

Article

The Politics of Rights Retention

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Abstract: This article presents a commentary on the recent resurgence of interest in the practice of rights retention in scholarly publishing. Led in part by the evolving European policy landscape, rights retention seeks to ensure immediate access to accepted manuscripts uploaded to repositories. The article identifies a trajectory in the development of rights retention from something that publishers could previously ignore to a practice they are now forced to confront. Despite being couched in the neoliberal logic of market-centric policymaking, I argue that rights retention represents a more combative approach to publisher power by institutions and funders that could yield significant benefits for a more equitable system of open access publishing.

Keywords: open access; rights retention; scholarly communication

1. Introduction

In recent years, instigated in part by the European open access policy landscape, there has been a renewed interest in the practice of authors ‘retaining’ their right to self-archive publications immediately upon publication. Often termed rights retention, this practice involves researchers licensing the accepted version of their article as open access irrespective of whether the publisher requests copyright assignment as a condition of publication [1]. Once accepted in a journal, the author deposits and makes the article available in a repository, often under a Creative Commons licence. Rights retention is primarily used as a strategy for allowing repository-based (‘green’) open access to research articles published in subscription journals, although its potential application is broader than this [2].

Rights retention exists in a complex open access policy landscape in which funders increasingly require immediate open access to the research they fund, while universities are keen to ensure that funder requirements are met without unnecessary expense. Consequently, as funding is made available for article-processing charges, academic publishers have successfully managed to monetise the transition to open access thanks in part to a hybrid journal model that allows publishers to receive both subscription money and open access fees. Yet rights retention allows researchers to publish open access in subscription journals without the payment of article-processing charges, making it attractive to budget-conscious universities but a perceived threat to the business models of publishers. Rights retention is therefore a site of struggle between funders and publishers—with researchers often caught in the middle.

But how do we make sense of what proponents of rights retention are trying to achieve? What are the politics of rights retention? Similar to much of open access advocacy, rights retention can reflect a variety of ideologies and stakeholder motivations. It is not merely about making research freely available, but relates to the broader political economy of scholarly communication and an individual researcher’s role within it. By interrogating its politics, this article seeks to understand what rights retention is trying to achieve and what its overall impact may be on ethical approaches to open access. I am interested in whether and how rights retention may positively shape the political economy of publishing or if it



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merely rehearses a more neoliberal understanding of academic subjectivity grounded on systemic change through individual, market-based action.

2. Origins of Rights Retention

Although open access has been successfully adopted as a commercial pursuit, it is worth considering that many early debates around OA—prior even to the signature of the movement-defining Budapest Open Access Initiative declaration—concerned the different ways that authors may share their accepted papers within repositories, either by retaining copyright or other strategies. For example, in 2001, Stevan Harnad and Charles Oppenheim devised the Harnad-Oppenheim Strategy for ‘getting around copyright legally’ in order to share articles in repositories (Figure 1). This strategy was based on self-archiving the article’s initial submission (pre-print) and amending the copyright transfer agreement with the publisher to permit sharing of the accepted article. Ingeniously, where publishers decline to accede to the contractual amendments, the strategy recommends posting a corrigenda note to the preprint that details the corrections made since original submission, so that readers know what changes were made after peer review.

How to get around restrictive copyright legally:

(Harnad/Oppenheim strategy)

- 1. self-archive pre-refereeing preprint**
- 2. submit preprint for refereeing (revise etc.)**
- 3. at acceptance try to fix copyright transfer agreement**
- 4. if (3) successful, self-archive refereed postprint**
- 5. if (3) unsuccessful, archive "corrigenda"**

Resolving the Anomaly
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Figure 1. The Harnad-Oppenheim Strategy [3]. All rights reserved.

In the mid-2000s, North American universities began to explore the possibilities of rights retention for faculty publications. For example, in 2006, the University of California approved a statement from the Special Committee on Scholarly Communication urging faculty to ‘transfer to publishers only the right of first publication, OR at a minimum, retain rights that allow post-print archiving and subsequent non-profit use’ [4]. Early discussions around open access, particularly on the influential American Scientist Open Access web forum [5], focused on how researchers could retain the legal right to share their work in institutional repositories, especially through contractual amendments prior to publication. To this end, in 2006, MIT developed a licence that authors could attach to any copyright transfer agreement to inform the publisher of their intention to share the accepted article in

a repository [6]. Such an approach also formed the basis of the subsequent SPARC Author Addendum which is still widely used today to amend publication contracts to facilitate open access [7].

In 2008, Harvard became the first university in the world to adopt—through unanimous faculty vote—an open access policy based on rights retention [8]. This policy still exists today and requires researchers to grant a ‘nonexclusive, irrevocable, paid-up, worldwide license to exercise any and all rights under copyright relating to each of his or her scholarly articles, in any medium, and to authorize others to do the same, provided that the articles are not sold for a profit’ [9]. Authors then provide a copy of each accepted article for distribution in a repository under these conditions. Crucially, a waiver is available for any publication that the researcher does not wish to make open access, on a no-questions-asked basis [8].

