McGill Law Journal — Revue de droit de McGill

Implementing Secondary Publication Right in Copyright Law for Green Open Access to Research

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ABSTRACT

This article argues that, as the Canadian government and governments in peer jurisdictions adopt open access policies requiring researchers to provide free and immediate (embargo-free) public access to research publications resulting from government-funded research projects, the green road to open access (self-archiving) must remain a viable means of complying with these policies. This is essential to ensure that government open access policies do not create an unsustainable dependency on limited government resources. Although the gold road to open access offers immediate access, it often necessitates the payment of article processing fees demanded by publishers. In contrast, the green road to open access does not require payment to publishers for public access to a reliable version of the research publication (the author's accepted manuscript); however, researchers frequently have limited authority to provide open access to their works in this manner when publishers acquire their

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Citation: (2026) 71:1 McGill LJ 297 — Référence : (2026) 71:1 RD McGill 297

copyrights and impose restrictions on republication. Such restrictions typically take the form of embargoes on republication, which undermine opportunities to use the green road to deliver immediate public access to research. Researchers often have weak, and sometimes nonexistent, bargaining power. Consequently, it is frequently challenging for them to navigate the publishing industry's contractual framework that secures copyrights for free, prevents researchers from retaining the rights necessary to republish their accepted manuscripts on an open access basis, and limits their capacity to provide immediate public access to research by imposing embargoes on republication. To support the green road to open access as a viable option for researchers to provide immediate public access to research, I argue that Canada and other countries must implement, alongside their open access policies, a legislative strategy involving a secondary publication right within copyright law. This article proposes an ideal secondary publication right framework and advocates for its implementation in Canada and beyond.

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RÉSUMÉ

Cet article soutient que, alors que le gouvernement canadien et ceux de juridictions comparables adoptent des politiques de publication en libre accès exigeant un accès public gratuit et immédiat (sans embargo) aux publications issues de recherches financées par l'État, la voie verte du libre accès (l'auto-archivage) doit demeurer un moyen viable de s'y conformer. Cette exigence est nécessaire pour éviter que ces politiques ne créent une dépendance insoutenable envers des ressources gouvernementales limitées. Bien que la voie dorée du libre accès offre un accès immédiat, elle exige souvent le paiement de frais de publication d'articles imposés par les éditeurs. À l'inverse, la voie verte du libre accès ne requiert aucun paiement aux éditeurs pour offrir au public une version fiable de la publication, soit le manuscrit de l'auteur accepté pour publication. Toutefois, les auteurs disposent souvent d'une marge de manœuvre restreinte pour diffuser leurs travaux de cette manière lorsque les éditeurs acquièrent les droits d'auteur et imposent des restrictions à la republication. Ces restrictions prennent le plus souvent la forme d'embargos, compromettant l'utilisation de la voie verte pour assurer un accès public immédiat à la recherche. Les chercheurs ont généralement un

pouvoir de négociation faible, voire inexistant. Cette asymétrie complique leur capacité à s'orienter dans le régime des contrats d'édition, lequel s'approprie gratuitement les droits d'auteur, empêche la conservation des droits nécessaires à la republication en libre accès des manuscrits acceptés pour publication et restreint l'accès public immédiat à la recherche par l'imposition d'embargos. Afin de soutenir la voie verte du libre accès comme option viable pour offrir un accès public immédiat à la recherche, je soutiens que le Canada et d'autres pays doivent mettre en œuvre, parallèlement à leurs politiques de libre accès, une stratégie législative prévoyant un droit de publication secondaire en droit d'auteur. L'article propose un cadre idéal pour ce droit de publication secondaire et plaide en faveur de sa mise en œuvre au Canada et ailleurs.

