6-3-2024

A Right to Republish: Redesigning Copyright Law for Research Works

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A RIGHT TO REPUBLISH: REDESIGNING COPYRIGHT LAW FOR RESEARCH WORKS[1]

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ABSTRACT

Research works occupy a unique place in the knowledge economy. They are foundational to human development, and they expand our existing knowledge base and catalyze entirely new fields of study. Creators of research works have a significant interest in the public accessibility of their works at the earliest opportunity with no expectation of financial returns from sales and distribution. As such, they constitute a different category of works and facilitate distinct considerations than other creative goods governed by copyright. Copyright law is organized around the provision of economic incentives to facilitate the continued production and distribution of authorial works for societal progress and development. It rests on the assumption that authorial motivation is the same for all authors – economic – and that the existing panoply of exclusive rights work favorably for authors of every kind of work. However, copyright law systematically fails to address and protect the motivation of research authors, namely, the widespread dissemination of their works at the earliest possible opportunity. Authors of journal articles routinely give up copyright in their works and any royalties that may accrue in exchange for publication, even under the strictest public access conditions. This Article argues that there should be differentiated treatment of research works in copyright law. The Article proposes the creation of an inalienable

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and nonwaivable secondary publication right for research authors. Such a secondary publication right will empower authors of research works to make the final reviewed and accepted version of a manuscript publicly accessible on a digital platform without the need for prior approval from the journal publisher and regardless of any term to the contrary in the publishing agreement. The secondary publication right would vest upon first publication of the work by the publisher. It would stimulate the production of research works and their dissemination to the public, thus offering alignment among copyright law's goals of incentivizing authors and maximizing access to knowledge goods.

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INTRODUCTION

Without researchers, the huge volumes of research publications available today would not exist. Commercial publishers neither write nor commission

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researchers to engage in research activities or publish the results of their research engagements. Publishers also do not directly engage in review activities. Researchers put in the labor required to ensure the quality and reliability of research outputs that are published. To further intensify the situation in the journal publishing industry, publishers do not fund research activities, rather, universities, academic and other research institutions, the public, and private funding agencies fund the activities that result in journal publications. Despite these facts, only the publishers (over)adequately benefit from the publication of research outputs through a reliance on the copyright system. Publishers gain immensely at the cost of the interests of other stakeholders, including the research authors whose interests copyright law ought to protect to incentivize the continued creation of research outputs.

Scholarly researchers[3] often engage in research activities to generate and disseminate knowledge that have social significance.[4] They communicate research results, findings, and opinions through writings which are usually published in academic journals and, in some cases, edited books. The publication and distribution of these research writings are mostly controlled by publishing companies, which are often for-profit organizations with profit maximization rather than knowledge dissemination as their primary objective.[5] Publishers often distribute research works behind paywalls that are too high for the average member of the public to scale through and obtain

[3] Here, I use scholarly researchers to broadly identify persons who engage in academic and scientific research activities across all disciplines, regardless of whether or not they have institutional affiliations or are paid to engage in research as part of their employment responsibilities.

[4] Reto M. Hilty et al., *European Commission – Green Paper: Copyright in the Knowledge Economy – Comments by the Max Planck Institute for Intellectual Property, Competition and Tax Law*, 40 INT'L REV. OF INTELL. PROP. & COMPETITION L. 309, 309 (2009). *See also* Lucie Guibault, *Owning the Right to Open Up Access to Scientific Publications*, *in* OPEN CONTENT LICENSING: FROM THEORY TO PRACTICE 137, 160 (Lucie Guibault & Christina Angelopoulos eds., 2011).

[5] *See* Valentina Moscon, *Academic Freedom, Copyright, and Access to Scholarly Works: A Comparative Perspective*, *in* BALANCING COPYRIGHT LAW IN THE DIGITAL AGE: COMPARATIVE PERSPECTIVES 99, 101, 116 (Roberto Caso & Federica Giovanella eds., 2015). *See also* Hilty et al., *supra* note 4.

access to useful research works.[6] This is despite the significant interest of research authors in the wide dissemination and access to their works by members of the public.[7] The result of this is a mismatch between the interests of research authors in the wide dissemination of research works and the interest of commercial publishers in profit maximization. Publishers' control over dissemination and access to research works is made possible by the suite of copyrights in research works that they hold. While copyright is primarily an author's right,[8] the reality is that it has become a publisher's right, especially in the context of research works published in journals and edited books. This current reality is made possible by the fact that research authors typically freely transfer their copyrights to the publisher in exchange for the publisher accepting their writings for publication in a relationship that is very fraught with power imbalance and has little or no room for meaningful negotiation.[9] Publishers also routinely require researchers to transfer copyrights in their works to publishers as a condition of publication.

Although there is a growing movement towards open-access publishing, many of the purely open-access peer-reviewed journals are relatively new and have not gained sufficient credibility or acclaim within the scholarly community.[10] Journals that are published by more established commercial publishers are mostly closed-access or at best a hybrid of open-access and

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[6] For examples of how publishers maintain high paywalls, *see* Brian Resnick & Julia Belluz, *The War to Free Science*, VOX (July 10, 2019, 3:58 PM), https://www.vox.com/the-highlight/2019/6/3/18271538/open-access-elsevier-california-sci-hub-academic-paywalls; Joi Ito, *The Quest to Topple Science-Stymying Academic Paywalls*, WIRED (Jan. 4, 2019, 3:46 PM), https://www.wired.com/story/ideas-joi-ito-academic-paywalls/.

[7] Esther Maríín-González et al., *The Role of Dissemination as a Fundamental Part of a Research Project: Lessons Learned From SOPHIE*, 47 INT'L J. HEALTH SERVS. 258, 258 (2017) ("Effective dissemination and communication are vital to ensure that the conducted research has a social, political, or economical impact.").

[8] *See Copyright*, WIPO https://www.wipo.int/copyright/en/ (last visited Mar. 13, 2024); *Copyright and Fair Use*, HARV. OFF. GEN. COUNS., https://ogc.harvard.edu/pages/copyright-and-fair-use (last visited Mar. 13, 2024).

[9] *See* Guibault, *supra* note 4, at 148; PETER SUBER, OPEN ACCESS 9 (2012); Moscon, *supra* note 5, at 102.

[10] *See, e.g.*, *Gold Open Access Journals*, SAGE JOURNALS, https://uk.sagepub.com/en-gb/eur/pure-gold-open-access-journals-at-sage (last visited Mar. 13, 2024).

closed-access and the option of gold open-access[11] publishing is often attached to an enormous and prohibitive charge for authors.[12] Many commercial journal publishers are increasingly giving authors the option to publish their original manuscripts in their institutional research repositories or other digital research repositories (such as SSRN and ResearchGate) or even the author's personal website at no charge to the authors. However, the option to self-disseminate one's manuscript is dependent on the publisher's goodwill rather than a right that authors can exercise independently of the publisher's consent given that research authors are often "required" to transfer their copyrights (including their right to disseminate their own works) to publishers. Also, the publisher sometimes exercises control over the version of the author's manuscript that may be disseminated, and in some cases, only the original manuscript of the author that was first submitted and has not undergone review is allowed to be disseminated widely to the public.

The dominant situation within the scholarly publishing world is, therefore, that researchers produce works that are useful for other researchers and members of the public but are not allowed to exercise control over the dissemination of these works to the public because they are "required" to cede control to publishers. This not only leads to a situation where the researcher's interest in widely disseminating their work is affected, but it also creates a major knowledge divide between those who have access to knowledge and those who do not. Many potential beneficiaries of the knowledge embedded in research works cannot access and use them because they are behind significantly high paywalls that make them inaccessible to the non-affluent and underprivileged.

Notably, unlike some other subject matters of copyright protection where

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[11] Gold open access publishing provides open access to published articles in peer-reviewed journals but includes a payment of an article processing charge (APC) from the authors. *Id.*

[12] Rosemary Hunter et al., *Editorial: Why We Oppose Gold Open Access*, 2 FEMINISTS@LAW (2012), https://journals.kent.ac.uk/index.php/feministsatlaw/article/view/59/179.

an author/user dichotomy may easily be drawn, the author/user dichotomy in research works is almost nonexistent as many research authors are also research users and *vice versa* and both roles carry interests in opening access to research works. Furthermore, authors and users of research works both face a common enemy – the powerful publishers and distributors of research works. Copyright law does very little if anything at all for research authors and it only becomes a powerful tool for commercial publishers who wield it to exercise a strong monopoly over knowledge. It is obvious from the free transfer of copyright to publishers that authors routinely make that copyright is not an incentive for researchers to publish their writings in journals and/or edited books. Their incentives are purely non-economic, at least in the sense that copyright law envisions economic incentives, and are more tied to the widespread dissemination, readership, impact, and citation of their works, all of which become restricted when publishers wield copyright as an access-blocking tool. Research authors do benefit from the publication of their works, not financially, but through career advancement and the contribution to knowledge in a given area.

It is against the above background that this article argues that, in the context of research works, copyright law as currently framed does not cater to the interests of research authors even though copyright is first and foremost an author's right, and neither does copyright law adequately protect the interests of the public in the research works. In its current framing and practical working, copyright in research works only favors an interest group – publishers. Historically, copyright emerged out of a need to promote the interest of the public in the dissemination of literary expressions of knowledge. As such, the first English Copyright Statute, the 1710 *Statute of Anne,* was described in its long title as "An act for the encouragement of learning." Copyright law in the United States is premised on the need "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective

Writings and Discoveries."[13] Copyright is not meant to be an end but a means to an end, the end being the promotion and dissemination of knowledge. However, the current state of copyright law and practice does not serve this purpose of public access to knowledge and neither does it provide any meaningful opportunity for research authors to widely disseminate their works to the public. In the absence of a rethinking of copyright law to accommodate and protect the interests of research authors and users of research works, copyright law in research works would continue to be intolerable for research authors and users, unfit to incentivize research authorship, and incapable of meaningfully facilitating access to research publications.

This Article recommends a rethinking of the copyright system to accommodate and promote the interests of researchers and those of the public in widespread dissemination and access to research writings. It considers but argues against the abolition of copyright in research works as a viable way of protecting the interests of research authors as well as those of the public because the abolition of copyright in research works would most likely lead to a switch by journal publishers to an author-pays publishing model and significantly reduce the dissemination of research writings by authors.[14] It also considers the instrument of copyright limitations and exceptions (L&Es) and expresses doubts as to its capacity as a tool to promote the widespread dissemination of research works since L&Es often work to promote individual and small group access rather than mass access. Lastly, the Article considers and proposes the creation of an inalienable and nonwaivable secondary publication right for research authors. Such a secondary publication right will empower authors of research works to make the final reviewed or revised version of a manuscript publicly accessible on a digital platform without the need for prior approval from the journal publisher and

[13] U.S. CONST. art. I, § 8, cl. 8.
[14] *See* discussion *infra* Part II.

regardless of any term to the contrary in the publishing agreement. The secondary publication right would vest upon first publication of the work by the publisher. It would stimulate the production of research works and their dissemination to the public, thus offering alignment among copyright law's goals of incentivizing authors and maximizing access to knowledge goods. This Article argues for the recognition of this right within the framework of international copyright law to facilitate a global adoption of the right.

The Article is structured into six parts. In Part I, the Article discusses the control over access to research works by publishers and the consequent rise of open access publishing as a response—mostly by research authors—to the highly restricted dissemination of their works through the traditional journal publishing model. Part I concludes that open access publishing, whether through self-archiving or publishing on an open access basis, is fraught with challenges that still make the problem of widespread dissemination and access to research works very much present today. Part II then argues for a rethinking of copyright in research works to promote and facilitate dissemination and access to research works. It provides reasons why this is imperative and considers three ways in which such rethinking for dissemination and access might be achieved. It considers the abolition of copyright in research works, expansion of copyright L&Es, and the grant of a secondary publication right to authors and concludes that the grant of a secondary publication right presents the most viable pathway for securing the interest of research authors as well as the public. The proposal for the grant of a secondary publication right for authors is presented in Part III. Part III discusses the proposed nature and scope of the secondary publication right. Part IV recommends a global adoption of the secondary publication right and makes a case for the recognition of this right within the framework of international copyright law. Part V examines the recommendation's potential for success first as a tool for facilitating dissemination and access to research works and also its potential to succeed as a right recognized and included within the corpus of international copyright law. Part VI concludes the

Article.

I. COPYRIGHT IN RESEARCH WORKS AND THE SCHOLARLY PUBLISHING LANDSCAPE

A. Control of Access to Research Works

Scholarly researchers often record in writing the information and knowledge discovered and/or generated from their empirical and non-empirical research activities for widespread dissemination and engagement within and outside their scholarly circles.15 Although scholarly research publication is often motivated by the desire for prestige and reputation,16 researchers are also deeply motivated by the possible impact and value of the information and knowledge recorded in their writings to the public.17 Both of these motivations necessarily demand that research writings be published and disseminated as widely as possible. Researchers, therefore, routinely submit their research writings to relevant scholarly journals in their field of research to be considered for publication. Although unmotivated by the conferment of copyright in their writings and perhaps more concerned with proper attribution of authorship in their works, research writings qualify as original works of authorship eligible for copyright and the full bundle of rights copyright is automatically conferred on authors upon the creation of a research writing.18 Unlike novelists and other authors of books who expend time and energy in writing with the hopes of making a return on their creative efforts through copyright royalties, authors of research writings in scholarly journals do not write or publish their writings with the hope of receiving returns in the form of royalties.19 It is therefore not surprising that research

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[15] Chris A. Mack, *Why Write and Publish a Paper*? 16 J. MICRO/NANOLITHOGRAPHY, MEMS, & MOEMS, 2017, at 1.

[16] *Id.*

[17] *Id.*

[18] *See* Copyright Act, 17 U.S.C. §§ 101–1511.

[19] Chris A. Mack, *supra* note 15, at 1.

authors generally transfer their copyright to journal publishers with no expectations of returns from the subsequent commercialization of their research works by the publishers.20 All that research authors want is to get their works published and distributed widely.

The publication and distribution of research works are mostly controlled by publishing companies that are often for-profit organizations with profit maximization rather than knowledge dissemination as their primary objective.21 The result of this is a mismatch between the interest of research authors in the wide distribution of their works and the interest of commercial publishers in profit maximization through the exercise of a monopoly over access to journal publications. Research authors are historically not able to reproduce and redistribute their works once they transfer their copyrights or grant an exclusive license to publishers in exchange for the publication of their work.22 The cost and expenses involved with a secondary reproduction and distribution of their writings in the print age did not make such secondary distribution feasible and/or desirable and it seemed reasonable for journal publishers to have that exclusive right of publication that enabled them to recoup the costs associated with the production, marketing, and distributing of research journals in print.23

However, times have changed. The digital age brought new opportunities for the production and dissemination of research works through the internet and digital technologies like computers and mobile devices.24 Researchers now produce a typed version of their own manuscript and submit the same in digital formats to publishers, thereby reducing the costs on the

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[20] Some journal publishers include American Physical Society, Wiley, and Elsevier.

[21] *See* Moscon, *supra* note 5, at 116. *See also* Hilty et al. *supra* note 4, at 5.

[22] *See* Sally Rumsey & Ignasi Labastida, *Exclusive Licence to Publish – Now Here's a Thing*, SOAPBOX (July 25, 2022), https://www.coalition-s.org/blog/exclusive-licence-to-publish-now-heres-a-thing/.

[23] Donald W. King, *The Cost of Journal Publishing: A Literature Review and Commentary*, 20 LEARNED PUBL'G 85, 86–91 (2007).

