Open Access Author Agreements, Institutional Policies and the Legal in-between:
Two Qualitative and Case-Law Studies

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Outline

- Open Access Publishing (Author) Agreements
  - Research Methodology, Data Collection & Analysis
  - Findings and Recommendations
- OA Policies and Practices
  - Research Methodology, Data Collection & Analysis
  - Findings and Recommendations
- Legal implications: validating case law
  - Creative commons
  - GNU Open Source
- Conclusions
OA Publishing: Challenges and Perceptions

- Predatory OA journals and publishers collect article processing charges
- OA journal may not be credible or trustworthy
- Lack of proper peer review can damage authors’ academic reputations
- Possible theft or plagiarism of research
- The Academy: “critical mass” and the “Publish or Perish” mandate
- OA Publishers: Business Models →→→ Critical Mass
OA Publishing: Types

- **Gold OA**
  - OA publishers
  - Initially authors often needed to pay for article processing charges: the journals reviewed did not have publication fee
  - Institutional policy mandates publication OA journals

- **Green OA**
  - OA self and/or institutional archiving by authors
  - Peer review
  - Rights retention: Public distribution via OA repositories or on author websites
Diffusion and awareness across LIS domains

OA-published works can co-exist within U.S. copyright law

- Right of first publication
- Proprietary interests (and advantage) maintained: embargo period

Creative Commons license

- Used within OA publishing by authors to restrict uses, e.g., to prevent plagiarism (BY), misrepresentation (SA, ND), or commercial re-use (NC)
- Validity and enforcement: copyright and contract (see Part III)
Research Problem & Question

- OA applies to publications **traditional** (books, articles) and **non-traditional** (grey literature)
- Discover impact of **OA phenomenon** on LIS scholarly communication
  - Analyze **author agreements** of sampled OA LIS journals
  - Reveal **implications** for information policy and “**best practices**” for drafting balanced publication agreements
- **RQ:** What are common and **best practices** for drafting publication agreements that balance copyright and publisher interests with unfettered access to and use of information?
Research Methodology

- **Case study** of 5 OA LIS publication agreements
  - Consult Directory of Open Access Journals and Scimago (Journal Rank indicator) to find top journals in LIS domain that are OA

- **Sample** contains:
  - 1 brand-new OA journal with publication agreement drafted by copyright librarians: JCEL
  - 4 top-ranked LIS journals that converted to OA
<table>
<thead>
<tr>
<th>Journal</th>
<th>Publisher and Country</th>
<th>Scimago LIS Rank (out of 209, April 2017)</th>
<th>Scimago LIS OA Rank (out of 40, April 2017)</th>
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<tr>
<td>Journal of Copyright Education and Librarianship</td>
<td>University of Colorado at Colorado Springs, Kraemer Family Library (U.S.A.)</td>
<td>N/A</td>
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<td>Library and Information Science Research</td>
<td>Elsevier (U.K.)</td>
<td>6</td>
<td>3</td>
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<tr>
<td>Information Technology and Libraries</td>
<td>Library &amp; Information Technology Association, American Library Association (U.S.A.)</td>
<td>20</td>
<td>4</td>
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<tr>
<td>Journal of the Medical Library Association</td>
<td>University Library System, University of Pittsburgh (U.S.A.)</td>
<td>38</td>
<td>6</td>
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</table>
Data Collection & Analysis

- **Document data collection** of publication agreements
- **Descriptive data analysis** based on Lipinski and Copeland (2015; 2013) and Lipinski (2014; 2012): Sample size and content analysis

- **Variable clusters**
  - Formation and contract particulars
  - Publisher rights, author rights
  - Publication requirements
  - Rights clearances
  - Risk shifting
Findings

- OA publication agreements are licenses (contracts)
  - Consideration (*JCEL*: “this is an agreement”) and signature (*LISR, JMLA*) and Authority issues

- Publisher rights (exclusive and non-exclusive)
  - All require right of first publication; not under review elsewhere (*LISR, ITL*); subsequent publication requires citation to original journal

- Author rights
  - Ownership of copyright; self-archiving; repository (explicit: *JCEL, ITL*; implied: *LISR, CRLJ, JMLA*); author teaching/research (*JCEL*); republication