INTRODUCTION

INVESTMENTS in research and innovation are key drivers of growth in any society.[1] Accordingly, governments have robust research and innovation policies that involve government funding of research projects. Governments award research grants to researchers directly or indirectly by establishing and funding research institutions such as universities as part of their research and innovation policies, with the aim that society will benefit from the outcomes of research activities.[2] Public access to published research results, especially in journals, is challenged by how copyright is used in research publishing.[3] Copyright is often used, especially by commercial publishers, in an exclusionary manner to restrict access to research publications to persons and institutions who can afford the huge costs of access.[4] This barrier to public access to research led to the open access (OA) movement,[5] which involves providing free public access to research publications.

In recent years, OA policies have become key features of the research and innovation policies of governments.[6] Government policies on OA to

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1 David Sarpong et al, "The Three Pointers of Research and Development (R&D) for Growth-Boosting Sustainable Innovation System" (2023) 122 Technovation, No 102581 at 4. See also Bulent Guloglu & R Baris Tenkin, "A Panel Causality Analysis of the Relationship Among Research and Development, Innovation, and Economic Growth in High-Income OECD Countries" (2014) 2:1 Eurasian Econ Rev 32 at 43.

2 Peter Suber, *Open Access*, MIT Press Essential Knowledge Series (Cambridge, Mass: MIT Press, 2012) at 14 [Suber, *Open Access*].

3 Faith O Majekolagbe, "A Right to Republish: Redesigning Copyright Law for Research Works" (2024) 25:2 Minn J L Sci & Tech 1 at 3–4.

4 See generally Suber, *Open Access*, *supra* note 2 at 29–43. It has been suggested that the annual cost of subscribing to a single title of a journal can be more than US$20,000 (see Julie L Kimbrough & Laura N Gasaway, "Publication of Government-Funded Research, Open Access, and the Public Interest" (2016) 18:2 Vanderbilt J Entertainment & Tech L 267 at 281–82). See also Simon Spedding, "Open Access Publishing of Health Research: Does Open Access Publishing Facilitate the Translation of Research into Health Policy and Practice?", Review (2016) 4:1 Publications, No 2 at 1.

5 Suber, *Open Access*, *supra* note 2 at 7. For the history of open access, see Open Access Network, "History of the Open Access Movement" (last modified 6 March 2024), online: <open-access.network> [perma.cc/AP64-37AU]. See also Peter Suber, "Timeline of the Open Access Movement" (last modified 9 February 2009), online: <legacy.earlham.edu> [perma.cc/MM4T-88LW] [Suber, "Timeline"].

6 Chun-Kai (Karl) Huang et al, "Evaluating the Impact of Open Access Policies on Research Institutions" (2020) 9 eLife, No e57067 at 1. See also section II(B), *below*.

research aim to provide the public with access to the published outcomes of government-funded research activities at no cost and as early as possible.[7] Governments' OA policies are typically in the form of mandates or recommendations to researchers to publish their works on an OA basis,[8] and can generally be satisfied through one of two roads to OA: gold or green.[9] The gold road to OA involves publishing in OA outlets (mostly journals) that are available and accessible to the public at no cost or publishing on an OA basis in journals that are closed access by default.[10] In the case of the former, the researcher may or may not be subject to the payment of an article processing charge (APC) to make their work openly accessible.[11] The latter, however, usually involves the payment of APCs.[12] The green road to OA, also known as self-archiving, involves republishing or self-archiving the accepted author's manuscript of a research work that has been published in a journal on a closed-access basis in an open

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7 See e.g. US, Office of Science and Technology Policy, "Ensuring Free, Immediate, and Equitable Access to Federally Funded Research" (Memorandum for the Heads of Executive Departments and Agencies, 25 August 2022) at 1, online (pdf): <biden-whitehouse.archives.gov> [perma.cc/2VKP-VHVZ] [Office of Science and Technology Policy, "Ensuring Access"]. See also Austl, Commonwealth, Australian Research Council, *ARC Open Access Policy Version 2021.1* (Canberra: Australian Government, 2021) at 5; Canada, "Tri-Agency Open Access Policy on Publications (2015)" (last modified 20 December 2016), online: <science.gc.ca> [perma.cc/Z3JK-RSNB] [Canada, "Tri-Agency"]. See also UK Research and Innovation, "UK Research and Innovation Open Access Policy" (last modified 15 November 2023), online: <ukri.org> [perma.cc/B6QY-2AM9].