[24] Sisule F. Musungu, WIPO, *Using Copyright to Promote Access to Information and Creative Content: Education and Research*, at 5, WIPO/CR/WK/GE/11/2 (Nov. 3, 2011).

publisher's end of rendering authors' manuscripts into digital formats. Unlike in the print age, publishers do not have to produce multiple copies of a work to fulfill subscription requests because of the non-rivalrous nature of digital files.25 Once the publisher uploads a copy of a journal or research work on their platform, the single copy can be accessed simultaneously by multiple users without the need for the publisher to produce a new copy, as was the case in the print era, thereby making the marginal cost of additional subscriptions zero.26 Further, as the internet becomes more accessible and many people own their own computers and mobile devices, the demand for journals in print is almost inexistent and many journals now only publish digitally, which has a significantly higher potential of public reach than works in print.27 In light of all these developments in scholarly communication and publishing, one would expect the hugely reduced costs of production and distribution to be reflected in journal subscription prices and for individuals to have affordable access to research articles. The reality is, however, much different and directly opposite. Since the advent of digital technologies, copyright owners (publishers) have lobbied for stronger protection and an increase in rights to give them greater monopoly and control over digital access to journal publications.28 The result of this is a significantly, but unjustifiably, high increase in the costs of obtaining institutional and individual access to journals because new rights need to be cleared for digital

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[25] Vincent Larivière et al., *The Oligopoly of Academic Publishers in the Digital Era*, 10 PLoS ONE, June 10, 2015, at 12.

[26] *Id. See* Brian Fitzgerald et al., *Creating a Legal Framework for Copyright Management of Open Access Within the Australian Academic Research Sector*, *in* LEGAL FRAMEWORK FOR E-RESEARCH: REALISING THE POTENTIAL 264, 309 (2008); Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 384–85 (2005) [hereinafter *What Contracts Cannot Do*].

[27] Lloyd A. Davidson, *The End of Print: Digitization and Its Consequence—Revolutionary Changes in Scholarly and Social Communication and in Scientific Research*, 24 INT'L J. TOXICOLOGY, 25, 25–26 (2005).

[28] *See generally* Thomas C. Leonard, *Copyright, Monopoly Games, and Pirates: The Past, Present, and Future of Copyright*, *in* THE ROUTLEDGE COMPANION TO MEDIA EDUCATION, COPYRIGHT, AND FAIR USE 317, 327–28 (Renee Hobbs, ed., 2018).

works.29 Journal publishers also increasingly adopted technological tools to enclose and commodify useful knowledge in journal articles, and the enactment of laws that prohibit the circumvention of technological protection measures has reinforced the use of these knowledge enclosure tools.30

The fact that only a small number of multinational publishing companies control the dissemination of most of the journal titles in the world makes the monopoly over access and use of research journals extremely strong. More than half the market for scientific and scholarly journals is controlled by five major commercial publishers: Elsevier, Springer, Wiley, Taylor & Francis and SAGE.31 These publishers make mind-boggling profits from high journal subscription fees.32 In 2015, Elsevier, the biggest commercial publisher,33 made an approximate profit of $,2900 per article published,34 and it published approximately 400,000 articles in approximately 2,500 journals in that year.35 These major corporate publishers are utilizing digital access and copy control technologies, highly restrictive one-sided contracts, and copyrights to prohibit the redistribution of research works, and thereby exercise enormous control over the access and use of research works.36 They exploit their ownership of huge databases of

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[29] Elkin-Koren, *What Contracts Cannot Do*, *supra* note 26, at 385–86.

[30] WIPO Copyright Treaty art. 11, Dec. 20, 1996, 2186 U.N.T.S. 121; Digital Millennium Copyright Act § 103, 17 U.S.C. § 1201. *See also* Musungu, *supra* note 24; Elkin-Koren, *What Contracts Cannot Do*, *supra* note 26, at 375.

[31] THOMAS EGER & MARC SCHEUFEN, THE ECONOMICS OF OPEN ACCESS: ON THE FUTURE OF ACADEMIC PUBLISHING 1–2 (2018); Moscon, *supra* note 5, 116–17.

[32] *See* Kayla Yup, *How Scientific Publishers' Extreme Fees Put Profit over Progress*, THE NATION (May 31, 2023), https://www.thenation.com/article/society/neuroimage-elsevier-editorial-board-journal-profit/; *Journal Subscription Prices*, ELSEVIER, https://www.elsevier.com/about/policies-and-standards/pricing/journals (last visited Mar. 15, 2024).

[33] JONATHAN TENNANT, DEMOCRATISING KNOWLEDGE: A REPORT ON THE SCHOLARLY PUBLISHER, ELSEVIER 5 (2018).

[34] Ted Bergstrom, *Watching Your Cards in the Big Deal*, SCIENCE EUROPE (Apr. 26, 2017), https://www.scienceeurope.org/media/wkno2jcz/20170426_wsbigdeals_keynote_ted_bergstrom.pdf.

[35] Tom Reller, *Elsevier Publishing – A Look at the Numbers, and More*, ELSEVIER (Mar. 22, 2016), https://www.scienceguide.nl/wp-content/uploads/2019/04/elsevier.com-Elsevier-publishing-a-look-at-the-numbers-and-more.pdf.

[36] *Id.*; TENNANT, *supra* note 33, at 26.

journals to impose journal subscription models that place significant financial burdens on institutional as well as individual users. For example, they have replaced the traditional model of individual journal subscriptions for institutional subscribers with bundle subscriptions, leaving libraries and other institutions with no choice but to subscribe to the entire bundle to get access to the journals they are most interested in.37 This increases the cost of journal subscriptions for these institutions while significantly widening the publishers' profit margins.38 It also makes it more difficult for institutions to cancel subscriptions since they will be losing access to a large set of publications for which they have paid huge sums of money over time.39

While the cost of journal subscriptions is more challenging for libraries, universities and research institutions with minimal funding,40 it remains a heavy financial burden for all.41 No institution can afford to subscribe to the complete range of available journals, especially with increasing journal subscription prices that do not match library budgets.42 Researchers are now faced with situations where they need access to a journal, but their institutions cannot provide it.43 It is even more difficult for

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[37] EGER & SCHEUFEN, *supra* note 31, at 2; Larivière et al., *supra* note 25, at 12; TENNANT, *supra* note 33, at 18.

[38] EGER & SCHEUFEN, *supra* note 31, at 2; Larivière et al., *supra* note 25, at 12; TENNANT, *supra* note 33, at 18.

[39] Larivière et al., *supra* note 25, at 12.

[40] In some developing countries, the subscription fee to a single database may exceed the total annual budget of a university library. *See* Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *Report of the Special Rapporteur in the Field of Cultural Rights*, ¶ 80, U.N. Doc. A/HRC/28/57 (Dec. 24, 2014).

[41] *See* Ian Sample, *Harvard University Says It Can't Afford Journal Publishers' Prices*, GUARDIAN (Apr. 25, 2012, 12:45 PM), https://www.theguardian.com/science/2012/apr/24/harvard-university-journal-publishers-prices.

[42] KYLIE PAPPALARDO ET AL., UNDERSTANDING OPEN ACCESS IN THE ACADEMIC ENVIRONMENT: A GUIDE FOR AUTHORS 4 (2008). Harvard University, one of the world's most affluent academic research institutions, announced that the huge cost of subscribing to all scientific journals is financially overbearing. Memorandum from Harvard University Faculty Advisory Council to Faculty Members in all Schools, Faculties, and Units, *Major Periodical Subscriptions Cannot Be Sustained* (Apr. 17, 2012), as cited in Jorge L. Contreras, *Confronting the Crisis in Scientific Publishing: Latency, Licensing, and Access*, 53 SANTA CLARA L. REV. 492, 496 n.19 (2013). *See also* Sample, *supra* note 41.

[43] PAPPALARDO ET AL., *supra* note 42, at 4.

the average member of the public with no affiliation to an institution that can provide meaningful access to journal articles to access the output of research that is mostly funded through public funds given that journal subscription prices are far beyond what an individual can manage to pay.44 Globally, there are more people who do not have institutional access to journals and because access is highly dependent on the ability to pay for journal subscriptions, the cost of which is quite high, research works remain largely inaccessible for most people.

B. The Rise of Open Access Publishing

The enormous control and monopoly that corporate publishers wield over the dissemination of research works do not give many people the opportunity to access full texts of research works. It further hurts research authors whose motivation for writing is connected to a wider reach of their works than is possible when works are locked behind high paywalls. This has led to calls for open access to research works, notably by researchers. The term open access is a coinage of researchers seeking to eliminate the price, legal, and technological barriers to accessing research journals and ensure that everyone derives benefit from research knowledge.[45] One of the reasons for the push for open access is that most research activities that are the subject of journal publications are carried out with public funds, and the public is then again charged for access to the research results.[46] All the revenue from the commercial publication and distribution of the research results goes to private entities, even though researchers (who also constitute a part of the public) freely peer review the works for quality assurance.[47] It is hard to point

[44] *Id.*

[45] SUBER, *supra* note 9., at 7. For the history of open access, *see Timeline of the Open Access Movement*, EARLHAM, http://legacy.earlham.edu/~peters/fos/timeline.htm (last updated Feb. 9. 2009).

[46] PAPPALARDO ET AL., *supra* note 42, at 4–5.

[47] *Id.* at 3.

to a specific time when the open access movement began.[48] However, with the immense access opportunities created by the internet and digital technologies, coupled with the readiness of researchers to publish their works without financial gain, open access to research publications in journals has gained significant support in the last decade.[49]

Notably, the advocacy for open access to research emerged strongly in developed countries,[50] a testament to the fact that the challenge of access to research is not limited to developing or poor countries. There are three main declarations in which the principles of open access have been stated – the Budapest Open Access Initiative of 2001,[51] the Bethesda Statement on Open Access Publishing of 2003,[52] and the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities of 2003.[53] It was, however, at the Budapest meeting in December 2001 that open access was first formally defined as:

> [F]ree 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.[54]

The goal of the participants at the Budapest meeting was open access to journal literature.[55] Participants at the meeting recognized the major

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[48] Robert C. Denicola, *Copyright and Open Access: Reconsidering University Ownership of Faculty Research*, 85 NEB. L. REV. 351, 353 (2006).

[49] Suzanne Day et al., *Open to the Public: Paywalls and the Public Rationale for Open Access Medical Research Publishing,* 6 RSCH. INVOLVEMENT ENGAGEMENT, Feb. 28, 2020, at 1–2.

[50] *See* Séverine Dusollier, *Sharing Access to Intellectual Property through Private Ordering*, 82 CHI.-KENT L. REV. 1391, 1427 (2007).

[51] *Budapest Open Access Initiative*, BOAI (Feb. 14, 2002), https://www.budapestopenaccessinitiative.org/read/.

[52] *Bethesda Statement on Open Access Publishing,* BETHESDA (June 20, 2003),http://legacy.earlham.edu/~peters/fos/bethesda.htm.

[53] *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities*, OPEN ACCESS (Oct. 22, 2003), https://openaccess.mpg.de/Berlin-Declaration.

[54] *Budapest Open Access Initiative*, *supra* note 51.

[55] *Id.*

challenges militating against access to research works – financial (the price of purchasing or subscribing to journals); legal (copyright restrictions on the use of works in ways that may conflict with the exclusive rights of the owners); and technical (the use of digital locks to restrict the way the works may be accessed and used).[56] It was agreed that the removal of these three barriers that are fueled by how copyright protection is being exercised will result in the free and widespread availability of research literature. To achieve this, they recommended self-archiving (also known as the green road to open access) and open access publishing (known as the gold road to open access).[57] Self-archiving involves researchers depositing the accepted manuscript of their journal articles in open electronic archives from which they can be accessed free of financial, legal, and technical barriers.[58] Open access publishing involves the publication of research articles in journals that do not charge subscription or access fees or on the terms that they would be freely available without access restrictions.[59]

Self-archiving involves the deposit or archival of a published article, or a pre-print or post-print version of the article, in an open digital repository or publishing it on the author's individual website and making it accessible to the public at no charge through search engines.[60] The pre-print version of a work is the version that has not been formally reviewed by the journal[61] while the post-print version (or the author's accepted manuscript version) is one that has been approved for publication after the review process but has not been copy-edited by the publisher.[62]

For a research author to be able to self-archive/deposit the accepted

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[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *See* Guibault, *supra* note 4, at 156; Eric Priest, *Copyright and the Harvard Open Access Mandate*, 10 NW. J. TECH. & INTELL. PROP. 377, 392 (2012); PAPPALARDO ET AL., *supra* note 42, at 111.
[61] Guibault, *supra* note 4, at 156; Steven Shavell, *Should Copyright of Academic Works be Abolished?*, 2 J. LEGAL ANALYSIS 301, 331 n.66 (2010).
[62] Shavell, *supra* note 61, at 331 n.66; PAPPALARDO ET AL., *supra* note 42, at 111.

manuscript version of their work for public access, they must have retained the rights to do so in the publishing agreement with the author. To merely grant the public access the work for free, the author must have retained the right to make the work available to the public. If the author wishes to grant to the public the right to use, distribute, and/or adapt the work, then further rights that can enable these must be reserved. Whether an author will be able to provide public access to their work through self-archiving and the version of the article that an author would be able to provide, depends on the agreement between the author and the publisher, because copyrights are usually transferred to the publisher in exchange for the article's publication in journals. In some cases, publishers subject the archival or republication of the author's accepted manuscript version of the work to public access to an embargo period of between six months and 18 months.[63]

However, the fact that the self-archived version of an article may not be the reviewed version raises reliability problems because users who do not have access to the final accepted version of the article would not know the changes that have been made post review and whether those changes are consequential or not.[64] This means users may have to revert to paying for the publisher's copy-edited version of the work. In cases where the publisher permits the author to archive the copy-edited version, it is usually subject to a long embargo period[65] and this prevents immediate access to the work.

Furthermore, many research authors are not sure about whether or when they can republish the manuscript of their work in an open repository or personal website or even whether they retain certain rights to their original manuscript.[66] Copyright creates significant chilling effects and coupled with

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[63] *See* Priest, *supra* note 60, at 392; Guibault, *supra* note 4, at 157.
[64] *See generally* Guibault, *supra* note 4, 156–57; Shavell, *supra* note 61, at 332.
[65] *Id.*
[66] *See* Jenice Jean Goveas, *Whose Right is it Anyway? Copyright and Scholarly Publishing*, INT'L SCI. COUNCIL: BLOG (May 9, 2022), https://council.science/current/blog/copyright-and-scholarly-publishing/.

the dominant position of journal publishers against individual authors, some authors may refrain from battling with publishers to allow them to publish their accepted (reviewed) manuscripts. Even in cases where a publisher has a policy that allows research authors to make such republication, some research authors may still be doubtful of the extent of the privileges conferred on them by journal publishers. The fact that the republication of an accepted manuscript of an author's article remains an option or privilege that may or may not be granted to authors by publishers on terms dictated by publishers makes it difficult for authors to decide whether they can deposit their works in open repositories. Yet, self-archiving remains the most viable and attractive way for research authors to provide immediate public access to their research works. This is because most established (especially peer-reviewed) journals still adopt toll-access publishing or at best, a hybrid between toll-access publishing and open access publishing. Additionally, the option to publish on an open access basis (gold open access) often comes at a high financial cost to the author.

Open access publishing, which is the other recommended option by the participants at the Budapest Meeting for providing open access to research works, involves publishing in an open access journal or publishing a research article on an open access basis.[67] Publishers are usually paid for their publishing services prior to publication.[68] Authors will therefore not assign their copyright in the work to the authors and even when authors assign their rights, publishers will still make the published work available to the public at no cost.[69] In this case, "payment of publication costs is shifted from readers (via subscriptions) to authors."[70] This is why the gold road to open

[67] *Budapest Open Access Initiative*, *supra* note 51.
[68] Shavell, *supra* note 61, at 333.
[69] *See* Guibault, *supra* note 4, at 154; Shavell, *supra* note 61, at 333.
[70] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, at 5, COM (2012) 401 final (July 17, 2012).

access is also known as the author-pays model of publishing.[71] Although there are also journals known as platinum open access journals, i.e., journals that do not require authors to pay the costs of publication, these are very few because of the financial difficulties of maintaining such journals.[72]

The fees paid by authors to facilitate open access publishing of their articles are known as "article processing charges" (APCs).[73] These APCs are usually paid by the author's university or funder can be excessive and prohibitive, and only a few institutions can support their researchers by paying for APCs.[74] The APC for some of the journals indexed in the Directory of Open Access Journals is as high as $5000.[75] For example, the PLOS, a non-profit open access publisher in the fields of science and medicine that publishes seven journals charges up to $6,000 for research articles in these open access journals.[76] Hybrid journals,[77] which most traditional toll-access journals are now, charge even more excessively for open access publishing since they charge twice per open access article, first through the APC and second through the journal subscription fee for

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[71] Denicola, *supra* note 48, at 358.

