

## **Legal and policy implications of licenses between LIS open access journal publishers and authors:**

**A qualitative case study**

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**Abstract:** “Open access” (“OA”) refers to research placed online free from all price barriers and from most permission barriers (Suber, 2015). OA may apply to research outputs published traditionally, such as books (Schwartz, 2012) and articles in academic journals (Suber, 2015), and non-traditionally, such as student dissertations and theses (Schöpfel & Prost). The lack of legal barriers is grounded in and given effect through the law of copyright and contract, and the submission of content by authors is often executed through a publication agreement. This paper studies the contract aspects of OA and the open publishing movement in library and information science (“LIS”) scholarly communication. To explore this phenomenon, it undertakes a case study of the publication agreements of five OA LIS journals. The sample consists of a brand-new open journal with an agreement drafted by copyright librarians (journal 1) and top-ranked LIS journals that converted to OA (journals 2 through 5) (Scimago, 2017). With a descriptive data analysis based on that in Lipinski and Copeland (2015; 2013) and Lipinski (2013; 2012), the case study investigates the similarities and differences in the agreements used by the sampled OA LIS journals. The study builds on the best practices from the Harvard Open Access Project (Shieber & Suber, 2016; 2013). It recommends best practices for the drafting and content of OA LIS publication agreements.

**Keywords:** information policy, law, open access, scholarly communication, library science, information science, LIS, best practice

### **1. Introduction and Research Problem**

Open access (“OA”) refers to research placed online free from all price barriers (e.g., subscription, licensing fees, and pay-per-view fees) and from most permission barriers (e.g., copyright and licensing restrictions) (Suber, 2015). OA may apply to research published traditionally, such as books (Schwartz, 2012) and articles in academic journals (Suber, 2015), and non-traditionally,

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such as student dissertations and theses (Schöpfel & Prost). In particular, OA journals are those scholarly journals available to readers online “without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself” (Chan et al., 2002; see Suber, 2015). Thus, OA allows unfettered access to scholarship and promotes open scholarly communication (see Eysenbach, 2006). The lack of legal barriers is grounded in and given effect through the law of copyright and contract, and the submission of content by authors is often executed through a publication agreement.

As of early April 2017, the Directory of Open Access Journals counted some 9,362 journals from 129 countries in its database of open scholarship offering almost 2.5 million articles (DOAJ, 2017). This paper studies the contract aspects of the OA movement in library and information science (“LIS”) scholarly communication through a case study of the agreements of five OA LIS journals. Using a descriptive data analysis based on Lipinski and Copeland (2015; 2013) and Lipinski (2014; 2012), it compares and contrasts the terms of the agreements will reveal implications for information policy and provide practical guidance regarding best practices for drafting balanced publication agreements.

## **2. Literature Review**

### **2.1. Introduction to Open Access**

As Margaret (2016) and Bohannon (2013) detail, backlash against the traditional publishing paradigm effected a shift to OA publishing. In 2002, the Budapest Open Access Initiative (“BOAI”), sponsored by the Open Society Institute (now the Open Society Foundations), coined the term “open access” (Chan et al., 2002; see Ocholla & Ocholla, 2016; Rizor & Holley, 2014; Harnad, 2011). Among the many factors that inspired the OA movement was the continuously increasing prices of journal and database subscriptions (Dawson & Yang, 2016; Nguyen, 2008). The OA movement promotes unencumbered access to scholarship by promoting open scholarly communication (Eysenbach, 2006) and creating a comprehensive, efficient system for disseminating research findings (Margaret, 2016).