- Creative Commons licensing: CC-BY, CC-BY-NC, CC-BY-ND (*LISR, JCEL, CRLJ, ITL*)

- Warranty of non-infringement and lawful character
  - Absolute (*LISR, CRLJ, JMLA*) and conditional: “best knowledge” (*JCEL*) and indemnification (*JCEL, JMLA*)
Recommendations: Best Practices

- Formation Issues: Agreement and assent, e.g., signature or click-to-agree
- Adequate **consideration** (a promise for a promise)
- **Integration** or merger provision
- Rights granted: non-exclusive right, but right of **first publication** recognized
- Publisher right of **citation to first publication** when republishing
- Author retains **copyright** in the work
- Use of work in author’s own **teaching and research**
Recommendations: Best Practices

- Author allowed to **deposit** in institutional repository
- Author possesses **authority** to assent, including when the work is subject to **joint authors** (copyright issues: see discussion of institutional policies, below)
- Use of **Creative Commons** in lieu of EULA: attribution (CC-BY) license or similar license; use of CC-BY-NC is optional
- **Warranty, absolute**, regarding lawful nature of work, i.e., non-infringement, obscene, libelous, etc.
- **Indemnification?**
Barriers associated with traditional compilations of journal articles from commercial publishers are absent

- Embargo period may apply → → → → dark archive

OA applies to publications traditional (scholarly articles, proceedings, etc.) and non-traditional (grey literature)

Access to content in university digital repository often managed with OA policy

Other policies may be extent: Copyright Policy and Institutional Repository Policy
Research Question and Methodology

**RQ:** What are **best practices:** Institutional OA policies (copyright ownership and access) regarding literatures, including grey works, in university digital repositories?

**Case study** of OA policies at iSchools

**Sample** of 5 policies:

- Tomas A. Lipinski and Katie Chamberlain Kritikos, Legal and Ethical Implications of Licenses Between LIS Open Access Journal Publishers and Authors, 9th Qualitative and Quantitative Methods in Libraries International Conference (QQML2017), May 23-26 May, 2017, Limerick, Ireland

<table>
<thead>
<tr>
<th>iSchool</th>
<th>Location</th>
<th>U.S. News 2017 Rank</th>
<th>OA Policy</th>
<th>Institutional Repository</th>
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<tr>
<td>University of Illinois at Urbana-Champaign</td>
<td>Champaign-Urbana, IL</td>
<td>1</td>
<td>Yes, 5/14/2016</td>
<td>Illinois Digital Environment for Access to Learning and Scholarship (IDEALS)</td>
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<tr>
<td>University of Washington</td>
<td>Seattle, WA</td>
<td>2</td>
<td>Proposed draft, 6/1/2016</td>
<td>ResearchWorks Archive</td>
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<td>University of North Carolina-Chapel Hill</td>
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<td>Syracuse University</td>
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<td>No, info about OA only</td>
<td>Syracuse University Research Facility and Collaborative Environment (SURFACE)</td>
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<td>University of Michigan-Ann Arbor</td>
<td>Ann Arbor, MI</td>
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<tr>
<td>University of Texas-Austin</td>
<td>Austin, TX</td>
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<tr>
<td>Rutgers, The State University of New Jersey-New Brunswick</td>
<td>New Brunswick, NJ</td>
<td>7</td>
<td>Yes, 10/29/2014</td>
<td>Scholarly Open Access at Rutgers (SOAR); RUCore</td>
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<td>University of Maryland-College Park</td>
<td>College Park, MD</td>
<td>8</td>
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<tr>
<td>Indiana University-Bloomington</td>
<td>Bloomington, IN</td>
<td>9</td>
<td>Yes, n.d.</td>
<td>IUScholarWorks Repository</td>
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<tr>
<td>University of Pittsburgh</td>
<td>Pittsburgh, PA</td>
<td>10</td>
<td>Proposed draft, 9/13/2013</td>
<td>D-Scholarship@Pitt</td>
</tr>
</tbody>
</table>
Data Collection & Analysis

- **Green, Gold, Bronze** and **Black**… and shades in between.

