

# SPARC Japan Seminar 2023

Preparing for Immediate OA:  
A Reintroduction to Licensing for Getting Your Papers and Data Used

## Current State of Rights Retention in the United States

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### Abstract



This presentation provides an overview of the current and future state of rights retention in the United States. Rights retention refers to the ability of individuals and entities to retain ownership and control over various rights, including intellectual property, digital data, and personal privacy. It highlights the importance of rights retention in the past and looking to the future. An understanding of the current state of rights retention is necessary to prepare for the 2022 OSTP Memorandum.

### Jennifer Beamer

Jennifer is a Fulbright Researcher at the NII for 2023 – 2024 and advocates for open access and infrastructure. She completed a doctoral dissertation on how SPARC NA and JP organizations support open access infrastructure. She is a SPARC NA Steering Committee member and Past Chair of the Statewide California Electronic Library Consortium (SCELC) Scholar Communications Committee and the SCELC IR Subcommittee. Presenter for the Association of College and Research Libraries (ACRL) Scholarly Communication Roadshow. An alumnus of the SPARC Open Education Program 2019–2020 and OpenCon 2014 and 2016. Doctorate in Communications and Information Science and a Master of Library Science from the University of Hawaii at Manoa. Jennifer's career as a Librarian has been committed to researching and advocating for policy that would help faculty participate in Open Access in alternative ways.



I would like to thank SPARC Japan for inviting me to participate in this important panel and conversation on licensing rights. I have been invited to telling the current state of rights retention in the United States, and I am looking forward to discussing what is currently going on in the U.S. and what lies ahead in light of the 2022 Nelson the Office of Science and Technology Policy (OSTP) Memorandum.

### Why Retention is So Important

In the complex landscape of open access policies, funders increasingly demand immediate open access to their funded research, while universities strive to ensure compliance without unnecessary costs. Within this context, rights retention emerges as a powerful tool. It permits researchers to publish their work openly in subscription-based journals without incurring article processing charges (APC), a suggestion that resonates with

budget-conscious universities.

Nevertheless, this approach is seen as a potential threat to the established business models of publishers. Thus, rights retention becomes a tug-of-war between funders and publishers, with researchers often caught in the middle of this ongoing struggle. The comments that I have presented here show the importance of this struggle in solving many global challenges with the sharing of research, and many U.S. librarians and researchers agree to them.

### **Rights Retention Strategy at Harvard and Plan S**

What has rights retention looked like in the United States in the recent past and present? In response to this struggle of authors' rights in the U.S., many institutions started to adopt and are still using the Harvard approach as a way to retain authors' rights. Harvard faculty voted to give the university non-exclusive rights to their future journal articles, and Harvard University granted the same rights back to their faculty. As of 2022, there are 81 open-access declared policies based on rights retention in the United States, most of which are being adopted and emulating the Harvard approach.

The Harvard policy approach still exists and requires researchers to grant a non-exclusive, irrevocable, paid-up worldwide license to exercise all rights under copyright relating to each of his or her scholarly articles in any medium, and to authorize others to do the same, provided that the articles are not sold for a profit. Authors can then provide a copy of each accepted article for distribution in a repository under these conditions. Crucially, a waiver is available for any publication that the researcher does not wish to make open access on a

no-questions basis. In the years that followed the Harvard open access policy, commercial publishers successfully devised a number of business models that allowed gold open access to flourish and stemmed the tide of rights retention policy adoption.

Then, we have Plan S, the policy framework developed by a coalition of research funders that came into effect in 2021. Plan S is also being practiced by institutions and individual authors mostly in Europe, but having a direct effect on the United States. Unlike the Harvard approach, which makes open access the default but allows for exceptions for subscription access, the rights retention strategy of cOAlition S sits within a complex list of requirements for which the endpoint must be immediately CC BY open access.

This strategy allows researchers to publish CC BY open access in a repository without paying a fee, which is why it has received renewed attention in Europe, where many cOAlition S funders are based. Some funders provide text that must be included in the submitted manuscript to inform the publisher of the intention of rights retention.

Of course, there are many other ways that we are using in the U.S. There are too many to cover in this short presentation. These include author negotiations, author addendums, creation of institutional intellectual property, policies, compliance policies, and a mix of the Harvard approach and Plan S. To learn more, I suggest reading Peter Suber's excellent "Methods of Rights Retention."

### **Federal Rights Retention**

Rights retention has also been encouraged by U.S. institutions, academic institutions, when a researcher wishes to publish in a hybrid journal. For example, subscription journals that make indi-

vidual articles open access through APC or gold, but when the researcher does not have the funding to do so.

Under longstanding policy, federal agencies already receive a license to any copyrighted work created within federal funds that authorize the agency to make broad use of the work for federal purposes and authorize others to do so. This federal license empowers the agency to extensively utilize the work for federal purposes and grant others the same. This federal policy likely confers the necessary authority to mandate the provision of publicly accessible copies of scholarly publications.