[72] Hagner Michael, *Open Access, Data Capitalism and Academic Publishing*, 148 SWISS MED. WKLY., Feb. 16, 2018, at 6.

[73] *Id.* at 1.

[74] *Id.* at 7.

[75] *The Directory of Open Access Journals*, DOAJ, https://doaj.org/ (last visited Mar. 18, 2024).

[76] *Publication Fees*, PLOS, https://plos.org/publish/fees/ (last visited Mar. 18, 2024). According to the PLOS, the charges are used to "offset publication expenses – including the cost of peer review management, journal production, and online hosting and archiving . . .." *Id.*

[77] On hybrid journals:

> Hybrid journals are journals that offer some open access articles and some toll access articles. The choice of whether an article will be open access or toll access is made by the author. Authors who choose the open access option will usually be required to pay a fee to cover the costs of publication. However, the author will often be able to retain copyright in the article, or at least many of the rights that enable reuse. The publisher also provides free online access to the article on the publisher's own website (and sometimes also allows the author to deposit the article elsewhere).

PAPPALARDO ET AL., *supra* note 42, at 59.

institutions that require access to the entire journal issue.[78]

Although the open access movement has yielded significant gains in increasing public access to journal articles, there remain some challenges to the sustainability and viability of the green and gold roads to open access. For open access publishing to lead to the widest possible dissemination of research works to be public, there must be sustainable ways of paying for the APC. While funders, institutions, and research sponsors sometimes pay APCs, open access publishing that rests on an author-pays model may not be sustainable because an APC can be very high while funding is limited.[79] Research authors may, therefore, not be able to afford to pay these charges in the absence of funding.[80] There is also little incentive for researchers to pay out of pocket to publish their papers in an open access journal when the same paper can be published in a traditional journal on a toll-access basis without making any payment.[81] Self-archiving in institutional repositories or other open digital repositories is a more viable and attractive way for researchers to disseminate their works because there are no associated costs to researchers. However, whether a researcher can republish their journal articles in this way still depends on the publishing agreement between the researcher and the publisher. Such an agreement is often an unnegotiated standard contract prepared by the publisher solely to protect the publisher's interests in the exploitation of the work. Also, a publisher may only allow the republication of the unreviewed version of the manuscript and not the accepted peer-reviewed version of the manuscript. In other cases, the publisher may place an embargo on the republication of the accepted peer-reviewed version of the manuscript. The absence of any legal provision in copyright law that empowers researchers to have some form of inalienable control over the dissemination of their works makes it difficult to assert the

[78] *See* Larivière et al., *supra* note 25, at 12.
[79] Musungu, *supra* note 24, 18–19.
[80] *See* Denicola, *supra* note 48, at 358–59.
[81] Michael, *supra* note 72, at 7.

self-archiving of works as a right rather than a privilege tied to the goodwill of publishers.

More gains in open access to research works would be made if the copyright system normatively protects the interests of authors in the wide dissemination and readership of their works. Given that public access to research works matters both to the authors and the public, it begs the question of whether the copyright framework for research works is fit for the purpose. As Part II elaborates on, the grant of copyright protection to authors of works is not an end in itself but a means to an end – the end being public access to useful and socially beneficial works of authorship that are research works. If this end is not being served – whether because of a misuse of copyright, exploitation of copyright by middlemen (publishers), or an imbalance in power between authors and publishers – there is justification to call for a rethinking of the copyright system to ensure that it operates in a manner that fosters public access to knowledge, a key motivation for the publication of research works by researchers.

II. REDESIGNING COPYRIGHT AS APPLICABLE TO RESEARCH WORKS

A. Why Redesign Copyright as Applicable to Research Works

There are legitimate grounds to call for a rethinking of the copyright regime for research works; the chief of which is that the interests of the relevant stakeholders in research works differ significantly from the interests of the stakeholders in other sectors of content production that copyright regulates.[82] While creators in other sectors of content production like films, music, trade books, and even textbooks, may have similar interests as middlemen (publishers/producers/distributors) in the maximization of profits and getting huge economic returns on their creative and financial

[82] Hilty et al., *supra* note 4, at 4.

investments, this is not the case for research works. Also, in those other sectors of content production, creators and middlemen are usually the main stakeholders. The stakeholders in research works are hardly binary (i.e., not just research authors and publishers/distributors). They include universities, research institutions, the general public, and public and private research funding agencies that directly or indirectly finance the creation of the research content and have a significant interest in the dissemination of research. This interest aligns with that of research authors but differs from the interest of journal publishers in maximizing profits and restricting access. Yet, copyright does not make a distinction between research works and other categories of copyrighted works where economic incentives may be a huge driver for the stakeholders to invest their efforts, skills, and resources in the creation and continued creation of those works. The result of this is that publishers who ultimately obtain the copyright in research works exploit it in the manner envisaged by copyright law (i.e., for economic returns) but in a way that significantly hurts the interests of authors whose interests copyright law is supposed to serve and is often described as serving.

The conventional rationale for copyright protection as an incentive for the creation and dissemination of works does not apply to research authors, especially where journal publications are involved.[83] Neither the authors nor their employers or financiers receive royalties for the sale or distribution of their works as intended under the copyright incentive theory, and as such, they do not depend on or benefit from an over-protectionist copyright regime.[84] Authors of research works are not motivated by economic incentives in the way promoted under copyright law, as the financial compensation for their works is guaranteed outside the workings of

[83] Shavell, *supra* note 61, at 301. *See also* EGER & SCHEUFEN, *supra* note 31, at 11.

[84] Shavell, *supra* note 61, at 302; Peter Murray-Rust et al., *Open Content Mining*, *in* ISSUES IN OPEN RESEARCH DATA 11, 17 (Samuel A. Moore, ed., 2014); Hilty et al., *supra* note 4, at 5.

the copyright system.[85] It can be argued that scholars affiliated with educational and research institutions are required to publish articles based on their employment contracts and that the desire to continue to be in gainful employment may be one of the incentives for publishing. However, even if this were so, it is not an incentive that is connected to the workings of the copyright system because the salaries of researchers are not tied to any income received by institutions from the sale and distribution of their research, as these institutions do not receive any royalties from publishers.

The general premise on which copyright law is founded is that the primary and perhaps only motivation for the creation of original works of authorship from which society can benefit is the grant of economic incentives in the form of exclusive proprietary rights.[86] Yet this is not true for research authors who write for professional reasons and not for any economic interest that may accrue from copyright protection. This is why, unlike other categories of authors, authors of journal articles do not negotiate the payment of royalties with publishers and in fact do not strive to retain copyright in their works. On the flip side, the grant of copyright empowers publishers in a way that works against what motivates research authors to write and publish their works. Scholars are primarily motivated by "scholarly esteem and professional advancement"[87] and they "desire readership of their works to gain esteem."[88] The benefits that scholars normally expect from the

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[85] SUBER, *supra* note 9, at 2, 12.

[86] William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 169 (Stephen Munzer ed., 2001); Neil Wilkof, *Theories of Intellectual Property: Is it Worth the Effort?*, 9 J. INTELL. PROP. L. & PRAC. 257, 257 (2014).

[87] Shavell, *supra* note 61, at 302. *See also* EGER AND SCHEUFEN, *supra* note 31; SUBER, *supra* note 97, at 12.

[88] Shavell, *supra* note 61, at 302. *See* Princeton Univ. Press v. Mich. Doc. Servs., 99 F.3d 1381, 1410 (6th Cir. 1996) (Ryan, J., dissenting) ("More than one hundred [academic] authors declared on the record that they write for professional and personal reasons such as making a contribution to a particular discipline, providing an opportunity for colleagues to evaluate and critique the authors' ideas and theories, enhancing the authors' professional reputations, and improving career opportunities. These declarants stated that the receipt of immediate monetary compensation such as a share of licensing fees is *not* their primary incentive to write.").

publication of their works can only be obtained from a wide readership of their works and relevant citations which are dependent on wide dissemination, access, and use of their works.[89] Publishers, on the other hand, use copyright as an exclusionary tool in their quest for profit maximization, thereby restricting access to research publications to those who can pay the high price tags placed on them. In short, the economic rights of copyright law do not serve the interests of research authors but are used by publishers in a way that is detrimental to the interests of such authors in the free access of their works by the scholarly research community as well as the public. Considering that research authors rarely have any financial incentives for publishing their research and are interested in sharing their works and obtaining access to the works of their peers, there is a pressing need to protect the interest of this category of authors in copyright law.[90]

Research authors also occupy a distinct position as both producers and users of knowledge and these are not mutually exclusive – they feed into each other.[91] Researchers value and have reason to value existing research literature because the success of their creative engagements is largely dependent on access to existing information.[92] In the course of producing research works, researchers must draw from a large pool of existing research.[93] So previous research publications are necessary inputs for new research. To be able to engage in research activities and create new research outputs, researchers need access to existing research literature, and for this reason, universities and research institutions are the major target market for publishers of research journals.[94] Restricted access to essential knowledge

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[89] Murray-Rust et al., *supra* note 84, 17–18.

[90] *See* Moscon, *supra* note 5, at 128; Hilty et al. *supra* note 4, at 4.

[91] *See* Murray-Rust, et al., *supra* note 84, at 11. "As scientists and scholars, we are both creators and users of information." *Id.*

[92] *See* Till Kreutzer, *User-Related Assets and Drawbacks of Open Content Licensing*, *in* OPEN CONTENT LICENSING: FROM THEORY TO PRACTICE 107, 116 (Lucie Guibault & Christina Angelopoulos eds., 2011); Hilty et al., *supra* note 4, at 5.

[93] Hilty et al., *supra* note 4, at 5.

[94] *See* TENNANT, *supra* note 33, at 8.

contained in research literature can, therefore, impede research capacity and affect the career goals of researchers. Moreover, there is no substitute for scientific and scholarly research outputs.[95] If a reader is looking for a book on intellectual property, perhaps they can find many to choose from multiple sources. However, if one is looking for a research work on a phenomenon, there may just be a single relevant source because most of the research works are published by a small group of publishers and an article cannot be published in multiple journals.[96]

Within the research community, unimpeded access to research publications also helps avoid duplication of effort from conducting the same research more than once, thereby preventing the wastage of funds and time.[97] Researchers can build on previous research findings and advance the body of knowledge in that area. According to the European Commission in a communication to the European Parliament on the need for better access to scientific information, wider access to scientific publications will help to accelerate innovation, avoid duplication of efforts, and build on previous research findings, thereby improving the quality of scientific results.[98]

Access to research works also matters to the public because such works often contain the results of systematic human inquiries into scientific and non-scientific issues that are of importance to humanity. Research works contain useful information that can help understand a phenomenon better and/or provide solutions to socially significant problems. Research works play a significant role in combating global challenges in areas such as health, food security, climate change, economic growth, and even mis/disinformation, that undermine sustainable human development. Health research findings can benefit society but health practitioners, scientists,

[95] *See* Larivière et al., *supra* note 25, at 12; Hilty et al., *supra* note 4, at 6.
[96] *See* SUBER, *supra* note 9, at 39.
[97] PAPPALARDO ET AL., *supra* note 42, at 4.
[98] European Commission, *supra* note 70, at 3.

policymakers, and even general members of the public must first obtain sufficient access to health research literature before they can translate research knowledge into better health.[99] According to the World Health Organization (WHO), "the application of knowledge from health research has underpinned many of the gains in health and economic development in countries all over the world."[100] Developing countries bear the brunt of most of the world's diseases and as such have a greater need for reliable health information.[101] Despite this, they have the least access to research publications containing this useful information because of extremely high access tolls.[102] Restricted access to health research literature affects healthcare systems because access to health information and other health findings is necessary for the prevention and treatment of diseases and to generate good health outcomes.[103] As Spedding rightly asks, "what is the point of health research unless it leads to better health?"[104] The whole point of health research is to contribute positively to global health systems,[105] but this cannot happen without access to health research literature.

Global public health crises such as the outbreak and spread of COVID-19 further highlight the importance of widespread access to scientific research publications. In the war against COVID-19, scientists, researchers, policymakers, governments, health providers, and even members of the general public utilized health research literature as an important weapon.[106] This was made possible by efforts worldwide to disseminate

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[99] Simon Spedding, *Open Access Publishing of Health Research: Does Open Access Publishing Facilitate the Translation of Research into Health Policy and Practice?*, 4 PUBLICATIONS, Jan. 21, 2016, at 1.

[100] WORLD HEALTH ORGANIZATION [WHO], WORLD REPORT ON KNOWLEDGE FOR BETTER HEALTH: STRENGTHENING HEALTH SYSTEMS 1 (2004).

[101] Gavin Yamey, *Excluding the Poor from Accessing Biomedical Literature: A Rights Violation That Impedes Global Health*, 10 HEALTH & HUM. RTS. 21, 24 (2008).

[102] *Id.*

[103] *Id.*

[104] Spedding, *supra* note 99, at 1.

[105] WHO, *supra* note 98, at 14.

[106] Victoria Heath & Brigitte Vezina, *Now is the Time for Open Access Policies – Here's Why*, CREATIVE COMMONS (Mar. 19, 2020), https://creativecommons.org/2020/03/19/now-

knowledge generated from coronavirus-related research carried out globally.[107] The immediate and rapid dissemination of, and access to, coronavirus-related research around the globe allowed health professionals and scientific researchers to make informed decisions on how to find a solution to the pandemic,[108] thus saving time and yielding greater gains. Extending the benefits of medical and health-related knowledge to everyone through access to health research literature is "essential to the fullest attainment of health."[109]

Even though lack of access to health information can be fatal, and despite the great demand for access to health research globally, the price of scientific and medical journals continues to increase significantly.[110] People faced with chronic diseases and illnesses need access to journal subscriptions to have up-to-date information about their illnesses.[111] One person wrote in response to the call for public access to publicly funded research in the U.S.:

> As a parent of a child with cancer as well as someone who struggles with my own medical issues, current knowledge on treatment, outcomes, etc. is *extremely* important in order to make informed decisions about treatment and clarify knowledge about the health issues in question. Being able to read about the research provides me with a better picture of available treatment or of ways of handling the various effects, allowing me to ask more specific questions and make decisions based on wider knowledge. The information/questions I ask can and has resulted in better treatment and support for my daughter. The current practice of requiring a subscription or charging a fee for each article quickly goes beyond my ability to pay.[112]

Notably, even research institutions, universities, and research funders,

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is-the-time-for-open-access-policies-heres-why/.

[107] *Id.*

[108] *Id.*

[109] WORLD HEALTH ORGANIZATION [WHO], CONSTITUTION OF THE WORLD HEALTH ORGANIZATION, https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1.

[110] Day et al., *supra* note 49, at 2.

[111] PAPPALARDO ET AL., *supra* note 42, at 5–7.

[112] PAPPALARDO ET AL., *supra* note 42, at 6 (March 17, 2008, public comment by Melissa Stoltz on NIH website).

who are important stakeholders in research works, all share a similar interest with the research authors in disseminating research results for societal impacts. Public and private agencies fund research endeavors because of the potential benefits and utility to society.[113] Universities pay academic staff salaries to provide compensation for their research activities because of the range of public interests served by research works.[114] Funding research activities would be inconsequential without opportunities for disseminating, accessing, and using knowledge generated from these activities. Therefore, universities and funding agencies encourage academics and researchers to publish their research findings by conditioning career elevation partly on the publication of research papers.[115]

In recent times, universities and funding agencies are adopting policies that either compel or encourage researchers to make their works publicly accessible whether by publishing on an open access basis or depositing their journal publications in a free online repository.[116] This is a testament to the fact that the motivation for universities and funders to support research activities is closely tied to the wide public access to research outputs and the societal impact that comes with such access. Public research funding agencies like the National Institutes for Health (NIH),[117] Social Sciences and Humanities Research Council of Canada (SSHRC),[118] European Research Council (ERC),[119] UK Research and Innovation

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[113] SUBER, *supra* note 9, at 14.