### **2.2. Types of Open Access Publishing**

OA publishing takes one of two forms, gold or green (Dawson & Yang, 2016; Suber, 2015; Clobridge, 2014; Neugebauer & Murray, 2013; Willinsky, 2010; Harnad et al., 2008). Gold OA refers to OA publishing by the *publishers* (Harnad, 2011). Authors must often pay article processing charges to publish their works openly without the traditional publishing paywall of subscription or licensing fees (Dawson & Yang, 2016; Harnad et al., 2008; Suber, 2005). The pressure to “publish or perish” can incentivize authors to submit work to fraudulent journals (Margaret, 2016). Predatory journals and publishers make it difficult for authors to determine their credibility (Al-Khatib, 2016; Dawson & Yang, 2016). Further, works published under Gold OA lacking proper peer review raise concerns about damage to authors’ academic reputations and the increased likelihood of article theft or plagiarism (Yang & Li, 2015).

Green OA refers to OA self-archiving by the *authors* (Harnad, 2011; Harnad et al., 2008). Green OA can avoid the above concerns with Gold OA because works are peer reviewed and authors have the publisher's permission to place them in OA repositories or on authors' websites (Dawson & Yang, 2016; Suber, 2005). According to Harnad (2011), "the fastest and surest road to OA is the green road of OA self-archiving" (p. 88). Because Green OA rests in the hands of authors and can be mandated, it more directly benefits research community interests, unlike Gold OA, which rests in the hands of the corporate publishers (Harnad, 2011; Harnad et al., 2008).

### **2.3. Open Access Publishing, Copyright, and Best Practices**

As Suber (2005; 2002) explains, OA-published works do not inherently infringe United States copyright law because their legal basis comes from the voluntary consent of newer works' copyright holders or from the expiration of older works' copyright. For such older works in the public domain, there is no risk of copyright infringement and no consent from the copyright holder is needed. One way for copyright holders to voluntarily consent to OA of newer works is via a Creative Commons license (Suber, 2005; 2002). Author consent in this case covers the "unrestricted reading, downloading, copying, sharing, storing, printing, searching, linking, and crawling of the full-text of the work" – essentially, "all the uses required by legitimate scholarship" (Suber, 2005).

The LIS literature demonstrates some treatment of best practices for OA publication agreements, particularly in law librarianship (see, e.g., Crews, 2016; Shieber & Suber, 2016; Shieber & Suber, 2016; Juan, 2015; Keele, 2010; Baker, 2010; Widener, 2010). Crews (2016), a copyright lawyer and member of the *Journal of Copyright in Education and Librarianship* board, recently wrote about the principles of the brand-new journal's agreement. Every journal (academic, scholarly, or professional) should have authors sign an agreement that considers facets of the relationship between copyright and scholarly works, such as ownership, distribution, and fair use (p. 2).

The 2008 policy of the Harvard University Faculty of Arts and Sciences requires authors to deposit their works in OA repositories and grant non-exclusive copyright licenses to Harvard (Priest, 2012). Today, the Harvard Open Access Project guide *Good Practices for University Open-Access Policies*, edited by Stuart Shieber and Peter Suber (2017), provides the gold standard for OA best practices, ranging from policy drafting, adoption, and implementation to setting up a repository. While the LIS literature reflects attention to developing OA peer-reviewed journals (Solomon, 2008) or to OA best practices for agreements in areas like law and science (Baker, 2013; Keele, 2010; Widener, 2010), there is a gap regarding their application specifically OA LIS journal agreements.

### 3. Research Design and Method

Case studies are a useful research design because examining and understanding a distinct phenomenon may illustrate a more general problem (Flick, 2014; Creswell, 2013). Here, analyzing five publications will reveal the implications for information policy and best practices for the drafting or amendment of agreements in other OA LIS journals. The research team consulted the Directory of Open Access Journals and Scimago to find top-ranked journals that are OA and connected to the LIS domain.