As of 2022, 91 open access policies based on rights retention exist, the majority of which are adopted by US-based universities emulating the Harvard approach [10]. Rights retention approaches initially distinguished the USA from other global areas that prioritised other approaches to open access. For example, Latin America had a pre-established publicly-funded open access publishing infrastructure, while other countries adopted a mixed approach that was more tolerant of embargo periods and commercial approaches [11]. Ultimately, in the initial years that followed the Harvard open access policy, commercial publishers successfully devised a number of business models that allowed gold open access to flourish and stemmed the tide of rights retention policy adoption.

Writing in 2012, Cameron Neylon argued:

The decision in the United Kingdom has been that the benefits of access and reuse will be achieved more quickly and efficiently by supporting the growth of the journal-mediated route. Fundamentally, this is a political judgement. Funders do not feel that they have the political leverage to take a rights-retention approach. The RCUK and Wellcome have decided that the most effective way to support progress towards open access and reuse is to provide the resources to support journal-mediated access. [12]

The lack of ‘political leverage’ cited here may reflect the neoliberal ideology of the Conservative-Liberal Democrat coalition that looked towards market-based solutions to social problems [13]. The chief architect of the UK’s policy approach was the then Minister for Higher Education, David Willetts, who in 2010 presided over the threefold increase in tuition fees from £3000 to £9000 a year, drastically restructuring UK universities according to market logic [14]. In 2012, Willetts opened up open access to the same logic of marketisation through the introduction of the RCUK policy for open access that provided public money for universities to pay article-processing charges. This policy—along with those of other European states and philanthropic funders—contributed significantly to the growing dominance of the article-processing charge model in the years that were to follow [15]. The growth of APC-based open access meant that green open access, and therefore rights retention approaches, were relegated in the eyes of policymakers.

3. Renewed Interest in Rights Retention

Although it remained an important feature of many university open access policies throughout the 2010s, policymakers have more recently contributed to a renewed interest in rights retention in Europe [16]. One key instigator of this interest is Plan S, the policy framework developed by a coalition of research funders (Coalition S) that came into effect in 2021. Unlike the Harvard approach, which makes open access the default but allows exceptions for subscription access, the Coalition S ‘rights retention strategy’ sits within a complex list of requirements for which the end point must be immediate CC BY open access [17]. Rights retention is one way of making research available open access when other avenues are unavailable. One such avenue is the preclusion of funding for hybrid journals.

Rights retention is encouraged by institutions when a researcher wishes to publish in a hybrid journal, i.e., a subscription journal that makes individual articles open access

through article-processing charges, but does not have the funding to do so. Sceptical of the value of hybrid journals, which charge for both subscription access and to make articles open access, Coalition S funders refuse to provide funding for open access fees, meaning that authors routinely need to find other ways to publish in the hybrid journal of their choice. The rights retention strategy allows researchers to publish CC BY open access in a repository without paying a fee, which is why it has received renewed attention in Europe (where many of Coalition S funders are based). Some funders provide text that must be included in the submitted manuscript to inform the publisher of the intention to use rights retention, for example:

“This research was funded in whole or in part by the Wellcome Trust [Grant number]. For the purpose of Open Access, the author has applied a CC BY public copyright licence to any Author Accepted Manuscript (AAM) version arising from this submission”. [18]

In doing so, the publisher knows that the researcher has already released the accepted article under a CC BY licence, meaning that rights retention is one of the author’s conditions of publishing. Crucially, the assignment of CC BY to the accepted article takes precedence over any subsequent copyright transfer statement that the author is asked to sign by the publisher, because the rights have already been ‘opened up’ [19]. This means that authors may sign away their copyright while still ensuring that the accepted article can be distributed in the way intended.

While the Harvard approach has been adopted on an institution-by-institution basis, rights retention in Europe is more of a top-down strategy driven by funders. It is therefore couched in terms of blanket funder compliance and the need for researchers to ensure that all funded research is immediately available under CC BY. In response to this requirement, building also on the work of the UK-Scholarly Communications Licence [20], a number of universities in the UK have implemented institutional policies based on rights retention, including the Universities of Sheffield, Edinburgh, Leeds and Aberdeen, while the Universities of Oxford and Cambridge (the author’s own university) are piloting opt-in approaches to rights retention [10,21]. These policies are specifically being enacted to allow researchers to comply with funder policies, which is different to the original Harvard approach driven by OA as a good in itself. However, as Sally Rumsey argues, the policies have broader benefits:

In the case of funded grantees, rights retention is often treated as a compliance matter. This misses recognition of rights retention as a core factor in control and ownership within modern open scholarship. Control of when, how, and to whom research findings are disseminated, and ownership of the content, should not be handed over to a third party service provider, i.e., a publisher. A service provider should be paid for services—not take control and ownership of content. [16]

For Rumsey, rights retention is about control of the scholarly record; it prevents publishers from having a monopoly over the content they publish, which ensures that others may take full advantage of the publication. In this context, the name rights *retention* is somewhat disingenuous because it is premised not on the individual user retaining their exclusive rights to the article, but on the opening up of rights through a Creative Commons licence. A similar point is made by Alain Schuhl of CNRS who highlights that the French translation is ‘stratégie de non-cession des droits’ (non-transfer of rights strategy) [19]. This terminology is more appropriate for what advocates of rights retention hope to achieve.

Nevertheless, because publishers no longer have a monopoly on accepted research articles, some institutions are viewing the implementation of rights retention policies as about more than just open access and enabling more favourable negotiation positions for libraries in subscription negotiations. In an article in *The Times Higher Education*, Christopher Pressler, university librarian at Manchester’s John Rylands Library, described rights retention as helping to redress the ‘unfortunate practice of universities giving away IP or copyright to publishers who then hold all the cards in negotiating price to access those same

universities' content' [22]. In this context, rights retention becomes a bargaining chip for universities who are able to point to the existence of freely available 'realistic alternatives' within institutional repositories so as to reach a more favourable deal with publishers [16]. The service Unsub, which presents information to libraries on subscription usage and open access availability, makes it easier for universities to work out which journals they may cancel while still providing access through repositories¹. As more research is made open access through rights retention, publishers may worry that journal cancellations will hasten in response.

The industry consultancy Clarke & Esposito argue that 'to the extent that the RRS succeeds, it will do so by (counterintuitively) accelerating the shift to Gold (not Green) OA' [23]. However, this is not counterintuitive at all: it is the clear design of the current push for rights retention, and which is also what most separates it from its original incarnation in Harvard aimed at free access and without directly confronting subscription publishing [24]. Now driven by compliance with Coalition S funder policies, rights retention is designed to influence negotiations with publishers to allow more affordable publishing agreements, thus transitioning journals from closed to open access using the threat of green open access as a counterweight to publisher profiteering. So what, then, are the politics of rights retention?

4. The Politics of Rights Retention

I have argued elsewhere that although the politics of open access are multifarious rather than unified, there is a coherent neoliberal basis to the open access policies of funders and governments in the Global North [25]. Policies are implemented to stimulate market outcomes and are judged by market measures, and so to this extent rights retention will sit within an ideological framework that promotes financialization and marketisation as the dominant modes of production. Rights retention is driven largely by the need for institutions to comply with open access policies in a way that will ultimately influence price negotiations in their favour. However, this does not mean that open access is unimportant or the not main aim of these policies; rather, it is a form of regulation designed to redress the publishing market and the oligopolistic features that allow a handful of presses to maintain control and set high prices [26]. It is unsurprising, for example, that Springer Nature (one of the largest publishers in the world) has fought quite strongly against the adoption of rights retention policies, which they see as undermining the push towards gold (meaning APC-based in this context) open access [27].

Indeed, article processing charges were originally promoted for their ability to stimulate market outcomes and make researchers base their publication decisions on journal price [28]. Instead, however, those researchers who did have access to APC funding realised they were spending someone else's money (their funder's) and so were under no pressure to submit to journals with lower prices [29]. The negative effects of the APC model are exacerbated by the fact that many researchers simply do not have access to funding to pay for publication, meaning that researchers from less resourced disciplines, institutions and countries are often excluded by this approach to publishing. Rights retention neatly sidesteps these inequities by ensuring that researchers can publish where they want while making their publications open access. This is exactly why it is being promoted by libraries, researchers and policymakers.

Yet the onus is still on publishers to consider or reject papers that are subject to rights retention. Ultimately, publishers now need to make a decision on whether or not to accept rights retention papers, which may entail the financial risk of diluting the value of a journal subscription (because more articles are now freely available, albeit in an un-typeset and uncopyedited form). The journal *Science*, for example, has published a statement announcing its 'green OA-zero day' policy that allows researchers to share their articles in a repository immediately upon publication [30]. They perhaps do so under the assumption that the journal's non-research 'magazine' content will continue to drive subscriptions to their prestigious journal. These considerations, however, are still primarily financial: a cost-

benefit analysis of whether it makes sense to allow authors to share their work immediately upon publication.