- **Variables** (clusters) derived from Harvard Open Access Project’s “Good Practices for University Open-Access Policies” (Shieber and Suber, 2017)
  - **Administrative**: goal/mission, responsibility, application (must or may, opt-out, embargo)
  - **Rights**: copyright “ownership”/holdership, rights granted, assignable, open licenses (Creative Commons)
  - **Works**: deposit version, timing (when to deposit), included and excluded
  - **Variables added**: student works and exclusions (conflicting license)
Findings: Policy Elements

- **Goal/Mission**: disseminate scholarship / perpetual access
- **Responsibility**: Provost/VPAA (2) and library (2), IU: library? (library retains powers to remove content)
- **Policy Application**: mandatory, opt-out allowed except IU; embargo allowed
- Non-exclusive **rights** to the institution
- **Assignable** by institution: (UI, UT and IU?)
- **Open license**: UI (OA or link to publisher site) and IU (“may consider” Creative Commons)
Findings: Policy Elements

- **Works included**: Limited to “scholarly” or “peer-reviewed” articles (except IU); conference proceedings included: UT and Rutgers
- **Student works** included: Rutgers and IU, UI via General Rules
- **Version**: final, post peer-review except (IU)
  - IU: “submitted versions (as sent to journals for peer-review)”
  - “Accepted versions (Author’s final peer-reviewed drafts)” and “Published versions (publisher-created files)”
- **Timing of deposit**: not indicated (UI and UNC), no later than publication date (UT and Rutgers), all versions (IU)
Findings: Policy Elements

- **Works Excluded**
  - Incompatible license agreement entered pre OA Policy adoption
  - Classroom or pedagogical materials (UNC, Rutgers)
  - Books (UNC, UT, Rutgers) and Book Chapters (UT)
  - Conference Posters (UT)
  - General scholarly repository (UT)
  - Dynamic resources (IU)
  - Unlawful content (IU)
  - Illinois per General Rules: articles “that fall outside the scope”
Who Holds the Copyright?

- **Statutory**: Work Made for Hire, 17 U.S.C. § 101
  - 17 U.S.C. § 204(a): signed, written transfer requires identification of the work
  - General policy insufficient: Manning v. Board of Trustees of Community College District No. 505 (Parkland College), 109 F.Supp.2d 976 (C.D. Ill. 2000)

- **Case law**: Hays v. Sony Corporation of America, 847 F.2d 412 (7th Cir. 1988)

- Separate **Copyright/IP Policy**: copyright to scholar
  - UI is the only institution that references its Copyright Policy in its OA Policy!!!

- Authors alerted to **copyright issues** with publication: scholarly communications site (CIC/BTAA or SPARC Author Addendum)
Conclusion

- Except IU there is *bifurcation* of OA and institutional *repository* policies.
- Except for UI the OA policies reviewed place *copyright* with the author-scholar, but the derivation of that right is not indicated, nor is information regarding *retention* of copyright during the publication process included.
- General inclusion consistent/exclusion less consistent.
  - Inclusion of *student authors* inconsistent.
  - Inclusion of peer-reviewed *proceedings* inconsistent.
- *Embargo* allowed and *waiver* granted.
Recommendations: Best Practices

- Connect OA Policy with broader institutional repository policies
- OA Policy and copyright
  - Include author rights awareness (CIC/BTAA or SPARC Author Addendum)
  - Reference Copyright/IP Policy
- Consider making scholarly repository policy mandatory for certain literatures, especially grey works: working/white papers, reports, proceedings if not in OA repository, and of course ETDs
- Consider Gold OA as discipline and campus culture allow
- Next Step: analysis of university OA repository EULAs or use of CC….TBD
Litigation: Contract Basics and Creative Commons

► Contract formation issues: Elements
► Offer, Acceptance and Consideration: “To the extent this license may be considered to be a contract, the licensor grants you the rights [offer] contained here in consideration of your acceptance of such terms and conditions.”—Creative Commons, Attribution (BY), 3.0, https://creativecommons.org/licenses/by/3.0/legalcode
► Breach of Covenant, a legal promise vs. Breach of Conditions (such as terms of use)
► Terms can be both a covenant and a condition
Contract enforcement issues: Contract and Copyright

“Generally, a copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement and can sue only for breach of contract.” Jacobsen v. Katzer, 535 F.3d 1373, 1379 (Fed. Cir. 2008) (quoting Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1121 (9th Cir. 1999) (internal quotation marks omitted). However, if the license “is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement.” Id.