Some universities have gone further by adding these policies in their intellectual property policies, assigning copyright ownership in scholarly works to individual creators rather than the university. Many of these university copyright or intellectual property (IP) policies already include provisions that allow for adherence to the licensing requirement by altering the default distribution of rights. This is typically achieved through universities specifying that the ownership of all rights in the work produced under a grant or through the declaration of the university will retain the requisite portion of rights to fulfill grant or contract obligations.

I think it is easier to understand when you read what those IP policies are, so I have provided two of them at the University of Texas and Stanford University. You can also see the type of form that you need to fill out to adhere to policies and licensing at the University of Wisconsin.

### **What Needed for Future**

Now, it is time to look Back to the Future, which is one of my favorite movies. You might be familiar with the SPARC Author Addendum. It is

a really great tool that was created in the early years of open access for government-funded researchers. In general, this addendum is used during negotiations with publishers. This tool became very important for any author wanting to have their work openly licensed.

However, the issue is that using a tool like this puts all the responsibility on the researcher. Looking into the future, we can learn from the practices we know now about how researchers, institutions, agencies, and how publishers will assert their rights earlier on in the process.

If we want to encourage researchers to assert their rights, then we need to assist them in doing this, and we need to somehow build into our policies, our agency requirements that we need full reuse rights to allow the full utility of scientific articles, for example, in text and data mining and AI. We also must need the rights to go beyond, and that includes data. Just the ability to post articles in a public repository is essential. These policies need to be built in at the point of creation of the scholarship, rather than the author having to assert their rights after the fact. Outputs need to have full reuse rights.

### **SPARC North America's Guidance**

Recognizing the difficulty for individual authors to assert their own rights in agreements with publishers, SPARC North America worked with several legal experts in the U.S., including Creative Commons and the Authors Alliance, to develop guidance for federal agencies in light of the 2022 OSTP Memorandum (Compliance Steps to Ensure Public Access with Reuse Rights: <https://sparcopen.org/wp-content/uploads/2023/08/Public-Access-with-Reuse-Rights.pdf>). As mentioned previously, the U.S. has

a federal purpose license, which means the government reserves a royalty-free, non-exclusive, and irrevocable right to reproduce, publish, or otherwise use outputs of federally funded research for federal purposes, and to authorize others to do so.

This document created by SPARC North America offers recommendations to ensure that publicly funded scholarly publications comply with copyright law and with the 2022 OSTP Memorandum's requirement for accessibility to the American public and scientific community. It suggests using policy and contract language to ensure grantees make peer-reviewed scholarly publications accessible without delay. Federal agencies already possess those licenses, and those can be leveraged for that purpose.

This document further advises agencies to obtain additional copyright licenses from grantees to solidify those public access rights with the specifics of those licenses tailored to the agency's access obligations. The contract language grants the agency these additional licenses at the moment of publication, safeguarding them against conflicts with author agreements. The document also recommends including information about the licenses with publicly accessible scholarly publications, ideally through a standardized template attached by the author or repository manager. By visiting the link in this guidance, you can access all the suggestions for a template and with various agencies, institutions, and future repositories.

### **Public Comments to Federal Agencies**

It is important to note that the document does not cover all aspects of the 2022 OSTP Memorandum, such as mandatory repository deposit or metadata requirements. However, these aspects

are and will be addressed as U.S. federal agencies continue to ask for and receive public responses to their plans.

SPARC North America has been providing public comments to the federal agencies as their plans for the 2022 OSTP Memorandum are released, and you can read those plans and comments on their website (<https://sparcopen.org/our-work/2022-updated-ostp-policy-guidance/>). Many of the comments focus on ensuring that policies are updated to guarantee equity in both the publishing and access to the record of science, particularly for traditionally underserved communities and early-career researchers.

One example of these comments is in SPARC's public comments on page 3. (<https://sparcopen.org/wp-content/uploads/2023/08/SPARC-NASA-RFI-Comment.pdf>). In this NASA comment, they recommend NASA to explicitly emphasize the availability of compliance options that do not present financial barriers. Since authors may be encouraged to pay added open access fees in circumstances if they are unnecessary for compliance, SPARC North America also recommend that NASA should clarify any charges from publishers are publication charges, not compliance charges. It is critical that authors do not conflate compliance with article processing charges.

We also see recommendation for institutional repositories run by libraries and other research institutions that do not charge authors or rarely charge authors to deposit articles or manuscripts. These kinds of recommendations ensure we will build a better future of rights retention.

### **Closing**

Thanks for listening as I touched upon the current and future state of U.S. rights retention.

While I cannot speak on behalf of all the U.S., my personal feeling is that there is extensive public engagement with stakeholders across the research publication ecosystem, and this has made it a very exciting time. It is my hope that conversations between academic publishers, for-profit and not-for-profit organizations, libraries and universities, scholarly societies, and members of the general public can lead to a more equitable system of scholarly communication that permits the immediate sharing of accepted articles.