8 Canada, "Tri-Agency", *supra* note 7; Office of Science and Technology Policy, "Ensuring Access", *supra* note 7 at 1; Australian Research Council, *supra* note 7 at 6.

9 While government OA mandates can be categorized as requiring either gold or green OA, there are other forms of OA including diamond/platinum OA, bronze OA, and black OA. For a glossary of the different types of OA publications, see Lucy Barnes, "Green, Gold, Diamond, Black: What Does It All Mean?" (22 October 2018), online: <blogs.openbookpublishers.com> [perma.cc/MG2M-8AP9].

10 *Ibid*.

11 Lucie Guibault, "Owning the Right to Open Up Access to Scientific Publications" in Lucie Guibault & Christina Angelopoulos, eds, *Open Content Licensing: From Theory to Practice* (Amsterdam: Amsterdam University Press, 2011) 137 at 154. See also Steven Shavell, "Should Copyright of Academic Works be Abolished?" (2010) 2:1 J Leg Analysis 301 at 333.

12 Guibault, *supra* note 11 at 154.

digital repository or platform from which the public can access it.[13] Oftentimes, when the author can republish their manuscript in an open digital repository depends on the terms of their publishing contract, which are standard form contracts prepared by the publishers with little to no room for negotiations. Therefore, the green road to OA may not lead to immediate public access to research publications, especially when publishers impose embargoes on the republishing of the accepted author's manuscript.

While government OA policies usually give funded researchers a grace period of up to twelve months post-publishing to provide free public access to publications, there has been an emphasis on immediate public access in recent years.[14] Canada is one of the countries moving towards an OA policy that requires immediate public access to research. In 2023, Canada's federal granting agencies[15] announced plans to revise the *Tri-Agency Open Access Policy on Publications* (*Tri-Agency OA Policy*), which allows funded researchers to comply with the policy either through gold OA (which leads to immediate public access) or self-archiving within twelve months from the initial publication of the research output.[16] The revised *Tri-Agency OA Policy*, which will be released and take effect in 2026, will now require peer-reviewed journal publications arising from a research project supported by a federal granting agency to be made freely available to the public, without subscription or fee, at the

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13 Robert C Denicola, "Copyright and Open Access: Reconsidering University Ownership of Faculty Research" (2006) 85:2 Neb L Rev 351 at 361–62. See also Guibault, *supra* note 11 at 156. See also Eric Priest, "Copyright and the Harvard Open Access Mandate" (2012) 10:7 Northwestern J Tech & IP 377 at 391.

14 Canada, "The Presidents of Canada's Federal Research Granting Agencies Announce a Review of the *Tri-Agency Open Access Policy on Publications*", by Alejandro Adem, Ted Hewitt & Michael Strong (last modified 16 June 2025), online: <science.gc.ca> [perma.cc/9Y5T-C97E] [Canada, "Review"]. See also Office of Science and Technology Policy, "Ensuring Access", *supra* note 7 at 2; Australian Research Council, *supra* note 7 at 5; UK Research and Innovation, *supra* note 7.

15 The Canadian Institutes of Health Research (CIHR), the Natural Sciences and Engineering Research Council of Canada (NSERC), and the Social Sciences and Humanities Research Council of Canada (SSHRC).