Journal	Publisher and Country	Scimago LIS Rank (out of 209)	Scimago LIS OA Rank (out of 40)
<i>Journal of Copyright Education and Librarianship</i>	University of Colorado at Colorado Springs (U.S.A.)	N/A	N/A
<i>College and Research Libraries Journal</i>	Association of College and Research Libraries (U.S.A.)	3	1
<i>Library and Information Science Research</i>	Elsevier (U.K.)	6	3
<i>Information Technology and Libraries</i>	Library & Information Technology Association (U.S.A.)	20	4
<i>Journal of the Medical Library Association</i>	University Library System, University of Pittsburgh (U.S.A.)	38	6

**Table 1. Sample of open access LIS journals**

*JCEL* is a brand-new OA LIS scholarly journal with an agreement drafted by copyright librarians. The other journals converted to OA and rank in the top fifty LIS scholarly journals in Scimago Lab's Journal Rank (Scimago, 2017).

### 4. Data Collection, Analysis, and Findings

All agreements in the sample were available online. To study the impact of agreements on LIS scholarly communication, the research team investigated the similarities and differences in the agreements used by the sampled journals using a descriptive data analysis based on Lipinski and Copeland (2015; 2013) and Lipinski (2014; 2012). A detailed, clause-by-clause analysis of the agreements is available from the research team. The various terms of the agreements were reviewed in detail and deconstructed in terms of legal effect to

present a descriptive overview of this contract aspect of OA publishing. As in Lipinski and Copeland (2015), the study compared specific terms and conditions of the agreements in order to identify problematic provisions.

<b>Variable/Best Practice</b>	<b>LISR</b>	<b>JCEL</b>	<b>CRLJ</b>	<b>ITL</b>	<b>JMLA</b>
<b>Formation &amp; Contract</b>					
Agreement, Assent, Consideration.	Implied? Entitled: License Agreement.	Yes. <input type="checkbox"/> 1 (the following is an agreement <sup>1</sup> ).	Yes. <input type="checkbox"/> 1 (“full power to enter into this agreement <sup>1</sup> ”).	No. Agreement is to the “terms of this Copyright Notice” alone.	Implied? Entitled JMLA Copyright License Agreement.
	Signature required.	No signature line.	Signature line labeled “AUTHOR”.	No signature; checkbox on webpage.	Signature required.
	No specific mention of consideration.	Specific mention of consideration.	Specific mention of consideration.	No specific mention of consideration.	No specific mention of consideration.
Integration provision.	Yes.	Yes. <input type="checkbox"/> 6.	No.	No.	No.
<b>Publisher Rights</b>					
Right granted to publisher.	Exclusive .	Non-exclusive . <input type="checkbox"/> 4.2.1.	Non-exclusive . <input type="checkbox"/> 1.	Non-exclusive	Exclusive . Also non-exclusive license to “publish, print, copy...”
Publisher ability to sub-license to secondary publishers and aggregators (Widener)	No.	Yes. <input type="checkbox"/> 1.3.	No.	No.	Yes.

Right to use author name: publications and promotions.	No.	No.	Yes. <input type="checkbox"/> 1.	No.	No.
Publisher recognition, citation to first publication (Widender)	Yes: Implied if author retains copyright	Yes. <input type="checkbox"/> 2.3.	Yes. <input type="checkbox"/> 3.	Yes.	Yes, when author "re-publishes"
<b>Publication</b>					
Not under review elsewhere.	Yes.	No.	No.	Yes.	No.
First publication. (Keele, Widener)	Yes.	Yes. <input type="checkbox"/> 2.1.	Yes. <input type="checkbox"/> 3 ("in print form") and <input type="checkbox"/> 4(c).	Yes. Online posting encouraged.	Yes.
Embargo period, non-exclusive afterwards. (Keele, Widener)	No.	Yes. <input type="checkbox"/> 2.2.	No. Implied prohibited by <input type="checkbox"/> 5, reuse is licensed by either CC or another licensing vehicle.	No.	No.
<b>Author Rights</b>					
Author retains copyright.	Yes.	Yes. <input type="checkbox"/> 4.1.	Yes. <input type="checkbox"/> 2. Implied by <input type="checkbox"/> 5.	Yes.	Yes, and per statement in each issue.
Self-archiving (Keele)	Yes: Implied if author retains copyright	Yes. <input type="checkbox"/> 4.2.2.	Yes: Implied if author retains copyright	Yes.	Yes: Implied if author retains copyright
Ability to deposit in open	Yes: Implied if	Yes. <input type="checkbox"/> 4.2.2.	Yes: Implied if	Yes.	Yes: Implied if