Breach of Covenant, a legal promise (remedy in contract) vs. Breach of Conditions (potential remedy: copyright infringement)
“Copyright holders who engage in open source licensing have the right to control the modification and distribution of copyrighted material.” Id. at 1381.

“Copyright licenses are designed to support the right to exclude; money damages alone do not support or enforce that right. The choice to exact consideration in the form of compliance with the open source requirements of disclosure and explanation of changes, rather than as a dollar-denominated fee, is entitled to no less legal recognition.” Id. at 1381-1382.

Conclusion: there is adequate consideration; CC licenses are enforceable under contract and copyright (see Pat III)
Litigation: Creative Commons


- **Flickr photo** licensed under CC BY 2.0

- Creative Commons licenses only address the creator’s **copyright**. It does **not** affirmatively affect **publicity or privacy rights**. Users of CC-licensed material should make sure to clear the publicity and privacy rights of any works containing human subjects before reusing CC-licensed works.

- Tacit acceptance of the **validity** of CC license
Litigation: Creative Commons

**Drauglis v. Kappa Map Group, LLC, 128 F.Supp.3d 46 (D.C.C. 2015):** “When plaintiff posted the *Photograph on Flickr*, he indicated that it was protected by copyright, but that it was licensed pursuant to the Creative Commons Attribution–ShareAlike 2.0 license (‘the CC BY–SA 2.0 license’).” Id. at 49

“Nothing on the front cover identifies who took the Photograph, but the following text appears at the bottom of the back cover of the Atlas:

- Photo: Swain’s Lock, Montgomery Co., MD
- “Photographer: Carly Lesser & Art Drauglis, Creative Commons [sic], CC–BY–SA–2.0.” Id. at 50
Creative Commons license is a contract and the rules applicable to valid contracts apply: “Although the interpretation of a Creative Commons license is an issue of first impression in this Circuit, as a general matter, a license is governed by the laws of contract. Thus, in determining the terms and scope of the License, the Court may properly rely on traditional tools of contract interpretation, provided that those canons do not interfere with federal copyright law.” Id. at 53 (citations and quotation omitted).

- **Pre-emption** of contract by copyright where equivalent rights exist
- Validity of Creative Commons licenses established
Entire picture appears in the atlas: “Any discernible cropping appears to be “so minor and insubstantial that as a matter of law it falls within that degree of latitude afforded licensees to alter a copyrighted work to suit their style or the medium in which the work is presented.” Id. at 56 (citations and quotation omitted).

The attribution (BY) requirement: “Therefore, because defendant provided plaintiff with authorship credit in a manner comparable to and as prominent as the attributions on each of the individual maps when it attributed the Photograph to plaintiff on the back cover, the Court finds that defendant did not violate section 4(c).” Id. at 59.

“According to XimpleWare, Ameriprise purchased Versata’s products, which contained XimpleWare’s copyrighted source code, and then distributed XimpleWare’s software without copyright notices or GPL licensing information, in violation of the GPL. XimpleWare’s position is that Ameriprise did not simply use the software, but also distributed and copied it without the requisite copyright notices of licensing information, thereby acting outside the scope of the GPL.” Id. at *2.
Litigation: GNU GPL

**Artifex Software, Inc. v. Hancom, Inc.,** 2017 WL 1477373, *3 (N.D. Cal.): “Plaintiff plausibly alleges that Defendant’s use of Ghostscript without obtaining a commercial license or complying with GNU GPL deprived Plaintiff of the licensing fee, or alternatively, the ability to advance and develop Ghostscript through open-source sharing.”

Indeed, as the Federal Circuit has recognized, there is **harm** which flows from a party’s **failure to comply** with **open source licensing.**” Id.

Citing, **Jacobsen v. Katzer**, 535 F.3d 1373, 1379 (Fed. Cir. 2008): “[t]he lack of money changing hands in open source licensing should not be presumed to mean that there is no economic consideration” because “[t]here are **substantial benefits**, including economic benefits, to the creation and distribution of copyrighted works under public licenses that range far beyond **traditional license royalties.**”
CMI: “means any of the following information … including in digital form.”