16 Canada, "Review", *supra* note 14; Canada, "Open Access Update: Delayed Release of the Revised *Tri-Agency Open Access Policy on Publications*" (last visited 11 February 2026), online: <science.gc.ca> [perma.cc/K82S-C7KJ] [Canada, "Delayed Release"].

time of publication.[17] In other words, recipients of grants from any of the tri-agencies must provide immediate OA to journal publications arising from funded projects. Like Canada, the United States has announced that by the end of 2025, all peer-reviewed scholarly publications by individuals or institutions resulting from federally funded research must be made publicly accessible in agency-designated repositories without any embargo or delay after publication.[18] Compliance with these OA policies will, in many instances, result in the payment of APCs since not all journal publishers publish on an OA basis for free. However, there is no indication that APCs will be covered by government funding agencies. Governments may be unwilling to place dual burdens on the public to fund the actual costs of research and then fund publication costs in the form of APCs requested by many commercial journal publishers to provide subscription-free access to published research articles. In any case, governments might not be able to cover the APCs for all research publications for which it may be required.[19]

In the absence of government funding for APCs, researchers must comply with new OA policies by ensuring they publish the results of their research in platinum journals (i.e., journals that publish on a gold OA basis without charging APCs), or source funding to pay APCs when they wish to publish their works as free access publications in subscription-access journals or OA journals that require payment of such charges. Alternatively, researchers could also negotiate with subscription-access journals to permit them to immediately self-archive their publication manuscript in an open digital repository from which the public can freely access it. Self-archiving may offer a financially sustainable route to

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17 Canada, "Draft, Revised Tri-Agency Open Access Policy on Publications" (last visited 11 February 2026), online: <science.gc.ca> [perma.cc/T5F9-6L84] [Canada, "Draft"].

18 Office of Science and Technology Policy, "Ensuring Access", *supra* note 7 at 1.

19 For instance, following an engagement with stakeholders on revising Canada's tri-agency OA policy, there was widespread concern among stakeholders about increasing article processing charges, with researchers strongly questioning whether the use of research funds to pay APCs as opposed to other project costs was a wise use of government funds. There was strong support for the federal granting agencies to put a limit on the amount of agency grant funds that can be used for APCs (see Canada, "What We Heard Report: Engagements on the Review of the Tri-Agency Open Access Policy on Publications (2024)" (last modified 7 August 2024), online: <science.gc.ca> [perma.cc/8PGR-5V89]).

provide immediate public access to research publications since it does not involve paying APCs. However, for the self-archiving option to be viable, other strategies must be implemented in parallel,[20] to ensure that authors are not constrained by publishing contracts. Due to the imbalance in the bargaining power between research authors and publishers, authors routinely transfer their copyrights to subscription-based journals without retaining the rights to republish or self-archive their accepted manuscripts.[21] In cases where authors are allowed to retain the right to republish, the exercise of that right may be subject to an embargo period that can range from six to eighteen months or more.[22] This delay inevitably conflicts with the goal of many government OA policies to provide immediate public access to research works.[23] Given that the gold road to OA oftentimes requires the payment of APCs, widespread compliance with government OA policies aimed at immediate public access to research is difficult to achieve and unbearably expensive without a real option to use the green road to OA to provide immediate public access.

To make green OA an option for complying with government OA policies that mandate immediate public access to research works, this article argues that a legislative strategy in the form of a secondary publication right be implemented in copyright law to empower research authors to immediately republish the accepted manuscript of their research publications for free public access notwithstanding any term to the contrary in the publishing contract. This secondary publication right must be rooted in copyright law and should be considered as part of the broader research and innovation strategy of every government to provide free and immediate public access to research. An uptake in the grant of secondary publication rights to research authors under copyright laws is already present in a handful of European countries.[24]

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20 Jean-Claude Guédon, "The 'Green' and 'Gold' Roads to Open Access: The Case for Mixing and Matching" (2004) 30:4 Serials Rev 315 at 325.

21 Canadian Federation of Library Associations, "Secondary Publishing Rights and Open Access" (15 June 2023) at 1, online (pdf): <cfla-fcab.ca> [perma.cc/LG5L-7B43].

22 Priest, *supra* note 13 at 392; Guibault, *supra* note 11 at 157.

23 Office of Science and Technology Policy, "Ensuring Access", *supra* note 7 at 2. See also Australian Research Council, *supra* note 7 at 7. See also UK Research and Innovation, *supra* note 7.