educational sources or open archival repository (Centivany, Widener)	author retains copyright		author retains copyright		author retains copyright
Reproduce and distribute teaching or research.	Yes: Implied if author retains copyright	Yes. <input type="checkbox"/> 4.2.1 (right to distribute). <input type="checkbox"/> 4.2.2 (post on departmental page).	Yes: Implied if author retains copyright	Yes: Implied if author retains copyright	Yes: Implied if author retains copyright
Reprint in other works (treatise, as a chapter in a book) (Widener)	Yes: Implied if author retains copyright	Yes. <input type="checkbox"/> 4.2.2.	Yes: Implied if author retains copyright	Yes: Implied if author retains copyright	Yes: Implied if author retains copyright
Author ability to rewrite and revise (Widener)	Yes. Also, implied if author retains copyright	Yes. <input type="checkbox"/> 4.2.3.	Yes: Implied if author retains copyright	Yes: Implied if author retains copyright	Yes: Implied if author retains copyright
<b>Rights Clearances</b>					
Joint author: notification of joint author or authority to convey	Yes.	Yes. <input type="checkbox"/> 5.1. Required under warranty.	Yes. Implied in <input type="checkbox"/> 4(a). <input type="checkbox"/> 5. Required under warranty.	No.	Yes, implied. Required under warranty.
Excerpts permission and credited sources.	Yes.	Yes. <input type="checkbox"/> 6.	No.	No.	No.
Institutional policy restricts author's rights, waiver obtained.	Yes.	No.	No.	No.	No.
Trade sanction proviso.	Yes.	No.	No.	No.	No.

Creative Commons License.	Yes. CC-BY-NC-ND or CC-BY.	Yes. <input type="checkbox"/> <input type="checkbox"/> 4.3 and 4.4. CC-BY.	Yes. <input type="checkbox"/> 5. CC-BY-NC.	Yes. CC-BY.	No.
<b>Risk Shifting</b>					
Warranty	Yes (absolute)	Yes (Best Knowledge). <input type="checkbox"/> <input type="checkbox"/> 5.4 and 5.5.	Yes (absolute) <input type="checkbox"/> <input type="checkbox"/> 4(b) and (c).	No.	Yes (absolute)
Indemnification.	No.	Yes. <input type="checkbox"/> 5.6.	No.	No.	Yes.

**Table 2. Variables and best practices for publication agreements**

The provisions fall into several areas: formation and contractual particulars, publisher rights, publication requirements, author rights, rights clearances, and risk shifting. No agreement reviewed contains all the provisions. Collectively, the agreements represent the range of provisions that could be included, either by new OA journals or by future versions of the journals' existing agreements. This analysis provided insights into OA policy best practices and a checklist of considerations, presented in more detail in the following section.

## 5. Discussion and Recommendations

*Formation and contractual provisions* in any publication agreement should include a clear indication that the agreement is a contract or license. Three journals (*LISR*, *CRLJ*, and *JMLA*) imply this through their agreement titles, which is problematic: the meaning and effect of an agreement is determined by the substance of its actual terms, not by its title or headings (*Ott v. All-Star Ins. Corp.*, 1981; *First Securities Co. v. Storey*, 1935). Only *JCEL* indicates that "this is an agreement." *ITL* does not include the word "agreement," but provides that "authors agree to the terms of this Copyright Notice" alone and not to the entire agreement. There should also be an indication that the contractual requirement of adequate *consideration* is satisfied, made only by *JMLA* and *CRLJ*: "In consideration of the Publisher's agreement to publish the Work."