The title and other information identifying the work, including the information in the notice of copyright, or its author, owner

With the exception of public performances of works by radio and television broadcast stations, the name/identifying information about the performer whose performance is fixed other than an audiovisual work…in the case of an audiovisual work, the name/identifying information about, a writer, performer, or director who is credited in the audiovisual work

Terms and conditions for use of the work

Identifying numbers or symbols referring to such information or links to such information. 17 U.S.C. § 1202(c)(1)-(8).
Creative Commons and General Public Licensing terms and conditions are enforceable under principles of contract law.

Remedy: breach of contract and if scope of license exceeded a claim for copyright infringement can also be made.

Under U.S. law the terms and conditions of embedded CC or GPL would be copyright management information, the removal of which would be subject to an additional claim separate from copyright:

- “intentionally remove or alter any copyright management information [CMI]” 17 U.S.C. § 1202(b)(1).
- “distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law.” 17 U.S.C. § 1202(b)(3).
Elsevier, Inc. v. WWW.Sci-Hub.org, 2015 WL 6657363 (S.D.N.Y.) (unpublished). **Preliminary injunction:** “Based upon the facts and conclusions below, the motion is granted and the Defendants are prohibited from distributing the Plaintiffs’ copyrighted works.” Id. at *1. Irreparable demonstrated.

“Defendants gain access to ScienceDirect by using credentials fraudulently obtained from educational institutions… located in the Southern District of New York… screenshots showing how a user… search results, click on a link, and be redirected to a copyrighted article on ScienceDirect… whenever an article is downloaded via this method, the Defendants save a copy on their own servers.” Id. at *2.
“Elsevier also shows a likelihood of success on its claim under the *Computer Fraud and Abuse Act* (‘CFAA’).” Id. at *3.

“As found above, Elsevier has shown that the Defendants’ access to ScienceDirect was unauthorized and accomplished via fraudulent university credentials.” Id.

“While the CFAA requires a civil plaintiff to have suffered over $5,000 in damage or loss… Elsevier has made the necessary showing since it documented between 2,000 and 8,500 of its articles being added to the LibGen database *each day*… its articles carry purchase prices of between $19.95 and $41.95 *each*.” Id.
“Elsevier contends that the *public interest* favors the issuance of an injunction because doing so will ‘protect the *delicate ecosystem* which supports scientific research worldwide.’” Id. at *5.

**Idea/Expression Dichotomy**: “So while Elsevier may be able to keep its actual articles behind a paywall, the discoveries within them are fair game for anyone.” Id.

**Fair Use**: “Elsevier’s articles themselves may be taken and used, but only for legitimate purposes, and *not* for *wholesale* infringement.” Id. at *5* (citation omitted).

Order also requires *disclosure* of *domain name* operators and *bank accounts, preservation and restoration of files* deleted.

“This court hereby finds that Defendants are liable for willful copyright infringement under and this Default Judgment and Permanent Injunction is entered against each Defendant.”

“The TLD Registries for the Defendants’ websites, or their administrators shall transfer ownership of the domains listed in Exhibit B hereto to Elsevier Inc.”
Litigation: Open Access

- Statutory damages for willful copyright infringement: $150,000 for each of the 100 infringed copyrights identified in Exhibit A for a total of $15,000,000 ($150,000 x 100 = $15,000,000), which award shall bear interest from the date of this Permanent Injunction at the rate provided by law.”

- Ordered to destroy all unauthorized copies of Elsevier's copyrighted works in its possession.

- Further dissemination by “new websites owned or operated by Defendants, or through any other means, Elsevier may move the Court for a supplemental order as may be appropriate to effectuate the purposes of this Permanent Injunction.”
Conclusions

- OA author agreements should address copyright and subsequent use issues.
- OA institutional policies should alert authors to copyright retention issues in the publication process and should address the copyright issues or refer to the relevant institutional policy.
- Subsequent use of content by third parties subject to CC license or other EULA; validated by courts.
- Retention of terms and conditions supported in law as CMI (Copyright Management Information; a part of DRM schemes).
- Creation of institutional OA repository disconnected from faculty authors not supported by principles of contract or copyright law. 
  - Extraterritoriality issues notwithstanding.
Thank You!

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