[114] *Id.*

[115] *Id.* at 12–13.

[116] *See, e.g.*, *Understanding Open Access*, STAN., https://laneguides.stanford.edu/openaccess/policies (last visited Mar. 18, 2024).

[117] *NIH Public Access Policy*, NIH, https://publicaccess.nih.gov/policy.htm (last visited Mar. 18, 2024).

[118] All three federal granting agencies in Canada, the Social Sciences and Humanities Research Council of Canada (SSHRC), the Natural Sciences and Engineering Research Council of Canada (NSERC), and the Canadian Institutes of Health Research (CIHR), have all adopted some policy regarding open access to publications resulting from the research they fund. *Tri-Agency Open Access Policy on Publications (2015)*, GOV'T OF CAN. (Dec. 20, 2016), https://science.gc.ca/site/science/en/interagency-research-funding/policies-and-guidelines/open-access/tri-agency-open-access-policy-publications.

[119] *Open Science*, EUR. RSCH. COUNCIL, https://erc.europa.eu/manage-your-

(UKRI),[120] and Australian Research Council (ARC)[121] have adopted open access policies that involve depositing publications arising from funded research projects in open institutional repositories. In the absence of any provision in copyright law empowering researchers to take control of the dissemination of their own works or further funding for the payment of article processing charges, the success of these policies depends on the willingness of publishers to allow researchers to republish their peer-reviewed manuscript in a free online repository.

It is also important to note that a large part of the production of scientific and scholarly research literature is publicly financed, whether directly or indirectly.[122] Public funds should not be used to subsidize the production costs of research to give excessive profits to a small group of private corporate publishers, who then monopolize, restrict and highly commodify knowledge.[123] For other types of literary content, the public does not finance the production or subsidize the cost of production in any way. This peculiarity in the production of research knowledge should further compel a rethinking of the current framework for copyright in research works.

The irony of the control exercised by publishers over research publications is that publishers neither generate the content nor pay the authors of journals for the content that they commercialize.[124] Further, researchers graciously provide their time to review articles for journals to ensure the works published are of good quality.[125] The costs of generating content and

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project/open-science (last visited Mar. 18, 2024).

[120] *UKRI Open Access Policy*, UK RSCH. & INNOVATION, https://www.ukri.org/publications/ukri-open-access-policy/ (last updated Nov. 30, 2023).

[121] *Open Access Policy*, AUSTRALIAN RSCH. COUNCIL, https://www.arc.gov.au/sites/default/files/2022-06/Open%20Access%20Policy%20Version%202021.1.pdf (last updated June 30, 2023).

[122] Hilty et al., *supra* note 4, at 4–5.

[123] *Id.*

[124] *See* TENNANT, *supra* note 33, at 8.

[125] *Id.*

peer-reviewing articles should be the most substantial portion of the costs of producing research articles, but these services are provided to publishers at no cost by the academic research community.[126] Ironically again, these researchers who generate and review content are mostly employees of the educational and research institutions that journal publishers burden with excessive subscription charges.[127] The institutions pay their employees to conduct research and publish their findings in journals, thus subsidizing the cost of producing most of the works published in scientific and scholarly journals. Unfortunately, in return for this subsidy, publishers make institutions pay excessively to access the content they helped generate and subject them to unfair terms and conditions.[128] In combination, the foregoing analysis shows that only commercial publishers have a completely different interest in research works – the maximization of profit.[129] Although there are other stakeholders with competing interests, the copyright framework is designed to secure only the interest of commercial publishers in maximizing profit. It is important that there be a balance of interests within the copyright framework and as far as research works are concerned the scale is currently tilted largely in favor of publishers and against authors and the public. The copyright balance argument is often a balance between the interests of authors and publishers on the one hand and those of users on the other hand. However, in the case of research works, since the interests of authors and publishers hardly align, the copyright balance argument is a balance between the interests of publishers on the one hand and the interests of authors and users on the other hand.

Lastly and in conclusion, without a rethinking of copyright law to foster the dissemination of research works to the widest possible audience, in

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[126] Larivière et al., *supra* note 25, at 11. The other costs associated with journals and edited books that are borne by publishers are "copy-editing and layout, writing of editorials, marketing, and salaries and rent." *Id.*

[127] Moscon, *supra* note 5, at 117.

[128] *Id.*

[129] Hilty et al., *supra* note 4, at 5.

the interests of research authors and the public, copyright in research works would become more intolerable. Researchers, funders, universities and other research institutions, and the public who are key drivers of research activities and the production of research works all have a common interest – to see the widest dissemination and application of research knowledge possible. Copyright is meant to be a means of promoting the dissemination of knowledge by authors and facilitating society's access to useful knowledge. If copyright continually fails to achieve this end in the context of research works and only fosters what is supposed to be a means to this end (i.e., economic incentives), there would be a gross misalignment between how copyright operates in practice and how it is intended to operate. It would fail in its purpose both as a legal system for protecting the interest of authors in their works and as a means of securing public interest in authorial works. All these concerns necessitate an immediate rethinking of the copyright system in the interest of wide and rapid dissemination of research works globally. The next section turns to the question of how we should rethink copyright in research works.

B. How Should We Redesign Copyright Law as Applicable to Research Works

Copyright in research works deserves special attention.[130] It is not often the case that creators of works are also the champions of giving access to their work, but for research authors, this is the case. The demands for free public access to research works are mostly made by the creators of these works.[131] This shows a marked difference in the interests of creators of

[130] Moscon, *supra* note 5, and Hilty et al., *supra* note 4, have both called for a distinct copyright regime for scientific and scholarly works published in journals. According to Hilty et al., who called for a distinct copyright regime for science and research in the European Union (EU), the call "is legitimate on the grounds that the relevant stakeholders' interests significantly deviate from the interests in other sectors of content production." Hilty et al., *supra* note 4, at 4.

[131] The Bethesda meeting and Berlin meeting that gave birth to two of the three principal declarations on the open access initiative were meetings convened by researchers and with

research works and creators of other types of copyright-protected content, a difference that is neither reflected in the framework of copyright law at the international level nor in the majority of national copyright regimes.[132] There are sufficient and very legitimate reasons why we ought to rethink copyright in research works to develop a regime that accommodates the interests of research authors in opening up their works. Importantly, this would not only incentivize researchers whose motivation for publishing their research outputs is closely connected to the widest possible public access to their work, but it would also be significantly beneficial to the general public which has a shared interest in the dissemination of research knowledge. The question then is how do we rethink the copyright system to achieve this objective?

Shavell considers the abolition of copyright in research works as a potential solution to safeguarding the interests of research authors.[133] Moscon also suggests that given the extreme exploitation of copyright in research works by persons who are not the creators of the works to the detriment of creators, "it may no longer be necessary to hold exclusive economic rights to the written academic works."[134] She argues that it may be acceptable to only

researchers as the main participants. *See Bethesda Statement on Open Access Publishing*, *supra* note 52; *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities*, *supra* note 53.

[132] Except for a few European countries that grant a secondary publication right to research authors of publicly funded research. For more on this, *see* discussion *infra* Part III.

[133] Shavell, *supra* note 61, at 315.

[134] Moscon, *supra* note 3, at 128.

grant research authors moral rights[135] in publications.[136] If copyright were abolished in research publications, the works would effectively be in the public domain and could be freely reproduced, disseminated, and used by anyone. Users will have unrestricted access to the bulk of knowledge generated by researchers and published in journals that can contribute significantly to human development. Granting researchers moral rights will ensure that they are credited as the authors of their works and that their works are not distorted.[137] This will cater to the interests of researchers in gaining recognition for their works.

However, while it is tempting to push for the abolition of copyright in research works and grant authors moral rights only, this proposition raises some issues that cannot be easily brushed over. Commercial publishers defray the costs of publication and gain profit through the monopoly that copyright grants over the reproduction and dissemination of journal publications.[138] In the absence of exclusive proprietary rights that can be acquired by publishers from authors, anyone would be able to reproduce and disseminate to the public the copy-edited version of the work published by journal publishers without the need for the publisher's license or permission. There would be little or no incentives for institutions and end users to subscribe to journal publications when the journal issues can be freely

[135] Moral rights have been defined to include "non-property attributes of an intellectual and moral character which give legal expression to the intimate bond which exists between a literary or artistic work and its author's personality; it is intended to protect his personality as well as his work." Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMPAR. L. 465, 465 (1968). They differ from economic rights which are rights within the copyright bundle that gives rightsholders temporary monopoly over the exploitation of their works. *Id.* The interests protected by moral rights include the right of paternity, i.e., the right to be acknowledged as the author of a work and not to have an author's work attributed to someone else; the right of integrity, i.e., the right not to mutilate or misrepresent an author's work; and the right of withdrawal, i.e., the right to withdraw a work from the public on certain terms. James M. Treece, *American Law Analogues of the Author's "Moral Right"*, 16 AM. J. COMPAR. L. 487, 494 (1968). *See also* Berne Convention for the Protection of Literary and Artistic Works art. 6bis, Sept. 9, 1886 (as amended Sept. 28, 1979) [hereinafter Berne Convention].

[136] Moscon, *supra* note 5, at 128.

[137] *See* Sarraute, *supra* note 127, at 465–66.

[138] Shavell, *supra* note 61, at 311.

reproduced. As such, publishers will not be able to get licensing revenues to defray the costs of publishing and obtain profits.[139] Journal publishers would most likely then adopt an author-pays model, the same model as what is being used by traditional and many open access journal publishers where authors want their works openly licensed through the gold road to open access. In an author-pays regime, research authors would have to pay upfront the costs of publication for their papers to be published and the publication fees would likely be excessive and beyond the nominal costs of publication, as is already the case with open access publishing.[140]

Many research authors would certainly be inclined to push back against a reform within the copyright law that would result in them paying publication fees out-of-pocket before their articles are published. While the publishing fees can be defrayed by universities and funders, such funding may be limited as is currently the case with the payment of article fees for open access publishing. It may be more economical for universities and funders to offset publishing fees since they would not have to pay subscription fees for journal publications and the burden of paying publishing fees would not be on a single university or institution. Every university or research institution whose researchers are publishing can contribute to the knowledge commons in this way while saving immensely on journal subscription fees. However, where publishing fees are not defrayed to institutions or funders, abolishing copyright in research works is unlikely to be socially desirable as it would be unreasonable for researchers to pay out-of-pocket for their articles.[141] In particular, independent researchers and researchers in many developing countries where institutions lack funding to support research activities would have their voices completely shut out in the scholarly community, depriving humanity and even the scholarly community of the benefits of the diversity in knowledge and perspectives that is so

[139] *Id.*
[140] *Id.* at 317.
[141] *Id.* at 319–20.

important today. The inability to publish research works for lack of funds to pay publishers' fees would result in a decline in quality-assured research outputs and a reduction in the body of research knowledge that can be generated for societal benefits. Knowledge must first be produced before the question of disseminating and using it for human development purposes can even arise.

Further, given the excessive earnings publishers make off the current copyright framework which would no longer be available as a revenue stream if copyright is abolished, publishers would be greatly opposed to and fight against such a proposal whether at the domestic or international level, notwithstanding that they can change their business model into an author-pays model. Apart from the protracted negotiations that would occur if this ever got considered, such a reform may be too disruptive to see the light of day.

If the abolition of copyright is not very desirable and would not serve the best interests of researchers, what legal rules may be incorporated into copyright law to address the interests of research authors in the dissemination of their works? Could the apparatus of limitations and exceptions (L&Es) be helpful in this regard? [142] Copyright L&Es is an important policy instrument for balancing the interests of copyright owners and users and it has been widely recognized as the main mechanism for facilitating access to in-copyright works.[143] Copyright L&Es are legal provisions that permit certain

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[142] *See* Moscon, *supra* note 5, at 128; Hilty et al., *supra* note 4, at 9. Both argue that broadening the scope of copyright L&Es could cater to the interests of researchers and the public in access to research works.

[143] *See, e.g.*, Johan Axhamn, *Exceptions, Limitations and Collective Management of Rights as Vehicles for Access to Information*, *in* ACCESS TO INFORMATION AND KNOWLEDGE: 21ST CENTURY CHALLENGES IN INTELLECTUAL PROPERTY AND KNOWLEDGE GOVERNANCE 164, 164–65 (Dana Beldiman ed., 2013); P. BERNT HUGENHOLTZ & RUTH L. OKEDIJI, CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT 3 (2008); Ruth L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries*, INT'L CTR. FOR TRADE AND SUSTAINABLE DEV. [ICTSD] & UNITED NATIONS CONF. ON TRADE AND DEV. [UNCTAD] (2006).

uses of a work, which are ordinarily within the exclusive control of the copyright owner, without the need to obtain consent, and in some cases also dispensing with the requirement of paying copyright owners.[144] Where appropriately designed, copyright L&Es can alleviate the burdens on users around the world who lack access to copyrighted works.[145] However, for research works the issue is not just about the interest of users in accessing and using works but also the interest of authors in providing public access to their works. Since copyright L&Es are often designed to give rights to users, they might not be suitable as a standalone tool for addressing the interests of research authors. Although the interests of authors and users in research works are closely aligned, when copyright L&Es are designed, they are often weighed against the interests of copyright owners in a way that does not distinguish between the interests of copyright owners and authors or assumes that those interests are the same and are economic in nature. As such, it is difficult to envision a copyright L&E that would permit the public dissemination of research works by a person other than the copyright owner or a person who has the authorization to do so from the copyright owner.

While many copyright L&Es (in the style of fair use or fair dealing provisions) permit the reproduction or copying of works for private uses and research purposes, the enjoyment of these L&Es depends on lawful access to a copy that may be reproduced or copied. Thus, despite the presence of fair use or fair dealing provisions and similar use exceptions in copyright law, the challenge of accessing research works persists for persons, including members of the public and independent researchers, who are unaffiliated with an institution that can provide such access. In fact, it is difficult to imagine a single institution that can provide access to the full range of journals that their researchers need today given the soaring costs of journal subscriptions. It is

[144] Alberto J. Cerda Silva, *Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright*, 60 J. COPYRIGHT SOC'Y U.S.A. 581, 584 (2013).
[145] *Id.*

safe to conclude that while copyright L&Es can be used to increase the scope of permissible uses of research works, they cannot be relied on as a sufficient mechanism to address the interests of researchers in sharing their works and provide public access to research works. What is therefore needed is a legal mechanism that allows researchers as authors (not users) of research works to disseminate their works to the widest possible public audience through the internet without the need to obtain permission from or negotiate with publishers of their works.

Since "'open' and 'proprietary' models are not mutually exclusive,"[146] the proprietary model of the copyright system can be rethought in a way that empowers researchers to share their works with the public. Okediji notes that "[copyright] ownership can be used to facilitate access to knowledge goods, not just to maximize rent. Ownership can be at least as effective, or even a better, means of ensuring access to creative works . . ."[147] Indeed the open access movement relies on copyright ownership as a tool to facilitate access to creative works.[148] The challenge with open access to research works, however, is that the proprietary rights that can be utilized to facilitate public access are often parted with by the research author (the initial copyright owner) in exchange for publication in a journal, in a relationship that is fraught with gross power imbalance and undue exploitation. Where the author seeks to retain their copyrights, this comes at a financial cost that is often too burdensome for the researcher to bear at all or at all times. To utilize the exclusive rights model of the copyright system to empower researchers to share their works, copyright law's treatment of research works must be redesigned. A starting point that I propose in this article is to grant research authors a secondary publication right that gives them the right to publish the

[146] Moscon, *supra* note 5, at 103.

[147] Ruth Okediji, *Government as Owner of Intellectual Property? Considerations for Public Welfare in the Era of Big Data*, 18 VAND. J. ENT. & TECH. L. 332, 348 (2016).

[148] *See What is Open Access?*, UNESCO OPEN ACCESS PUBLICATIONS, https://en.unesco.org/open-access/what-open-access (last visited Mar. 19, 2024).

final, accepted, and reviewed version of their journal articles to the widest possible audience and at the earliest possible opportunity without the permission of the copyright owner (publisher). The grant of such right to research authors is a great way of using the copyright proprietary model to empower researchers and secure their interests in sharing their works with the public while at the same time facilitating public access to research knowledge. This creates some balance in power in an otherwise highly imbalanced power relation between research authors and journal publishers.