24 The countries are Austria, Belgium, Bulgaria, France, Germany, the Netherlands, and Slovenia. See Part II, *below*.

The article is structured in three parts. Part I explains how research authors, as initial copyright owners in research outputs, lose their copyrights to publishers via publishing agreements which in turn results in the loss of public access to research. Part II describes the OA movement response to the huge costs of accessing research publications, through the two roads to OA—gold and green. It considers government-designed OA policies in Canada, the United States, and the European Union (EU) and the limits of those policies. The focus on this paper is government OA policies, because of the unique position of governments as both key funders of research and the grantors of copyright protection that are utilized by research publishers to constrain access to research publications. Part III recommends implementing a secondary publication right in copyright law as a necessary strategy for making the green road to OA an available and viable route for complying with government OA policies requiring immediate public access to research publications. It proposes how Canada, the United States, and countries adopting similar OA policies should define the features of the secondary publication right. Part III also considers the limits of the secondary publication right and possible alternative pathways.

I. RESEARCH AUTHORS, COPYRIGHT, AND PUBLICATION AGREEMENTS

Professional academics in educational and research institutions, whether publicly funded or not, undertake research activities as part of their academic work. These research activities often lead to the preparation and publication of written research findings that become the subject matter of copyright protection. Under most copyright systems, the "academic exception" is recognized, which allows academic researchers, not their employers, to own the copyright in the research articles they produce in the course of their employment.[25] Accordingly, researchers have the "freedom" to exercise their copyrights however they see fit.[26] The recognition of researchers as the first owners of the copyrights in their

25 Chris Triggs, "Academic Freedom, Copyright and the Academic Exception" (2005) 7:1 Workplace 60 at 60, 62, 65, 72. See also John Willinsky, *The Access Principle: The Case for Open Access to Research and Scholarship*, Digital Libraries and Electronic Publishing (Cambridge, Mass: MIT Press, 2006) at 45–46.

26 Willinsky, *supra* note 25 at 45–46.

research works empowers them to publish in outlets of their choosing since the researchers can give the necessary copyright permissions to the publishers. However, publishing research works in academic journals often ends with the research authors losing their copyrights.[27] Research authors routinely transfer their copyrights to publishers, which leads to losing their exclusive rights to copy, publish, and distribute their works or authorize others to do so,[28] notwithstanding that a non-exclusive or limited exclusive licence to copy, publish, and distribute the work would be sufficient to give publishers the necessary authority to publish research works.[29] In exchange, publishers publish the works of research authors in their journals.

The traditional model of publishing, prior to the digital era, which involved giving up copyrights in exchange for publication, was tolerable for many reasons. Print publishing involved activities that were only practicable for publishers to undertake, including typesetting and formatting of authors' manuscripts, printing of the work, and distributing printed copies across libraries and institutions sometimes in multiple countries. The author was also often sent at least a copy of the journal issue in which their work was published. The research authors and buyers of journal publications, including libraries, were able to lend out their copies multiple times for as long as the copies remained undamaged or unlost. Copies of a research work in a journal within a library's collection could even be made for members of the public, usually for purposes of research and private study. Given the freedom to lend out printed copies of journals for others to use, the non-retention of copyrights by research authors did not, arguably, materially affect the dissemination of research works in the pre-digital age.

In the digital age, however, the convergence of the Internet, computing and information technologies, and digital literacy makes the loss of copyrights very disadvantageous for researchers and the public. The digital age brought new opportunities for the production and distribution of research works through the Internet, which makes it possible for anyone with a computer and Internet services to produce and distribute works to billions of people globally at once. For research authors who publish their

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27 *Ibid* at 43–45.

28 *Ibid* at 47. See also Suber, *Open Access*, *supra* note 2 at 130.