Providing a clear mechanism of *assent to the agreement* is preferred, fulfilled by a signature line or a click-to-agree mechanism that indicates that authors have read the terms and agree to them. Two journals (*LISR* and *JMLA*) explicitly require a signature. *CRLJ* appears to require one, as there is a line for the author's name at the top of the agreement and lines appear at the end for "AUTHOR" and "date." The assumption is that the second "AUTHOR" line is not redundant but requires another signature. *ITL* appears to offer a checkbox to mark, but, as noted above, the "check-to-agree" refers to "terms of this Copyright Notice" alone and not to the entire agreement. It is also not clear that

checking the box equates to assent, as in a true click-to-agree agreement. Only *LISR* and *JCEL* include an *integration clause*, a common part of contract drafting that attempts to “codify” the terms of the contract: “[T]he parol evidence rule, which plays such an important role in determining the existence and meaning of contracts, is based on the assumption that where a written memorial of the transaction is made, its terms, and not the subjective intent of the parties, will govern” (Lord, 2008; *Sweetwater Investors, LLC v. Sweetwater Apartments Loan, LLC*, 2011).

In all of the agreements reviewed, each publisher required a number of rights. While only two (*LISR* and *JMLA*) require authors to grant *exclusive rights*, all required authors to indicate *first publication* in their journal when republishing the work elsewhere, which Widener (2010) recommends. Only *JCEL* required the *right to sublicense* to other publishers, which Widener (2010) also recommends. *CRLJ* alone required the *right to use the authors’ names* in promotional materials.

Despite the comment by Keele (2010) that “most authors submit manuscripts to multiple journals at once [and] ... may have competing publication offers” (p. 277), two journals (*LISR* and *ITL*) require that the article *not be under review elsewhere* at the time of submission. Other agreement provisions relate to the *circumstances of publication* and to the OA movement as a *repository*. Every journal requires that *first publication* must occur therein, which Keele (2010) and Widener (2010) recommend. *CRLJ* requires that first publication apply “in print form” alone. Oddly, *ITL* indicates that authors “are permitted and encouraged to post their work online ... prior to and during the submission process, as it can lead to productive exchanges.” Copyright case law, however, indicates that posting content online or in an online repository is a publication (*Getaped.com v. Cangemi*, 2002), and this encouragement also contradicts the requirement of first publication. While all journals in the sample allow republication or posting elsewhere, only *JCEL* requires a one-year *embargo on subsequent republication* of the work “in any journal which is substantially similar to” it. Keele (2010) and Widener (2010) recommend the use of an embargo period.

As expected, a number of provisions govern *author’s rights*. Under each agreement sampled, *authors retain copyright in the work*. For *LISR* and *JMLA*, the provisions more precisely indicate what rights authors retained and did not give away. In *CRLJ*, where only a non-exclusive right is granted to the publisher, *others’ permission to reuse the work* rests with authors: “Anyone wishing to reuse the Work must contact the Author directly to negotiate permission.” Regardless of whether exclusive or non-exclusive rights are involved, each journal allows *self-archiving by authors*, as Keele (2010) recommends. *JCEL* and *ITL* also allow authors to deposit the work in an *OA repository*, which Centivany (2011) and Widener (2010) endorse, and the right of deposit is implied in the remaining three journals (*LISR*, *CRLJ*, and *JMLA*)

based upon authors' retention of copyright. *JCEL* specifies that authors also retain the right to *reproduce and distribute the work in teaching or research*, also implied for the remaining journals based upon authors' retention of copyright. Likewise, *JCEL* allows authors to reprint the work in another publication, such as a treatise or book chapter, as well as to revise and rewrite the work (i.e., derivative works), all rights that Widener (2010) endorses.