To facilitate open access to research publications, beginning with Germany, five countries in the EU[149] have adopted a secondary republication right to allow research authors to provide free public access to their works. The adoption of the right was in response to the European Commission's *Recommendation on Access to and Preservation of Scientific Information* to the European Union (EU).[150] The European Commission recommended that EU member states should make clear policies for open access to publications resulting from publicly funded research.[151] In addition, states were charged to ensure that as a result of these policies, there is "open access to publications resulting from publicly funded research as soon as possible, preferably immediately and in any case no later than 6 months after the date of publication, and 12 months for social sciences and humanities."[152]

Germany amended its Copyright Act in 2013 to give authors of research works created in the course of a research activity that was at least fifty percent publicly funded and published in a periodical collection, a secondary publication right to make the contribution available to the public in the accepted manuscript version for non-commercial purposes upon the

[149] Germany (2013), the Netherlands (2015), Austria (2015), France (2016) and Belgium (2018).

[150] Commission Recommendation 2012/417 of July 17, 2012, on Access to and Preservation of Scientific Information 2012 O.J. (L 194), 39–43 [hereinafter Commission Recommendation 2012/417].

[151] *Id.* at 41.

[152] *Id.*

expiration of twelve months after first publication.[153] In effect, researchers would be able to self-archive the peer-reviewed version of their work in an open repository for public access twelve months after the publisher publishes it in a journal and without having to obtain permission from the publisher, even if they have assigned their copyright to the publisher. The amending section of the Act also provides that any agreement to the contrary between the author and publisher shall be ineffective.[154] The German provision, however, presents the difficulty of determining whether a research activity has been at least fifty percent publicly funded. It is also unclear whether research works by authors employed in a public institution like a university or research institution will be deemed to have been semi-publicly funded given that part of the responsibilities of researchers in these institutions is to engage in research activities and publish the works created in the course of these activities.

In 2015, the Netherlands enacted the Copyright Contract Act[155] which amended the Dutch Copyright Act.[156] It introduced article 25fa which gives the author of a short scientific work, that has been wholly or partly paid for by Dutch public funds, the right to make the work available to the public for free after a reasonable period of time from the first publication of the work.[157] While the Act does not define what a short scientific work is, since it was enacted in response to the EC Recommendation discussed above, short scientific works should mean research works published in periodicals as opposed to monographs. The Act also does not define what reasonable time is but given that it was based on the EC Recommendation, twelve months

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[153] Urheberrechtsgesetz [UrhG] [Copyright Act], Sept. 9, 1965, BGBL I at 1273, as amended Oct. 1, 2013, BGBL I at 3728, § 38(4) (Ger.) [hereinafter Germany Copyright Act].

[154] *Id.*

[155] Wet Auteurscontractenrecht, 30 juni 2015, Stb. 2015, 257 (Amendment of the Copyright Act and Neighboring Rights Act in Connection with the Strengthening of the Position of the Author and the Performer in Agreements Concerning Copyright and Related Rights (Copyright Contract Act)) (Neth.).

[156] Auteurswet, 23 september 1912, Stb. 1912, 308 (Copyright Act) (as amended) (Neth.).

[157] *Id.* at art. 25fa.

should be the longest possible time. As in the German provision, the research author cannot waive this right, whether by contract or any other means.[158] Notably, the Dutch provision avoided specifying a percentage of public funding, and the work of persons employed by a university or research institution that is funded by public authorities is deemed to also have been financed wholly or partly by public funds.[159]

Like Germany and the Netherlands, France, Belgium, and Austria also grant the secondary publication right to research authors in research works that are published in periodicals (i.e., journal articles) with the condition that the published work must be the result of a research that is at least partly publicly funded. France, Belgium, and Austria followed in the line of Germany by requiring that the research activity be at least fifty percent publicly funded. While the other four jurisdictions do not require that the research authors be employed by a research institution to enjoy this right, the Austrian provision limits the grant of this right to authors who are employees of research institutions, thereby excluding independent researchers or other researchers who are not so employed.

It appears that the secondary publication right as designed in all five national laws is tailored towards promoting the self-archiving of research articles rather than publishing in open access journals. As such, except for the Netherlands which specifies no version, the secondary right publication for other countries expressly limits the exercise of the secondary publication right to the peer-reviewed version of the work accepted for publication. While the Belgian provision only refers to the publication of the author's manuscript, it has been suggested that the version of the manuscript referred to is the final accepted peer-reviewed version of the work.[160] Importantly, and

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[158] *Id.* at art. 25h.

[159] *See* The Netherlands House of Representatives of the States General, *Explanatory Statement to the Copyright Contract Act*, OVERHEID, https://zoek.officielebekendmakingen.nl/kst-33308-3.html (last visited Mar. 19, 2024).

[160] Christina Angelopoulos, *Study on EU copyright and related rights and access to and*

also a nod to the fact that the right is granted to facilitate public access to works, no jurisdiction allows the commercial exploitation of the right. Thus, the right can only be exercised to provide free access to the author's manuscript.

In all five jurisdictions, the right can be exercised regardless of any contract assigning the copyright in the research work to the publisher or granting an exclusive or non-exclusive license to the publisher, effectively creating an inalienable right. The right is also nonwaivable in all jurisdictions and as such any agreement that seeks to override or deviate from this right to the detriment of the author is ineffective. The fact that the right is designed to be inalienable and nonwaivable makes the right effective as a tool for empowering authors to share their works with the public since the right cannot be unwittingly contracted away to publishers.

The exercise of the secondary publication right is subject to an embargo period in the five jurisdictions. The work cannot be republished until some time after its first publication by the publisher. In Germany and Austria, the embargo period is twelve months after the first publication.[161] As stated earlier, in the Dutch provision no specific embargo period is stated. Instead, it refers to a reasonable period after the first publication of the work. In France and Belgium, the right can be exercised after a period of six months for research writings in the exact sciences and twelve months for social sciences.[162] Apart from France, which is silent on this point, the other four jurisdictions require that the author cite the first publication when making the

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reuse of scientific publications, including open access – Exceptions and limitations, rights retention strategies and the secondary publication right, Publications Office of the European Union, 2022, 35.

[161] *See* German Copyright Act, *supra* note 153, at § 38(4).

[162] Loi 2016-1321 du 7 octobre 2016 pour une République numérique [Law 2016-1321 of October 7, 2016 on the Digital Republic], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 7, 2016, p. 96, art. 9 (Fr.) (amending France's Intellectual Property Code to grant a secondary publication right to research authors).

work available on the basis of a secondary publication right.

The secondary publication right is an undeniably attractive tool for promoting open access to research publications through self-archiving and could be well designed to empower researchers to disseminate their works widely and promote greater access to research publications. In Part III, I conceptualize what I consider the ideal scope of a secondary publication right, including key elements that should be reflected in the substantive content of any provision(s) defining the right, bearing in mind the core objectives that the right should serve – empowering research authors to disseminate their research publications to the public at the earliest opportunity and facilitating public access to research publications. The proposed scope of the secondary publication right discussed below could also constitute part of a unilateral national design or redesign of a secondary publication right since any international provision in this regard would ultimately lead to national implementation. It is recommended that whether at the national or international level, in conceptualizing a secondary publication right for research authors, the discussion below should be regarded as a useful guide in designing the right.

III. CONCEPTUALIZING THE PROPOSAL FOR A SECONDARY PUBLICATION RIGHT FOR RESEARCH AUTHORS

A. Nature of the Secondary Publication Right

In conceptualizing a secondary publication right, both the nature of the right and the scope of the right must be considered. In terms of the nature of the right, I propose that the secondary publication right be conceived and designed as an author's right rather than a user's right even though the exercise of the right will yield immense gains for users. Designing the secondary publication right as an author's right is important for three main reasons. First, the primary rationale for proposing the rethinking of copyright

in research works is tied to the distinct motivation of research authors for creating research works for publication in journals. Research authors are motivated to create research works to generate impact and for their works to be widely engaged with and cited. These motivations are connected to the widespread dissemination of the authors' works. The lack of a system within copyright law for empowering research authors to widely disseminate their works in the face of blatant exploitation by publishers through contract undermines these motivations. To therefore empower research authors to have greater autonomy in the dissemination of the research knowledge created by them, the right must be an author's right.[163]

Second, branding and designing the secondary publication right as an author's right is strategic for dealing with potential opposition to the right by copyright publishing giants. Copyright in works of authorship is often branded as the author's right. Moreover, the expansion of the rights within the copyright bundle is often pushed for by big corporate publishing companies who argue that it is important to secure the interests of authors in their works and incentivize the subsequent creation of new works by these authors. As such, any strong resistance by publishers to an author's right in the form of the secondary publication right would necessarily put publishers in direct conflict with authors. It will also bring to public light a truth that publishers have sought to suppress, which is that publishers primarily (if not entirely) act in their own interests, and copyright expansion serves primarily (if not solely) the interest of publishers. To the extent that the secondary publication right seeks to grant research authors an additional right rather than limit their rights, an opposition by journal publishers to such a right-increasing act for the benefit of authors would be negatively received by the public. It would further make it clear that publishers support authors' interests

[163] *See* Alina Ng, *The Author's Rights in Literary and Artistic Works*, 9 J. MARSHALL REV. INTELL. PROP. L. 453, 456 (2009) (discussing how exclusive statutory rights granted to authors in literary and artistic creations incentivize "authors to create and publicly disseminate works").

in copyright only to the extent that those interests would serve the profit maximization goal of publishers.

Third, branding the right as an author's right is important for bypassing the powerful and access-limiting three-step test in the Berne Convention[164] and TRIPS Agreement[165] that users' rights in the form of copyright L&Es must pass. The three-step test is a provision that first appeared in the Berne Convention to control the scope of copyright exceptions in national copyright laws.[166] While the test ought to be a tool for balancing the interests of copyright owners and users, it has mostly been construed as a tool for restricting the scope of copyright exceptions and as such, it limits the autonomy of states to develop copyright L&Es to cater to the public interest in access to knowledge.[167] In the Berne Convention, the three-step test was designed as a test for copyright L&Es on the right to reproduction.[168] However, the TRIPS Agreement has expanded the scope of the test to cover copyright L&Es on all exclusive rights within the copyright bundle, including the right of publication. Article 13 of the TRIPS Agreement provides that "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."[169] If the secondary publication right is not a limitation or exception to exclusive rights but an increase in the scope of exclusive rights, then it takes it outside the reach of the three-step test and obviates the need

[164] Berne Convention, *supra* note 135, at art. 9(2).

[165] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994 (as amended on Jan. 23, 2017), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1867 U.N.T.S. 3 [hereinafter TRIPS Agreement].

[166] Berne Convention, *supra* note 135, at art 9(2) ("It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.").

[167] *See* Hugenholtz & Okediji, *supra* note 143, at 17 (discussing how the three-step test is not geared towards protecting the interests of society or the general public).

[168] *See id.* at 16–17.

[169] TRIPS Agreement, *supra* note 165, at art. 13.

to consider its compatibility with this test.

Article 20 of the Berne Convention gives parties the freedom to enter into agreements to increase the scope of rights granted to authors of literary and artistic works and nothing in the Convention suggests that new rights granted to authors must have economic significance for the authors.[170] Copyright law is not solely a market mechanism, it is also a mechanism for protecting the non-market interests of authors of works. In fact, article 6bis of the Berne Convention recognizes two non-economic rights.[171] It provides that "[i]ndependently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[172] The grant of a non-economic right is therefore not new in international copyright law and there is no reason why the secondary publication right should not be viewed as an author's right properly so-called.

It is difficult to see how the secondary publication right may be interpreted as a user right or copyright exception since it does not expand the scope of permitted uses for users under copyright law. The extent to which users can make use of a work that is made publicly available and accessible through the exercise of a secondary publication right still depends on the scope of copyright L&Es allowed under copyright law. Therefore, at most, the right can be seen as a tool for making copyright L&Es more effective since most provisions on L&Es grant use-access rather than copy-access. The exercise of this right would also provide access to a copy of research work to the public that can then be used in line with the scope of user's rights. The fact that the secondary publication right has the potential of enabling

[170] Berne Convention, *supra* note 135, at art. 20.
[171] *Id.* at art. 6bis.
[172] *Id.* at art. 6bis (1).

copyright L&Es to become effective tools for accessing and using research works does not and should not in and of itself change the nature of the right from an author's right into a user's right. Indeed, any right within the copyright bundle can be used by the rightsholder as an instrument for enabling public access to a work rather than an access-restricting instrument. This is why authors of works can rely on their copyright to provide open access as opposed to closed access to their works.

The secondary publication right can only be conceived as a copyright L&E if the copyright is fundamentally a publisher's rather than an author's right, and this is not so. Any right that publishers get under copyright law is a right that first subsists in authors and is then assigned or licensed to publishers. Copyright law does not prescribe rights for publishers of works. It prescribes rights for authors, and this explains why the duration of these rights is determined in connection with the life of the author notwithstanding any transfer of the rights by the author to another. Certainly, in designing the scope of the secondary publication right, the interests of publishers would be considered. However, the mere fact that publishers have an interest in research works is not enough to pull back from or push against making the secondary publication right an author's right rather than a copyright exception that is subject to the three-step test.

Conceiving and designing the secondary publication right as an author's right, however, does not mean that the right cannot be incorporated into or form one of the provisions in an international instrument that primarily contains the L&Es of copyright for educational and research purposes. Given that there is active and ongoing work at WIPO's Standing Committee on Copyright and Related Rights (SCCR)[173] on an international instrument on

[173] The SCCR has been addressing the issue of access to copyrighted works for research and educational purposes since 2004. *See Standing Committee on Copyright and Related Rights (SCCR)*, WIPO, https://www.wipo.int/policy/en/sccr/ (last visited Mar. 20, 2024).

access-enabling provisions for education and research,[174] it is pragmatic and efficient to include the secondary publication right as an agenda item in that proposed instrument. Again, while the instrument that is being conceived at the SCCR is being framed as an instrument on copyright L&Es, at its core, the aim of the instrument and the ongoing work at the SCCR is to enable access to copyrighted works for educational and research purposes.[175] Thus, a provision on the secondary publication right that has the potential to facilitate access to research works globally, is very likely to be seen as in tandem with the aim of the instrument and worthy of inclusion in the instrument. Like the Marrakesh Treaty,[176] which provides mandatory copyright L&Es to facilitate access to published works for visually impaired persons,[177] the proposed instrument can be flexibly titled as a "Treaty to Facilitate Access to Copyrighted Materials for Educational and Research Purposes" rather than narrowly titling the instrument as one on copyright L&Es. Suggesting that the instrument is restricted to provisions on copyright L&Es can limit the mechanism of enabling access to works to provisions that are in the traditional style of L&Es and *disqualify* innovative access-enabling legal tools like the secondary publication right.

B. Scope of the Secondary Publication Right

After having settled the issue of the nature of the secondary publication right and argued that it should be conceived as an author's right, the next focus is on outlining the exact scope of this right. In drawing out the scope of the right, the following must be addressed: the category of authors

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[174] *Limitations and Exceptions*, WIPO, https://www.wipo.int/copyright/en/limitations/ (last visited Mar. 19, 2024).

[175] *Id.*

[176] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled art. 3, Sept. 30, 2016, U.N.T.C. 54134.