29 Willinsky, *supra* note 25 at 44–47.

research findings for widespread dissemination, engagement, and impact,[30] the Internet and digital technologies opened a world of possibilities for the distribution and widespread access of their works. With the increasing accessibility of the Internet and the widespread ownership of computers and mobile devices, the demand for print journals significantly decreased.[31] As a result, many journals now exclusively publish their works digitally, and as a result likely have a greater public reach compared to print publications.[32] With the ease of reproduction in the digital age, journal publishers do not have to mechanically produce multiple copies of a research work for mass distribution.[33] A single digital copy of a work can be accessed by multiple people simultaneously and multiple times without diminishing the quality of the copy.

Affordable and widespread access to research works should be the natural consequence of the move from print to digital journal publishing. However, this has not been the case. Journal publishers have taken advantage of the advances of the digital age to maximize profit from research works rather than increase access to these works. The routine copyright transfers to journal publishers, new protections for copyrighted works in the digital environment, and the adoption of a business model of digital distribution that involves licensing rather than sales have been jointly utilized to enclose research works behind high paywalls.[34] Armed with the copyright of research authors, most journal publishers make research works available only upon payment of very high prices.[35] Some journal publishers only make works published in their journals available

30 Chris Mack, "Why Write and Publish a Paper?" (2017) 16:4 J Micro/Nanolithography, MEMS, & MOEMS, No 040101 at 1.

31 Lloyd A Davidson, "The End of Print: Digitization and Its Consequence—Revolutionary Changes in Scholarly and Social Communication and in Scientific Research" (2005) 24:1 Intl J Toxicology 25 at 25–26.

32 Mack, *supra* note 31 at 1. See also Milan F Klus & Alexander Dilger, "Success Factors of Academic Journals in the Digital Age" (2020) 13:3 Bus Research 1115 at 1116.

33 Vincent Larivière, Stefanie Haustein & Philippe Mongeon, "The Oligopoly of Academic Publishers in the Digital Era" (2015) 10:6 PLoS One, No e0127502 at 12.

34 Tom Reller, "Elsevier Publishing: A Look at the Numbers, and More" (22 March 2016), online (pdf): <elsevier.com> [perma.cc/HM6S-LEEA].

35 See Suber, *Open Access*, *supra* note 2 at 29–34. See also Valentina Moscon, "Academic Freedom, Copyright, and Access to Scholarly Works: A Comparative Perspective" in Roberto Caso & Federica Giovanella, eds, *Balancing Copyright Law in the Digital Age: Comparative Perspectives* (Heidelberg: Springer, 2015) 99 at 117.

through institutional subscriptions to their databases, which prevents members of the public with no institutional affiliations from accessing a single research work that may be of interest to them.[36] Institutions are often no longer able to purchase print copies of journals and must rely on digital subscriptions to databases to access journals.[37] As these digital subscriptions are in the form of bundle subscriptions, institutions are unable to subscribe to individual journals and have to subscribe to journals that may not be of interest to them rather than maximize the limited resources they have to access only what they need.[38] The digital subscription model also works to prevent institutions from owning digital copies of the research journals that they pay for. Instead, the arrangement is designed as a licensing agreement that subjects institutions to unreasonable terms and conditions and exorbitant subscription prices.[39] These licensing and subscription contracts often override copyright exceptions (user rights)[40] that should empower institutions to offer access to their library collections in ways beyond what is prescribed under the terms and conditions.

The OA to research movement arose to counter the practice of locking up research works behind high paywalls in the face of the pressing need for widespread public access to research findings. With this movement came a surge of OA policies by institutions, governments, and private funders of research works. The next part explains OA to research and considers the limits of government OA policies in delivering immediate free public access to research.

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36 Suber, *Open Access*, *supra* note 2 at 35.

37 Thomas Eger & Marc Scheufen, *The Economics of Open Access: On the Future of Academic Publishing* (Cheltenham: Edward Elgar, 2018) at 2. See also Larivière, Haustein & Mongeon, *supra* note 33 at 12; Dr Jonathan Tennant, *Democratising Knowledge: A Report on the Scholarly Publisher, Elsevier* (Brussels: Education International Research, 2018) at 18.

