their continuing willingness to give away their IP to publishers it would be an unfortunate own goal.

Mandatory CC BY may, in any case, be inevitable, if only because advocates for text and data mining ([TDM](#)) insist that the only effective way of enabling TDM is to adopt universal CC BY. It might even be that this would be a desirable outcome for society at large. I don't know.<sup>89</sup> But one does despair at the way the research community time and time again sleepwalks into the future. Right now, researchers seem to be conspiring in a process that will lead to their further proletarianisation.

In conclusion, copyright is the immovable barrier that the open access movement underestimated. In doing so, it has created a situation in which legacy publishers can expect to continue controlling scholarly communication, and profiting excessively from the public purse, even if/when the BOAI dream of universal open access is finally realised.<sup>90</sup>

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RICHARD POYNTER 2017



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<sup>87</sup> Is this already beginning to happen? The [draft text](#) of McGill's IP Policy, for instance, states "The University is automatically granted a non-exclusive, royalty-free, irrevocable, indivisible, and non-transferable license to use, for its own academic purposes" faculty copyright. Moreover, when the university helps with dissemination of a work, "the University may ask that a portion of any revenues derived from the Work be attributed to the University."

<sup>88</sup> It is worth noting here this additional [comment](#) made by Janice Pilch on the Scholcomm mailing list in response to the assertion that CC BY become the default licence. "If this is the vision, it's dark. Someone wrote: 'scholarly authors should not have the option of publishing except under a CC BY license'. Another person wrote: 'scholarly authors should not have the option of publishing except Open Access'. Such draconian restrictions! And all along the narrative was that open access was free, open, happy, bright, light, utopian, making a better world. Now it appears to brandish a weapon in a digital commons market, offering a threat to acquiesce or be banished."

<sup>89</sup> Although [some argue](#) that a more appropriate solution is to introduce new copyright exemptions that allow for text mining, as [the UK](#) and [France](#) have done.

<sup>90</sup> Finally, I note that commentators have begun to [argue](#) that the open access movement is too focused on the issue of content, and so missing the larger changes taking place amongst scholarly publishers as they move into the research workflow space. As Roger Schonfeld has put it, "there is little evidence that the open access community as a whole is engaged with Elsevier's transformation". But if the new workflow model that Schonfeld describes is successful, that success will surely depend on publishers continuing ability to control research content. But this is a topic for another day.