Although rights retention operates within a neoliberal context of market outcomes, it does mark a shift by research institutions (led by policymakers) to a more combative attitude towards commercial publishing models. As the hope fades that article-processing charges will result in a more competitive publishing market, rights retention is perceived as a way to strengthen the hand of libraries when negotiating future publishing deals. I would like to argue that this motivation is both separate to the original motivations for rights retention, which focused purely on free access to research articles, but also represents a continuation necessary for its broader adoption. Thinking back to its original incarnation at Harvard, rights retention was implemented in a way that meant publishers tacitly accepted it by ignoring it. While publishers knew that Harvard researchers were subject to a rights retention policy, they continued to follow the pre-existing culture of not confronting researchers who uploaded their accepted articles to the repository, or what the Harvard computer scientists Stuart Shieber described as ‘don’t ask, don’t tell’ [24].

However, the approach to rights retention inspired by Coalition S is often based on an individual author statement in the submitted manuscript (e.g., above), making it harder for publishers to ignore. It is also based on a ‘prior notification’ by universities to publishers informing them of the change in policy. As a result, publishers are now adding guidance to their author instructions emphasising that articles may not be shared before the embargo expires, and some are even asking authors to remove rights retention declarations or rejecting papers containing them [31]. So, because of the increasing number of policies being passed, many of which are based on authors informing the publisher of rights retention within their article file, publishers are now forced to respond in case a precedent is set to allow rights retention en masse². This means that “don’t ask, don’t tell” is no longer a possibility for both author and publisher.

The ‘increased complexity and conflict’ of rights retention was noted by Shaun Yon-Seng Khoo in an article describing why the strategy is not the correct one [32]. Khoo argues that authors will be caught up in the increasingly antagonistic relationship between institutions/funders and publishers. To the extent that this is true, this situation is not actually too much of a departure from the previous situation, only the publishing industry held more material power in negotiations due to the back catalogue of articles they owned. But certainly, rights retention is not a seamless activity and introduces new levels of complexity to the political economy of publishing, while also requiring library workers to provide the labour for compliance.

Strong rights retention policies ensure that authors are allowed to opt out from rights retention, or to choose the Creative Commons licence that is most appropriate to them (although the university of Edinburgh have shown that only three people opted out of their policy entirely [33]). Rights retention policies simply—as Peter Suber has noted previously—set the default to open access and therefore make it the natural course unless other action is taken [8]. Furthermore, while there is legal complexity and risk associated with rights retention, it is highly unlikely that a publisher will pursue legal action against either a university or individual researcher due to their own reputational risk. A more likely outcome is that publishers simply accept rights retention as an acceptable strategy once enough critical mass of policies has been reached. This critical mass is also achievable in a collective manner as university’s share practical insights with one another about how to approach rights retention, as is currently happening the UK. Given these considerations, rights retention is an eminently sensible approach for institutions and individual researchers to pursue to make research open access.

5. Conclusions

From a broader perspective, open access was always going to result in a situation in which universities needed to make a decision about their future relationship with the publishing industry—whether they continue to pay increasingly unaffordable subscriptions

and open access fees or demand an altogether different relationship. Rights retention may (or may not) hasten the need to take this decision (which is already being made in certain ways), but it did not create the reasons for the antagonism between institutions and publishers. Or rather, rights retention gives universities power to demand different conditions in the same way that cancellations of publisher ‘big deals’ do. This by itself is not particularly radical but could lead to a number of good outcomes, providing that research institutions are bold in their action.

Coupled with the current push for ‘diamond’ open access, which is to say journals that do not charge fees to access content or publish in, rights retention may contribute to reorienting the balance of power away from publishers and towards a more equitable system of scholarly communication that permits immediate sharing of accepted articles, while allowing publishers to receive payment for the service they provide. Rights retention is above all, then, a form of governance that demands certain conditions for the labour that academics provide. One of those conditions is that publishers no longer receive exclusive rights to published content; instead, academic publishing can only take place in partnership between university and publisher, rather than the latter extracting from the former.

There is also a related and promising legislative approach to research access in the form of ‘secondary publishing rights’. Currently adopted by seven countries in Europe, secondary publishing rights make publicly funded research online by amending copyright law to allow online distribution, usually after an embargo period. The Knowledge Rights 21 organisation recommends that secondary publishing rights are explored across the European Research Area and within individual national jurisdictions [34]. This approach is complementary to institutional rights retention policies and may even supersede them in future as immediate open access becomes legislated through secondary publishing rights.

To be clear, very little of the negotiations around rights retention represents much more than liberal market economics—it should not be confused for the kind of political radicalism that higher education institutions are unable to perform. However, this is not its point: rights retention makes institutions more combative towards extractive practices in the publishing industry by demanding certain transactional conditions that are about more than just price. To that extent, rights retention can be well coupled with a strategy that supports and nurtures alternative and more radical approaches to open access that are less dependent on market incentives.

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Notes

¹ <https://unsub.org/> (accessed on 11 May 2023).

² i.e., if enough papers are published containing rights retention declarations, publishers will have no argument against the claim that they permit rights retention.

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