[177] *Summary of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (MVT) (2013)*, WIPO, https://www.wipo.int/treaties/en/ip/marrakesh/summary_marrakesh.html (last visited Mar. 20, 2024).

that should enjoy the right; the type of works to which the right should apply; the version of the author's work to which the right should apply; the conditions to be satisfied, if any; whether there should be an embargo period and the length of such a period, if any; and the necessary legal safeguards for the effectiveness of the right.

i. The category of authors and the type of works

The republication right is advocated for authors of research works only, for reasons already discussed earlier.[178] The right should apply to research works published in periodical collections, i.e., journals that publish at least one issue annually. It should be left to the discretion of countries whether this right would also apply to research works published in edited collections. However, the right should not apply to research works published as monographs since researchers earn some, even if very little, royalties from their monographs and arguably have an interest in the commercialization of their copyright in such publications.[179]

Further, it is strongly recommended that the secondary publication right apply to all research works irrespective of the funding status of the research project from which the work resulted. While existing iterations of the secondary publication in domestic legislation apply to research publications that are fully or partly funded by public funds, such restriction is unnecessary, problematic, and not beneficial to society. In the laws of the European countries discussed earlier, the secondary republication rights were limited to publicly funded research works mainly because they were legislative responses to the EC Recommendation for open access to publicly funded works.[180] It is therefore most likely that the legislators did not consider the possibility of extending their legislative intervention beyond the

[178] *See* discussion *supra* Part II.
[179] Shavell, *supra* note 61, at 302.
[180] *See* Commission Recommendation 2012/417, *supra* note 150, at 39.

scope of the works that were the subject of the EC Recommendation.

Limiting the application of the secondary publication right to publicly funded works is unnecessary as the rationale for a distinct copyright regime for research authors within a copyright system that does not currently cater to this interest. Limiting the availability of the secondary publication right would amount to disregarding the similar interests of research authors in works that are not the products of publicly funded research activities. To the extent that researchers are similarly exploited by publishers and disempowered through the current copyright system, such limitation is not reasonably justifiable.

The copyright system was designed on the presumption that the motivation of creators or writers is connected to receiving monetary compensation for their writings through publishing markets,[181] but this is not true of researchers.[182] Since the interest of research authors in the public sharing of their works is the major premise for advocating for this right and this interest is shared by research authors generally, regardless of whether their research writing arises from publicly funded research or not,[183] the grant of the secondary publication right ought not to be limited to publicly funded works. Moreover, the funding status of a research activity or a research work published in a journal does not change the practice of assigning copyright to publishers in exchange for dissemination, nor does it change the reasons for which all researchers write and publish their works. Researchers with public funding from public agencies that have some form of open access or public access policy are more likely to be able to successfully negotiate the

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[181] *See*, Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 787 (2004) (discussing how the introduction of copyright was aimed to drive up financial investment and economic benefit for the creation and distribution of works).

[182] Aileen Fyfe, *What the History of Copyright in Academic Publishing Tells Us About Open Research,* LSE IMPACT BLOG (June 3, 2019), https://blogs.lse.ac.uk/impactofsocialsciences/2019/06/03/what-the-history-of-copyright-in-academic-publishing-tells-us-about-open-research/.

[183] *See id.*

republication of their articles on openly accessible platforms with publishers than researchers who are not bound by such policies. In sum, all researchers regardless of their access or non-access to public funding for their research works have a significant interest in the public dissemination, access, and use of their works and are all affected by the failure of the copyright system to protect this interest.

In addition to the point made above, limiting the application of the secondary publication right to works resulting from publicly funded research activities is also problematic because of the difficulty it presents in determining what constitutes publicly funded research. Ascertaining what publicly funded research entails may not be clear-cut in many situations. Does it refer to a research activity that is conducted in a publicly funded institution or a research activity that is the subject of a specific grant from a government agency? The ambiguity that could arise from limiting the application of this right to works from publicly funded research is unnecessary and can cause uncertainties and chilling effects, including a reluctance to exercise this grant for fear of copyright infringement. While any restriction to publicly funded research is strongly discouraged, if a state still opts for such limitation, the definition of publicly funded research should be broadly defined and should include research carried out by any person who has a paid or unpaid affiliation with a public institution.

Restricting the application of the secondary publication right to works from publicly funded research is not socially beneficial because it limits the scope of works that the public can easily access. There is a public interest in the dissemination of research works and the funding status of research works does not affect the public need for such works or their usefulness to society. Both publicly and non-publicly funded research activities can contribute to human flourishing and as such public access to research works resulting from both should be the goal. It is therefore socially beneficial that the secondary publication right applies to all research works published in journals.

Moreover, avoiding the public funding restriction can give greater impetus to private funders to fund publicly beneficial research activities that can result in the publication of useful research knowledge in journals. Similar to public funders, private funders are increasingly adopting open access policies to facilitate public access to the results of the research that they fund.[184] This is not surprising because it is not the public funding status of a work that determines the social utility of the work, the interest of a researcher in publishing and sharing the work with the public, or even the public interest in the work. It is the nature of the research work itself, detached from the public funding status. Allowing the application of the secondary publication right to research publications generally, irrespective of the public funding status of the researchers involved, will also help other relevant stakeholders in the research ecosystem – like private funders, universities, and research institutions – to realize the benefits of their contributions to research endeavors.

ii. The version of the work

At a minimum, the secondary publication right should be granted for the accepted author's manuscript of a published work, just as in the various domestic legislation that currently recognize the right. An accepted author's manuscript means the final (peer) reviewed version of the work before the editorial formatting made by the publisher for the purpose of dissemination in the journal. In an age of misinformation and disinformation, it is important that this version of the work is what the author is empowered to republish and make accessible on an open platform. This will ensure that the public has access to a version of the work that can be relied upon for going through a quality assurance process which in most cases is in the form of peer-reviewing. Peer-reviewing of journal publications is carried out for free by

[184] Carly Strasser & Eesha Khare, *Estimated Effects of Implementing an Open Access Policy for Grantees at a Private Foundation*, PEERJ, Sept. 26, 2017, at 1.

researchers for journal publishers and editors.[185] Since the labor involved in the peer-review exercise is borne directly by the research community that also has a heightened interest in sharing and making publicly available their accepted author's manuscript, it is reasonable to allow research authors to republish the peer-reviewed version of their works under a secondary publication right. For student-edited journals, like many of the American law journals, there is a similar justification for granting authors of articles in those journals a right to republish their final accepted author's manuscripts. Just like researchers, students on law reviews volunteer their time and labor to review articles, often under the supervision of their professors who are researchers.

The author's accepted manuscript, which should be made the subject of the application of the secondary publication right, is, however, different from the copy-edited version of the work which is the final version of record published by the publisher. The publisher would have put the copy-edited version or version of record into the structural or editorial format in which it will appear in the journal issue, including the paginations. The publisher has the original copyright in the format of the journal due to the creative efforts involved in the selection and arrangement of the articles in the journal.[186] Thus, this version may not be considered as a subject of the secondary publication right. Nevertheless, a draft on the secondary publication right could include a provision that the author would be allowed to republish the copy-edited version if the publisher consents.

iii. The conditions to be satisfied for the exercise of the right and the version of work

One of the important foreseeable consequences of the grant of a secondary publication right to authors is the much-needed public access to

[185] SUBER, *supra* note 9, at 17.
[186] Berne Convention, *supra* note 135, at art. 2(5).

research knowledge. The conditions to be attached to the exercise of this right should also reflect this. It is, therefore, proposed that the right should only be exercisable by republishing the work on an online platform accessible to the public at no cost. This secures the public interest in open access to research works and protects the economic interest of the publisher. In exercising the republication right, the author may be required to include the citation to the original journal publication to ensure that the public is pointed to the original publication for ease of verification and citation.

iv. Embargo period, if any

Any legal provision on the secondary publication right must address the issue of when the right should be exercisable by the author or any person acting on the author's behalf. Should the right be exercisable before the first publication of the work by the publisher or afterward? If it is done afterward, should there be a further embargo on the republication of the work, or should the author be permitted under this right to republish their accepted manuscript immediately after the publisher publishes its copy-edited version of the work?

As the name implies, the secondary publication right is a right that follows the current alienable (primary) publication right within the copyright bundle, which initially belongs to the research author but is often transferred to the research publisher. I propose that the secondary publication right operates as a republication right. Admittedly, the idea of republication is somewhat fictitious as I have proposed that the right be exercisable with respect to the author's accepted manuscript, which is not the same version (in form not in substance) as that published by the publisher in the periodical. However, given the secondary nature of this right and to accommodate the interest of the journal publisher in the primary publication right and the right of first distribution, it is desirable that the law declares the secondary publication right to be exercisable at a time after the first publication of the work by the publisher. Again, in the European countries where the right

exists, it is also subject to the condition that the author exercises it at a time after the first publication by the publisher.

Unlike the current iteration of the right in these European countries, I argue that any law on this right at the international or national level should allow authors to publish their accepted manuscripts in an open online platform immediately after the first publication by the publisher. In effect, no further embargo period should be placed on the exercise of the secondary publication right once the publisher exercises its own right to make the first publication of the work. As noted before, Germany, Austria, Netherlands, France, and Belgium all impose some form of time constraints that prevent an author from exercising a right of republishing an accepted manuscript. Despite the choice of these countries to have some embargo period, the EC Recommendation that was the trigger for the legislative reforms included a preference for immediate public access to the publications.[187]

An immediate republication of the author's accepted manuscript of a research work following the first publication by the publisher is much more desirable in securing the interest of research authors in the widest possible dissemination of their works at the earliest opportunity. The period between the emergence of the final accepted manuscript and the time of first publication of the work by the publisher is a sufficient embargo period. It is unnecessary both in the interests of the author and those of society that a further embargo period be adopted. Allowing an immediate republication of the work can significantly bridge the knowledge/access equity gaps that exist between those who can obtain access to the publisher's version of the work and those who cannot. It ensures that the rest of the public has an equal opportunity to access useful research knowledge at the same time as persons in privileged positions. The interest of research authors in disseminating their works as widely as possible and at the earliest opportunity will not be fully

[187] Commission Recommendation 2012/417, *supra* note 150, at 41.

catered to if the right is subject to a further embargo period that deprives persons whose only chances of having access to research knowledge is tied to the exercise of the right by the author. This set of people, who also include researchers and potential research authors, would have to wait for some time to have access to substantially the same works that their more privileged peers already have access to. While a research work would most likely still be useful after six or twelve months from the time of its first publication, the urgency of the issues covered or addressed through many scientific and other scholarly research publications necessitates favoring a legal tool that allows for the immediate republication of research works for everyone.

In the United States, a federal public access policy exists that mandates recipients of funding from certain federal government agencies to deposit the final accepted manuscripts of research works, resulting from the funded research activity, in an open repository from which the public can access them.[188] Through this policy, in almost a decade, more than eight million scholarly publications have become accessible to the public and over three million people read these articles for free every day.[189] Despite these immense public benefits, it was found that the optional twelve-month embargo on public access to these publications has implications on equitable public access since it limits immediate access to research publications for some members of the public who would rather have immediate access.[190] Following public feedback on the impact of the embargo period, the Office of Science and Technology Policy has now directed federal agencies to remove the twelve-month embargo period in their public access policies so that members of the public can access research works without an embargo,

[188] Memorandum for the Heads of Executive Departments and Agencies, Exec. Off. of the President Off. of Sci. & Tech. Pol'y 1 (Feb. 22, 2013).

[189] Memorandum for the Heads of Executive Departments and Agencies, Exec. Off. of the President Off. of Sci. & Tech. Pol'y 1 (Aug. 25, 2022) [hereinafter Memorandum (2022)].

[190] *Id.* at 2.

i.e., immediately upon their first publication by the publishers.[191]

It is also important that we draw lessons from the COVID-19 pandemic. The voluntary provision of immediate public access to relevant research works by commercial publishers, scientists, and others in the wake of the COVID-19 pandemic yielded immense public benefits. It provided policymakers, scientists, and the public with important information and insights that were necessary to make vital life-saving public health decisions.[192] Although useful works on important lifesaving research activities relating to COVID-19 would remain relevant in understanding the workings of the virus and the necessary lifesaving measures many years after the first publication of the works in toll-access journals, the dire consequences of the pandemic on global health necessitated the widespread dissemination of research works at the earliest possible time. The public needed to have quick access to health-related knowledge necessary to improve the severe challenges to global health posed by COVID-19. Not having this form of open and immediate public access to relevant health research knowledge could have been fatal. The "[i]mmediate public access to COVID-19 research is a powerful case study on the benefits of delivering research results and data rapidly to the people."[193] It is however crucial that important research works be immediately available to the public not only in times of crisis but at every point in time.[194]

It may be tempting to refrain from imposing an embargo on research publications in health sciences only while imposing it on research publications in other areas of study. Imposing an embargo period for research publications in other areas of study is, however, undesirable. Immediate public access to research works is not only necessary to combat health

[191] *Id.* at 1.
[192] *Id.* at 2.
[193] *Id.* at 2.
[194] *See id.* at 3.

challenges, but it is also important to solve other key global challenges like food security, climate change, clean energy, economic challenges, educational inequalities, and other challenges militating against human and sustainable development. Moreover, researchers in all areas of study have an interest in the wide and quick dissemination of their works.

v. Legal safeguards for the effectiveness of the right

For the secondary publication right to be effective as a legal tool for empowering authors to republish their accepted manuscripts on open platforms, certain safeguards must be designed into any legal provision on this right. This is crucial given the possibilities for this right to be overridden and rendered ineffective by publishing contracts. It is recommended that the secondary publication right be inalienable and non-waivable to prevent publishers from taking advantage of the unequal bargaining power against research authors that allows demanding authors to relinquish this right through contract. This also prevents a situation where an author relinquishes the right unwittingly. In effect, notwithstanding the transfer of the copyrights in a work, the secondary publication right will subsist or remain in the author of the work.

Without designating the right as inalienable and non-waivable, the position and power of research authors with respect to their works would very likely not change significantly even with the grant of the right. Within the current copyright framework, research authors are the initial copyright owners in their writings and have the exclusive rights to reproduction, publication, and distribution that are integral to the open publication of their works on the internet. However, the transferability of these rights and the journal publishing model of transferring or exclusively licensing these rights in exchange for (closed) publication are the reasons for the current state of powerlessness that research authors find themselves in. It is therefore only

reasonable to guard against a repetition of this current phenomenon with the secondary publication right. In the European countries where this right exists, it has already been declared as non-waivable.[195]

Although the secondary publication right is essentially an author's right, there is a concomitant public interest function that the exercise of the right serves – free public access to the author's accepted manuscript of a research publication that may only be accessible through a paywall. Given this and the significance of research knowledge to human welfare and flourishing, I propose that any provision(s) on the secondary publication right permit the right to be exercised on behalf of the author if the author dies before the right is exercised. The law can include an authorization for the right to be exercised by any of the author's institution, funder (if any), or family.[196] The possibility of such third-party exercise of the right on behalf of the author in the event of the author's death protects the interest of the author in the dissemination of their work and ensures that the death of an author does not affect public access to the work. Since the right is exercisable in connection to a work that has been made public by the author through publication in a journal, the issue of whether the (deceased) author wishes to make the work publicly available does not arise.

In Part IV, this article argues for the adoption of the secondary publication right for research authors in other nations as an effective way to enable public access to research works. It proposes the adoption of the secondary publication right at the international level to create a minimum scope of the right globally. This makes for a harmonized regime and deals

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[195] *See* Christina Angelopoulos, *Study on Copyright and Scientific Publications: Encouraging Access and Re-use,* KLUWER COPYRIGHT BLOG (Dec. 8, 2022), https://copyrightblog.kluweriplaw.com/2022/12/08/study-on-copyright-and-scientific-publications-encouraging-access-and-re-use/.

[196] This is not the first time such third-party exercise of a right is provided for in international copyright law. The resale right granted to artists, writers and composers under the Article 14ter of Berne Convention is drafted as a right that can be enjoyed by the said creators and after their death, "the persons or institutions authorized by national legislation . . ." Berne Convention, *supra* note 135, at art. 14ter.

with possible geographical differences in the secondary republication right that could be exploited by publishers and undermine the effectiveness of the right as a tool for global access to research works.

IV. THE CASE FOR GLOBAL ADOPTION OF A SECONDARY PUBLICATION RIGHT FOR RESEARCH AUTHORS

Global adoption of the secondary publication right is important to empower researchers everywhere to share their works with interested users across the globe and it also facilitates free access to research generated from different parts of the world. In the subsequent paragraphs, I provide reasons as to why countries all over the globe should embrace and adopt the secondary publication right.