Several provisions relate to *right clearances*. *LISR* and *JCEL* explicitly require that authors have the authority to *convey various publication rights* to the publisher, especially for possible joint authors (*JCEL* makes it one of the warranties that authors must make). *CRLJ* and *JMLA* imply this requirement by requiring that authors possess "full authority to enter into this agreement," and *JCEL*, *CRLJ*, and *JMLA* require authors to warrant (i.e., make a legal promise) that this is the case. A *signatory agent* must have the authority to bind the principal because "a principal will be bound by a contract entered into by the principal's agent on his behalf only if the agent had authority to bind him" (*Guideone Insurance Co. v. U.S. Water Systems Inc.*, 2011, p. 1241; *Empresas Electronics Walser, Inc. v. U.S.*, 1980; *Janowsky v. U.S.*, 1991). *ITL* alone is silent on this important issue.

*LISR* and *JCEL* require that authors obtain permission and include proper citation, when required, for the *use of excerpts*. Where institutional policy restricts authors' rights to convey publication and use rights, authors are required to obtain a waiver. Finally, all but *JMLA* require that author employ a *Creative Commons licensing scheme* or, in the case of *CRLJ*, an alternative license for further distribution. *LISR* allows either CC-BY-ND or CC-BY; *JCEL* suggests CC-BY or another Creative Commons license; *CRLJ* employs a CC-BY-NC license; and *ITL* uses a basic CC-BY license.

A final set of provisions relate to *risk shifting*, indicating what *warranties* authors must make and whether they must *indemnify* the publisher when a breach occurs. Harris (2009) explains the difference between a warranty and indemnification: "Whereas the warranty 'guarantees' the rights, the indemnity provides for financial compensation should the warranty be false. An indemnity clause states that the licensor must pay the cost of any legal expenses and other claims that arise for breaching the warranties in the agreement" (p. 81). Only *CRLJ* contains neither warranties nor indemnifications. The remaining journals contain warranties of various sorts relating to rights clearance and lawfulness of content.

One such warranty demands further discussion. Typically, when one offers a copyrighted work to another for further use, the offer includes a *warranty of non-infringement*. Without that promise, mere access of the work could be infringing. From the recipient-licensee perspective (here, the publisher), this promise should be absolute and accompanied by an indemnification that essentially says, "If I am wrong and the work is indeed infringing, I'll make you

whole and pay for any expenses or damages you incur.” *LISR*, *CRLJ*, and *JMLA* require that the warranty be absolute. Only *JCEL* requires a so-called “*best knowledge*” warranty regarding non-infringement and other unlawfulness. A “best knowledge” promise is not much of a warranty because it is not absolute, but conditional upon the authors’ knowledge. A *conditional warranty* operates more as a representation than a warranty. In order to breach the warranty, authors would have to know that the work illegal (e.g., infringing, obscene, libelous, defamatory, etc.) but assert that it is not (*Price Automotive Group v. Dannemann*, 2002).

Oddly, only *JCEL* and *JMLA* require an *indemnification* (if the work infringes copyright or breaches a promise, the author-licensor will compensate the publisher-licensee for any harms). But, as discussed above, the *JCEL* author would be responsible only if she knew the work was infringing, obscene, etc., and submitted it for publication anyway.

**Recommendation Checklist:**

- Agreement and assent, e.g., signature or click-to-agree
- Adequate consideration
- Integration or merger provision
- Non-exclusive right, but right of first publication
- Right of citation to first publication when republishing
- Author retains copyright in the work
- Author allowed to deposit in institutional repository and use work in teaching and research
- Author possesses adequate rights to assent, including when the work is subject to joint authors
- Required use of Creative Commons attribution (CC-BY) license or similar license; use of CC-BY-NC is optional
- Warranty, absolute, of lawful nature of work (e.g., non-infringement, obscene, libelous, etc.), and indemnification

**6. Conclusion**

Because the access and use of information forms the heart of education, research, and scholarship, this paper analyzed the similarities and differences of five publication agreements in current use in LIS scholarly communication to reveal best practices for OA publication agreements and information policy. Alongside a review of the literature on OA publishing and policy, descriptive data analysis of the sampled agreements reveals best practices for OA LIS publication agreements that balance copyright with unfettered access and use of information.

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