Many countries, especially in the Global North, have expressed the desire to make research publications publicly accessible through the adoption of open access/public access policies, requiring recipients of public research grants to make publications from such funded research publicly accessible within twelve months of the first publication.[197] The United States has even taken a step further with the August 2022 memorandum from the Office of Science and Technology Policy. It requests all U.S. federal agencies with research and development expenditures to update or develop new public access policies that ensure that all scholarly publications resulting from federally funded research are made freely available and publicly accessible without any embargo or delay after publication, no later than December 31, 2025.[198] The publication of the final accepted manuscripts of the articles published in journals is generally accepted as satisfying these government open access policies[199] This is because the final (even if not copy-edited

[197] Reference Open Access policies in many western countries including Canada, US, UK and Australia. *See, e.g.*, *Tri-Agency Open Access Policy on Publications (2015)*, *supra* note 118; WHITE HOUSE OFF. OF SCI. & TECH. POL'Y., REPORT TO THE U.S. CONGRESS ON FINANCING MECHANISMS FOR OPEN ACCESS PUBLISHING OF FEDERALLY FUNDED RESEARCH 5–6 (2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/Open-Access-Publishing-of-Scientific-Research.pdf; *Open Access Policy*, supra note 121.

[198] Memorandum (2022), *supra* note 189, at 1.

[199] *Id.* at 3 n.4. *See* Jeffery Brainard & Jocelyn Kaiser, *White House Requires Immediate*

version) version of the published manuscripts provides members of the public with the same research knowledge expressed in the copy-edited version and thus suffices to provide public access to research results and findings. Also, there is a reasonable reluctance on the part of public funding agencies to pay open access publishing fees, making self-archiving the only pathway to free public access. Yet, there are necessary prerequisites for implementing open access policies that envisage the deposit of accepted author manuscripts of publications in open repositories.

Research authors must either retain the right to republish their work to comply with the open access policies or seek out journals that have self-archiving rules that are consistent with those required in open access policies. This means the researchers must navigate the different publishers' rules on self-archiving or negotiate with publishers. This places a huge burden on researchers which is sometimes difficult to surmount and leads to non-compliance with open access policies. The adoption of a secondary publication right frees authors from the burden of negotiating with publishers and navigating different publishers' rules on self-archiving. It brings certainty regarding whether publishers can self-archive their works and on what terms. More importantly, it eliminates the ambiguity surrounding publisher rules on self-archiving. This can encourage more research authors to self-archive their works. To, therefore, encourage self-archiving and make it easy for authors to navigate this process, there must be an uptake of the secondary publication right around the world. open access mandates and policies are not enough to promote self-archiving if research authors must negotiate with publishers or rely on the varying goodwill of different publishers to be able to share their works with the public. A legislative intervention in the form of a secondary publication right can make open access mandates and policies more viable as access-enabling tools as researchers would have a right to republish their final

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Public Access to All U.S.-Funded Research Papers by 2025, SCIENCE (Aug. 26, 2022, 2:20 PM), https://www.science.org/content/article/white-house-requires-immediate-public-access-all-u-s--funded-research-papers-2025.

accepted manuscripts and would not be subject to the publisher's rules in this regard. Countries cannot adopt open access mandates and policies but not be willing to make the necessary legislative reforms to empower researchers to freely share their publications with the public.

Further, and as discussed previously, the copyright scale is currently tilted against research authors and neither caters to the interest of researchers in publishing their works nor their motivation to create research writing, both of which are tied to the widest possible dissemination of research works. The imbalance in power between research authors and publishers and the unmatching interests of research authors and publishers necessitate creating a special framework for copyright in research works that acknowledges and accommodates these differences. The copyright balance argument is often a balance between the interests of authors and publishers on the one hand and those of users on the other hand.[200] However, in the case of research works, the copyright balance argument is a balance between the interests of publishers on the one hand and the interests of authors and users on the other hand. By adopting a secondary publication right in copyright law, the copyright framework can accommodate these nuanced differences that arise in the context of research works and tilt the scale to become truly balanced in a way by securing the interests of researchers in sharing their works with the public. Research authors should not have to choose between publishing in the most reputable journals in their field and providing public access to their research works. The secondary publication right gives authors the freedom and autonomy to publish in their desired journal, which may be a toll-access journal for which the researcher cannot afford to pay for open access, and the autonomy to share their final accepted manuscript with the public in an open repository.

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[200] 6 JIA WANG, CONCEPTUALIZING COPYRIGHT EXCEPTIONS IN CHINA AND SOUTH AFRICA: A DEVELOPING VIEW FROM THE DEVELOPING COUNTRIES 35–36 (Björn Ahl & Rogier Creemers eds., 2018).

Beyond research authors, there are other important stakeholders' interests in the creation of research works that the secondary publication right would protect. These stakeholders are (1) universities and other academic/research institutions that support research authors financially and also in kind, through the provision of the necessary infrastructure for their research activities; (2) private funders of research activities; (3) governments who fund research activities either through the provision of research grants to researchers or the provision of funds to universities and other academic/research institutions to support research and pay researchers; and (4) the public, who through the payment of taxes enable the government to fund research. These stakeholders bear the brunt of the financial costs of generating research work which provides huge subsidies for publishers since they do not have to purchase research works from researchers nor share profits made from the freely obtained research works with any of these financiers of research. Yet, they are deprived of the full impact that the research activities they fund can generate when publishers charge enormously for individual and institutional access to research and further restrict researchers from sharing their works with the public. As a right that can empower authors to self-archive their works in open repositories, the secondary publication right would help these stakeholders reap their desired benefits of widespread access to and use of research works from the huge investments that they have made in research activities.

Another reason for recommending that countries all over the world adopt the secondary publication right is because of its potential impact on the preservation and enrichment of the public domain of research works. Traditionally, publishers distributed journals in print, and institutions and individuals could purchase and own copies of journal issues. However, since the advent of digital publication and dissemination technology, the medium of scholarly communication and the subscription model for research

publications have changed significantly.[201] Rather than sell copies of journals, publishers now license access to digital copies of content under restrictive terms of access and use.[202] Institutions, including libraries, that are the main subscribers to journal publications do not own copies of the journal articles that they subscribe to and as such do not have their own databases of these publications. They only have access to the copies through the digital databases or platforms of the publishers for as long as they continue to meet the terms of their licensing agreements and pay for access. As such, if a library fails to renew its subscription to the publishers' platform or some of the content on the platform, it will automatically lose access to content that it had previously subscribed to and paid for.[203] This puts libraries in a position where they cannot preserve research publications and guarantee that these publications will be available for free public access at the end of the copyright term. The current distribution model of commercial publishers creates the problem of a single source for collections of research publications since libraries have no such collections over which they have access/use control. Using the power of contracts and the absence of alternate sources for collections of research publications, publishers can extend their control over research publications beyond the term of copyright protection. Resultantly, these works may either never truly enter the public domain, or their availability in the public domain may be delayed for much longer than envisaged under copyright rules. The situation is even direr when one thinks of the fact that all the important research outputs on a particular area of research may be controlled by one or a few commercial publishers, thereby eliminating the chances of finding substitutes. While a secondary publication right would not grant public access to the copy-edited version that publishers distribute, it would make available in the digital commons a version of the

[201] *See* Moscon, *supra* note 5, at 116–17.

[202] *Id. See also* Giorgio Spedicato, *Digital Lending and Public Access to Knowledge*, *in* INTELLECTUAL PROPERTY AND ACCESS TO IM/MATERIAL GOODS 149, 151–53 (Jessica C. Lai & Antoinette Maget Dominicé eds., 2016).

[203] *See* Spedicato, *supra* note 202, at 152.

work that can serve as an almost perfect if not entirely perfect substitute for the version behind a paywall and digital locks. The self-archived final accepted manuscripts of research publications can eventually be collected and indexed into a digital library at the end of the copyright term, thereby ensuring the preservation of research knowledge and the enrichment of the public domain.

Finally, but most importantly, a secondary publication right would serve the public interest in access to research results and publications and promote the end of copyright protection which is the promotion of knowledge production for the benefit of society. By facilitating self-archival of the accepted author's manuscript, persons who need access to research outputs but do not otherwise have access because of the unaffordability of journal access fees and their lack of institutional access, can now also utilize research publications for their own development. The secondary publication right can enable access to research knowledge for the widest possible audience. The presence of more research publications in the digital commons can increase the production of research publications since more researchers can access existing works that can inform the creation of new works. This can further the decolonization of knowledge as researchers all over the world can have opportunities to be aware of the state of research activities in different spheres of knowledge and contribute their voices to ongoing debates or inquiries. We can then begin to move towards having a truly global knowledge common, rather than a Global North knowledge common – which is currently the case – since most research publications emanate from the North.[204]

To facilitate global adoption of the secondary publication right, international harmonization in this area is desirable. In the absence of an international agreement on a secondary republication right or any right at all in the copyright space, countries will simply choose what rights they want to

[204] *See* GLOB. F. FOR HEALTH RSCH., THE 10/90 REPORT ON HEALTH RESEARCH 2003-2004 63 (Sheila Davey ed., 2004).

recognize. In the case of the secondary publication right, the effectiveness of the right as a tool for facilitating widespread dissemination and access to research works becomes significantly reduced when countries unilaterally decide whether to adopt such a right or not. Currently, although the right is recognized in a handful of countries in the EU, that has not translated into global access to the majority of research works that users are interested in and that are essential to solving key research challenges all over the world. This is not surprising since the recognition of the right in those states does not empower authors in most countries where such right is not recognized to disseminate their works for free public access.

Internationalization of the secondary publication right would ensure that it becomes a minimum right accorded to research authors globally, and not just in the few national jurisdictions where the right currently exists. Considering that copyright laws are territorial, an author would not be able to exercise the republication right beyond the country where the right exists and as such will not be able to rely on that right to provide public access to their work in other countries. For example, when a German researcher publishes an article, the researcher would be able to exercise this right to disseminate their work online only within Germany and would have to ensure that the work is not available for free in other countries, thus limiting the scope of users who can benefit from the right. An international agreement in this area, therefore, offers huge benefits for authors seeking to disseminate their works and users seeking to access the wide range of works published in different jurisdictions, benefits that would not necessarily exist if the adoption of the right were left to national discretion.

Closely associated with the above point, is the fact that international harmonization on the secondary publication right offers certainty as to the nature and scope of the right. Where unilateral action is favored over multilateralism, the scope of the right may vary from one country to another, thereby burdening researchers with the need to tailor access towards the

scope of their rights to avoid infringing on the publisher's copyright. Already there are uncertainties in the scope of the republication in EU countries that make it difficult for authors to determine the extent of protection offered to them through the secondary publication right. Differences in national iterations of this right can be resolved through international agreement on the minimum scope of the right to be afforded to authors in all countries. This eliminates uncertainty and the complexity involved in determining whether an author can republish a work in a country and the terms under which such a republication can be made. International harmonization of rules relating to the secondary publication right provides a minimum level of right that states cannot go below and gives certainty to authors in the exercise of their rights. The application of the national treatment principle[205] in international copyright law will ensure that research authors enjoy that right in countries other than the country of origin of the work. Reciprocal conferment of the right on authors in other countries will also obviate the need to geo-block research content and will facilitate access to research knowledge for all.

Further, even though researchers do not discriminate in jurisdictions when transferring their rights to publishers, publishers can use the territorial limitations of copyright law to force publishers to only exercise their secondary publication right to publish their works in jurisdictions where they legally possess such rights. A multilateral response to the adoption of the secondary publication right would make it more possible for researchers to legally possess and exercise the right in multiple jurisdictions.

When a researcher writes a research work, they automatically have copyrights not only in the country where the work was written or published

[205] Berne Convention, *supra* note 135, at art. 5(2). The Berne Convention provides for the national treatment principle. *Id.* Under this principle, works originating from a country within the Berne Union will receive the same level of protection from another Berne Union country as the latter country grants to works of its own nationals. *Id.* The principle of national treatment combined with the automatic grant of copyright without formalities, ensures that once a work is created, it is immediately protected in all countries of the Berne Union.

but also in multiple other countries (all of which are often transferred to the publishers) because of the strong instrument of international harmonization of rights in copyright law that started with the Berne Convention on the Protection of Literary and Artistic Works (Berne Convention). The Berne Convention stipulates minimum rights that must be granted to copyright owners in every country that is a party to the Berne Convention. This has ensured a minimum level of harmonization in the scope of copyright protection in creative works that copyright owners can rely on to enjoy protection across geographical borders. In the same vein, international harmonization on the secondary publication right is important to guarantee the enjoyment of this right for research authors globally.

International agreement on a secondary publication right could be instrumental in countries, mostly developing countries, where there is insufficient capacity to design legislative response measures to copyright issues. An international provision could provide a useful model for such countries that can easily be implemented and transplanted into their national copyright laws. Also, in smaller or developing countries, it is easy for big multinational corporate giants in the copyright industry to lobby their national governments to shut down any reform efforts proposing a secondary publication right in those countries. This is possible even if the developed countries, where these multinational companies are primarily domiciled, recognize the secondary publication right in their own national copyright laws as it is not uncommon for developed countries to oppose proposed access-enabling norms in the laws of developing countries even when such norms are firmly entrenched in their own national laws. An example is the US opposition to recent copyright reform efforts in South Africa to introduce a US-style fair use provision in its national copyright law and some other access-enabling provisions that are similar to those contained in the US Copyright Act.[206] Thus, without an international order to lean on, developing

[206] Laura Kayali, *How the U.S. and European Union Pressured South Africa to Delay*

countries may find it more difficult to adopt a secondary publication right. One of the possible implications of this is that both local and foreign researchers would not be able to exercise such a right in those countries, thereby restricting the widespread dissemination of research knowledge emanating from those countries to users within and outside these countries. It will also restrict widespread access in those countries to important research knowledge emanating from other countries and which are useful in those developing countries.

The global relevance and impact of research works and the fact that a small number of corporations operate globally to control access to most of the published research works also make an international discussion in this area desirable since many countries operating individually to legislate on this right would most likely be facing potential opposition from the same entities. At the international level, countries can jointly address possible opposition from multinational publishing giants, giants that might otherwise be difficult for developing countries acting unilaterally to confront, in case of opposition to the adoption of the right in those countries. The introduction of the grant of a secondary republication right to research authors at the international copyright norm-setting scene could also raise awareness amongst countries as to the availability of a legal tool that can be employed to facilitate access to research.

There is already an active international norm-making within global copyright governance that can be latched upon to achieve multilateral action in the adoption of a secondary publication right. International norm-setting in copyright governance was established by the Berne Convention of 1886, the oldest and most important treaty on the international protection of copyright. The Berne Convention remains in force today, although it has undergone several revisions and amendments, with the latest version being the Paris Act

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Copyright Reform, POLITICO (June 28, 2020, 11:24 PM), https://www.politico.com/news/2020/06/28/copyright-reform-south-africa-344101.

of 1971.[207] There are now 176 parties to the Paris Act of the Berne Convention.[208] Since the establishment of the World Intellectual Property Organization (WIPO) in 1967, the Berne Convention has been administered by the organization. Subsequent international norm-making activities in copyright law have also been organized under the auspices of WIPO. This includes the WIPO Copyright Treaty[209] that introduced new rights for the digital environment and the Marrakesh Treaty. WIPO's status, as the main international organization on international harmonization and norm-setting in copyright law, its ongoing work, and its unique governance structure as a member-driven organization with 193 member states, makes it the ideal forum for facilitating international agreement on the global grant of a secondary publication right to research authors. The choice of an international organization like WIPO is even more important given that an international agreement under the auspices of an organization whose membership reflects only developing countries is unlikely to yield the benefits intended. This is because research authors in developed countries would still face challenges in disseminating their works to users in those countries. The challenge of access to research works and the desirability of research authors to disseminate their works to the public are not limited to the geographical terrain of the Global South.

One of the main motivations for proposing an international agreement on the secondary publication right is the need to have harmony in the scope and nature of the right globally. This is important for the effectiveness of the right as a tool for promoting the widest possible dissemination of and access to research works globally.

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[207] *See* WIPO, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971) 6 (1978).

[208] *WIPO-Administered Treaties*, WIPO, https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=A&act_id=26 (last visited Mar. 20, 2024).

[209] WIPO Copyright Treaty, *supra* note 30.

V. POTENTIAL FOR SUCCESS

In Part V, I discuss first, the potential for the secondary publication right to succeed as a tool for facilitating dissemination and access to research works domestically and globally. Then, I consider the chances of the proposal being incorporated into the corpus of international copyright law. Most of the discussions in the latter section are also relevant to the inclusion of the right in domestic copyright laws, absent any obligation to do so at the international level.

A. Success as a tool for facilitating dissemination and access to research works

The secondary publication right has immense potential as a tool for facilitating dissemination and access to research works. On the dissemination side, the right would empower research authors to publish their works online (without paywalls or similar access restrictions) notwithstanding any publishing agreement transferring their economic rights, including the rights of publication and distribution. Copyrights, contracts, paywalls, and digital locks stand in the way of wide dissemination. The secondary publication right, which eliminates these barriers and grants authors the freedom to disseminate their work through internet networks, will work as a great tool for research dissemination.

In terms of access to research works, because the secondary publication right can be relied on by research authors to make their works publicly available, this will provide an alternative source of access for members of the public. For most people who cannot afford the costs of journal articles and subscriptions and do not have institutional privileges, the version of articles disseminated via the secondary publication right would be accessible to them. In substance, they will have access to the same research outputs that persons accessing the publishers' version on record have access to but without the need to pay for it and almost concurrently.

Certainly, there is the question of the exercise of the right by researchers since without the exercise of the right, there could be no widespread dissemination and access to research works in the way envisioned in this article. The secondary publication right gives authors the right to republish their work if they so wish; it is not an obligation to republish or disseminate. Research authors are not and cannot be compelled by the copyright system to exercise this right. It is, however, hoped that researchers would take advantage of the certainty offered by the grant of the right to realize their interests in research dissemination and impact.

Open or public access policies requiring research authors to self-archive their works by depositing them in an open institutional repository, where they would be publicly accessible, could give authors the necessary push to utilize this right. Universities, research institutions, and funders often have open-access policies that require or encourage researchers to make their published research outputs publicly accessible through deposits in open institutional repositories.[210] To ensure the success of the secondary publication right, important stakeholders like universities, research institutions, and funders (public and private alike) must play a role in ensuring that authors take the necessary steps to exercise the right to disseminate their research outputs. They must do more than have open access policies and propel authors towards providing public access to their works at the earliest possible opportunity offered under the secondary publication right. The availability of a secondary publication right that can be relied on by authors will give universities, research institutions, and funders greater legitimacy to demand that researchers deposit their works in open repositories immediately after publication. This would occur because researchers would not have to go through the hassle of negotiating with publishers nor would they have to allocate some of their research funds to paying publishers for

[210] *See* ROARMAP, https://roarmap.eprints.org/ (last visited Mar. 20, 2024) (an online database which contains several hundred open access policies, including those of universities, research organizations, and academic institutions).

making their research articles open access before they can republish their final accepted manuscripts. Presently, universities, research institutions, and funders provide great financial and non-financial support to researchers in furtherance of their research activities which gives these institutions a material interest in the outputs of the research activities and the potential public impacts of the research.

When combined with effective open or public access policies, the secondary publication right offers immense potential to become a great and effective tool for facilitating dissemination and access to research works to the widest audience possible and at the earliest opportunity.

B. Success as a right recognized under and embedded in international copyright law

An important consideration when a new norm is being proposed at the international level is the chances of success. As earlier discussed, this right is being proposed for negotiation under the auspices of the WIPO. The General Assembly of WIPO Member States is the main decision-making body at WIPO and consists of the 193 member states, almost two-thirds of which are developing countries.[211] Developing countries in the membership WIPO have always expressed interest in the development of norms at the international level that facilitate and increase dissemination and access to knowledge globally.[212] Although it is an author's right, since they can only use the secondary publication right to facilitate access to their works and not to charge users, this proposal will be of great interest to developing countries. Developed countries within WIPO's membership have, on the other hand,

[211] *Member States*, WIPO, https://www.wipo.int/members/en/ (last visited Mar. 20, 2024).

[212] *See* WIPO, *Proposal by African Group for a Draft Work Program on Exceptions and Limitations*, WIPO Doc. SCCR/43/8 (Mar. 17, 2023); WIPO, *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, WIPO Doc. WO/GA/31/12 (Sept. 24, 2004).

pushed for norms that promote the interests of creators, by increasing the scope of rights and protection that WIPO member states are obligated to offer in their domestic copyright laws.[213] However, when domestic policies in developed countries are considered, one would realize that in contrast to other types of content protected by copyright law, there is a huge interest in the development of policies that are centered around facilitating widespread dissemination and access to research works.[214] This suggests that there is an alignment between the interests of developing and developed countries in public access to research works. This is particularly because the secondary publication right works both as a creator's right and as a public access mechanism. This alignment provides a strong footing for a proposal on the inclusion of the secondary publication right as one of the minimum rights of creators within international copyright law to be favorably considered by both sides.

In the context of publicly funded research works, many developed countries already either have laws or policies that seek to promote and facilitate the republication of research works on publicly accessible platforms.[215] When one considers the rationale of these policies and laws focused on open access to publicly funded research – that the public contributed financially to the research's development – one would be able to draw parallels between this and the proposal for a secondary publication right in both publicly and non-publicly funded research. At the heart of the rationale of these policies and laws is the idea that the interests of persons (in this case, the public) who aid in the development of research works are unprotected. The main justification for the grant of a secondary publication

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[213] *See* Carolyn Deere Birkbeck, *WIPO's Development Agenda and the Push for Development-Oriented Capacity Building on Intellectual Property: How Poor Governance, Weak Management, and Inconsistent Demand Hindered Progress*, 17 (Glob. Econ. Governance Programme, Working Paper No. 105, 2016); Musungu, *supra* note 24, at 7–9.

[214] *See e.g.*, Memorandum (2022), *supra* note 189; *Tri-Agency Open Access Policy on Publications (2015)*, *supra* note 118; *Open Access Policy*, *supra* note 120; *Open Access Policy*, *supra* note 121.

[215] *Id.*

right, as put forward in this work, is premised on the fact that the interests of the creators of research works are not being accommodated within the copyright system. Common to both is the notion that key interests are left unprotected by the copyright system and we need mechanisms to remedy this. Therefore, the secondary publication right will protect the interests of research authors and the public, two categories of people that are instrumental to the creation of research works (irrespective of the funding status of the research activity).

One of the main justifications for copyright protection is that it provides an incentive to create.[216] If the incentive or motivation for research authors to create works is tied to public dissemination, then they should be incentivized (like any other category of authors) through the framework of copyright protection. Most copyright reforms that have increased the scope of proprietary rights have been argued as necessary for incentivizing creative activity.[217] Since research authors are the creators of research publications and copyrights are intended to benefit creators, there should be no significant challenge against granting a secondary publication right to research authors. This is especially so given that their motivation to write is closely tied to the widespread dissemination of their works and they can only function as creators through access to the same category of works made by their peers. To push strongly against the secondary publication right is to agree to what many scholars have argued is the case with the copyright system: that it is a facade to protect the pecuniary interests of publishers (who are usually the owners of copyright in research publications) rather than the interests of authors.[218]

The secondary publication right is cast as an author's right and not a

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[216] William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. OF LEGAL STUD. 325, 325–28 (1989); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1539–40 *(*2005).

[217] Kreutzer, *supra* note 92, at 115.

[218] *Id.*; BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 8–9 (1967).

user's right, even though users and authors have similar interests in this right. This framing is important both at the domestic and international levels as countries and other stakeholders who often push for an increase in authors' rights within the copyright system would have no leg to stand on should they oppose this right. The rise in the use of the proprietary model to facilitate access to research (through open licenses) is partly premised on the fact that reforms focusing on users' rights (in the form of copyright L&Es) often face tough opposition when compared to reforms that seek to widen the scope of exclusive rights. This explains why there is little reform within the international copyright system regarding the expansion of users' rights and freedoms, whereas there are several far-reaching and successful reforms that have expanded proprietary rights. Being an author's first right via copyright law, it should be difficult, politically, and strategically, for governments and even publishers to argue against the secondary publication right whether at the domestic or international level.

Further, the secondary publication right of an author is not likely to conflict with any of the existing norms within the international copyright system, especially the three-step test.[219] The three-step test is only to be applied where copyright L&Es are to be devised. Article 20 of the Berne Convention also gives member states "the right to enter into special agreements amongst themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention."[220] Any international agreement concerning secondary publication right will grant authors of research works an additional right. Nothing in the Berne Convention suggests that new rights

[219] The three-step test is a term used for legal provisions in international copyright instruments that define the manner in which states may design L&Es in domestic copyright laws. *See* Berne Convention, *supra* note 135, at art. 9(2); TRIPS Agreement, *supra* note 165, at art. 13 (The three-step test in the TRIPS Agreement provides that "[m]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.").

[220] Berne Convention, *sup*ra note 135, at art. 20.

given to copyright owners must be compensable, i.e., a right that authors can monetize. Indeed, the Berne Convention recognizes other non-compensable, inalienable rights for authors.[221] Further, the idea of conferring a special right on a category of creators and not on others is not new within the framework of international copyright law. Article 14ter of the Berne Convention grants a *droit de suite* (resale right) in original works of art and original manuscripts of writers and composers.[222] Just like the proposed secondary publication right, the resale right is inalienable regardless of any assignment of the copyrights in the work and can be exercised by persons or institutions authorized by national legislation after the death of the author.

Given the financial interests of publishers in maintaining a monopoly of control over access to research works, the issue of publishers' interest is bound to arise both at the international and domestic levels. At least one author has argued that the grant of a secondary publication right to research authors may lead to journal publishers moving increasingly or exclusively towards an author-pays business model which will not be in the best interest of authors.[223] However, this is unlikely to happen. The secondary publication right as conceived in this work is not an economic right as it is not rent-seeking like other exclusive rights within the copyright framework. It is akin to a moral right. It cannot be used for commercial purposes, and as such, the exercise of the right will not lead to economic competition between authors and publishers. Also, the secondary publication right, as proposed in this work, does not involve the dissemination of the copy-edited version of the work (version of record) that the publisher publishes. Hence to the extent that

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[221] *See Id.* at art. 6bis(1) ("Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.").

[222] *Id.* at art. 14ter(1) ("The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.").

[223] Dirk Visser, *The Open Access Provision in Dutch Copyright Contract Law*, 10 J. INTELL. PROP. L. & PRAC. 872, 872 (2015).

it does not do that, institutions that are the major customers of journal publishing companies will not stop journal subscriptions. The secondary publication right is therefore unlikely to affect the commercial market for research works. The right should be a tool for providing an equal opportunity for access to research works for persons who cannot obtain access through the institutional channels that patronize the commercial market for research works. These are people who, absent this right, have no viable alternative for obtaining access to research works and are unable to pay directly for access themselves. Furthermore, it is becoming an industry practice for journal publishers to allow some form of self-archiving in open repositories by authors.[224] In effect, what a secondary publication right does is to standardize this practice by providing authors with certainty as to whether they can self-archive their work in an open repository, what version can be self-archived, and when the self-archival can take place.

A proposal for the grant of a secondary publication right to authors will most certainly be supported by both authors and users' groups since both have a shared interest in the widespread dissemination of research works at the earliest opportunity. There are non-government and intergovernmental organizations,[225] accredited as observers at WIPO[226] and are champions of access to knowledge, that will support this proposal at WIPO and push for its materialization. It is important to state that the secondary publication right should also receive the support of educational and research institutions and funders who financially support research activities through salaries and grants. This is because it will facilitate the dissemination of the research

[224] MARC SCHEUFEN, COPYRIGHT VERSUS OPEN ACCESS: ON THE ORGANISATION AND INTERNATIONAL POLITICAL ECONOMY OF ACCESS TO SCIENTIFIC KNOWLEDGE 85 (2014). *See e.g.*, *Author Self-Archiving Policy*, OXFORD ACAD., https://academic.oup.com/pages/self_archiving_policy_b (last visited Mar. 20, 2024).

[225] For example, ASEAN Intellectual Property Association, European Digital Rights, African Intellectual Property Organization, Chamber of Commerce of the United States of America, and Food and Agriculture Organization of the United Nations.

[226] *See* WIPO, *WIPO Observer*, WIPO, https://www.wipo.int/about-wipo/en/observers/ (last visited Mar. 20, 2024).

findings and increase the impact of the works that they finance. Scientific and other scholarly research is often sponsored "to promote the creation and dissemination of new ideas and knowledge for the public benefit" and "this mission is only half-complete if the work is not made as widely available and as useful to society as possible."[227] It is therefore not surprising that funders are increasingly mandating researchers to provide open access to research publications arising from funded research projects.[228] This lends credence to the fact that educational and research institutions, funding agencies and governments have incentives to support public access to research knowledge through granting a secondary publication right for authors. By allowing members of the public freely to access the knowledge embedded in works and benefit therefrom, the secondary publication right will help these institutions to realize some of the objectives behind funding the research works.

Overall, a proposal for the grant and recognition of a secondary publication right for research authors within the framework of international copyright law is more likely to succeed than fail. This applies to any similar proposal for the inclusion of the right in domestic copyright laws, absent any international obligation.

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[227] *Bethesda Statement on Open Access Publishing*, *supra* note 52.

[228] For example, in September 2018, a group of 11 research funders called "cOAlition S" (now made up of 26 funders) declared that from 2021, they will require funded researchers to publish their findings in Open Access journals, on Open Access platforms or make them available on open access repositories without embargo (and preferably under a CC BY license). *Principles and Implementation*, PLAN S, https://www.coalition-s.org/addendum-to-the-coalition-s-guidance-on-the-implementation-of-plan-s/principles-and-implementation/ (last visited Mar. 20, 2024). The funders include the Research Council of Norway, UK Research and Innovation, Welcome Trust, Howard Hughes Medical Institute, and Bill and Melinda Gates Foundation. *Organisations Endorsing Plan S and Working Jointly on its Implementation*, Plan S, https://www.coalition-s.org/organisations/ (last visited Mar. 20, 2024). Public research funding agencies like the National Institutes for Health (NIH), European Research Council (ERC), UK Research and Innovation (UKRI), and Australian Research Council (ARC) have adopted Open Access policies that involve depositing publications arising from funded research projects in open institutional repositories.

CONCLUSION

The unequal bargaining power between research authors and publishers of their research works has resulted in the current situation where authors easily lose the control rights under copyright law over their works to publishers. Research authors are often put in a position of powerlessness or extremely limited power over the dissemination of their works to members of the public. This problem exists despite the significant authors' interest in wide dissemination and public access to their works, including for their career advancement and making meaningful contributions to the knowledge in a given area. To ensure that research authors can retain the right necessary to exercise control over the dissemination of their work and in the shared interests of the public and other important stakeholders of research activities, this article presented a proposal for the grant of a secondary publication right to research authors. The secondary publication right was conceived as an inalienable and non-waivable right of research authors to republish the final accepted manuscript of their journal article and make it available to the public at no cost, on a publicly accessible online platform immediately after the first publication of the article by the journal publisher.

Empowering research authors to republish their accepted manuscripts in this way would give greater visibility to the works of research authors and promote the social impact of their works. It would also lower, if not eliminate, the cost-related barriers to access to research knowledge globally, thereby promoting equitable public access to research works and generally advancing human development in important areas, such as health, education, food security, and climate change and biodiversity. The proposed secondary publication right accordingly represents a viable tool for fostering the dissemination of research works to the widest possible audience, and at the earliest possible opportunity. It could also facilitate broad and expeditious access to research works, if well-designed and widely adopted globally. This is why my article made the case for the recognition and inclusion of this right within the framework of international copyright law.

To be sure, the grant of a secondary publication right in itself would not automatically lead to an exercise of the right by research authors. However, given the significant personal interests of research authors that would be served by the wide dissemination of their works, in this fashion, researchers are more likely to rely on this right to publish their accepted author's manuscripts online. Moreover, it is expected that other stakeholders in research works (for example, universities and other academic/research institutions as well as public and private funders) – who also have significant interest in the wide dissemination of and public access to the works – would develop the necessary measures required to promote the exercise of this right by research authors over time.