38 Eger & Scheufen, *supra* note 37 at 2. See also Larivière, Haustein & Mongeon, *supra* note 33 at 12. See also Tennant, *supra* note 37 at 18.

39 Suber, *Open Access*, *supra* note 2 at 34.

40 *Ibid*.

II. OPEN ACCESS TO RESEARCH AND THE LIMITS OF CURRENT OPEN ACCESS POLICIES

A. *Open Access to Research*[41]

The term "open access" is a coinage of academic and scientific researchers seeking to eliminate the price, legal, and technological barriers to accessing research journals to ensure that everyone derives benefit from research knowledge.[42] The driving force for OA is the fact that the public (which includes researchers who freely peer review research works for quality assurance) is charged to access already publicly funded academic and scientific research, while private entities earn revenue from the publication and distribution of works.[43] The access opportunities created by the Internet and digital technologies, combined with the willingness of scientists and other researchers to publish their work without financial gain, have led to significant support for OA to research publications in the last decade, even with the existing global digital divide.[44]

OA is an approach to the management of copyright that relies primarily on the consent of copyright holders.[45] OA is invoked through copyright, but rather than using copyright to restrict access to and use of authorial works, it is used to facilitate access to and use of works. The goal

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41 The section provides a brief overview of the concept of open access (OA) to research and explains the main models of OA to research. For more elaborate discussions on OA and OA models, see Suber, *Open Access*, *supra* note 2. See generally Berkman Klein Center for Internet & Society at Harvard University, "Harvard Open Access Project (HOAP)" (last modified 28 January 2025), online (wiki): <cyber.harvard.edu> [perma.cc/GW8U-SE3T].

42 Suber, *Open Access*, *supra* note 2 at 7. For the history of open access, see Open Access Network, *supra* note 5. See also Suber, "Timeline", *supra* note 5.

43 Kylie Pappalardo with the assistance of Brian Fitzgerald et al, *Understanding Open Access in the Academic Environment: A Guide for Authors* (Brisbane: Queensland University of Technology, 2008) at 4.

44 Suzanne Day et al, "Open to the Public: Paywalls and the Public Rationale for Open Access Medical Research Publishing", Commentary (2020) 6 Research Involvement & Engagement, No 8 at 5.

45 Sisule F Musungu, *Using Copyright to Promote Access to Information and Creative Content. Education and Research (Part I)*, WIPO, Mtg WIPO/CR/WK/GE/11, WIPO Doc WIPO/CR/WK/GE/11/2 (2011) at 7.

of the OA movement is greater access to knowledge.[46] OA is based on the author's or publisher's choice to make a work publicly accessible at no cost, with or without copyright restrictions on reuse. The OA movement focuses on access to knowledge in journals because the results of scientific and scholarly research are mostly communicated and authenticated through publication in journals.[47]

There are multiple models that researchers use to achieve OA ends,[48] with the two original and most recognized models being the green OA model (self-archiving a version of the complete research work in an online repository from which members of the public can freely read it) and gold OA (distributing the complete and final version of the work for free public access on the publisher's website).[49] Gold OA may involve payment of APCs by the author to cover publication costs, and it may also result in the removal of barriers to the reuse of a work. A form of OA that results in a work being available for free reading but with barriers to re-use is known as gratis OA, while OA resulting in a work being free to read and reuse is libre OA.[50]

1. The Gold Road to Open Access

The gold road to OA involves a journal that publishes research work exclusively on an OA basis (OA journals) or opting to publish on an OA basis in a journal that publishes on a closed access basis by default (hybrid journals).[51] In both cases, journal publishers would make the work

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46 Open Library of Humanities, "Open Access Movement" (last visited 27 May 2024), online: <openlibhums.org> [perma.cc/X7S3-ZETP].

47 Musungu, *supra* note 45 at 7.

48 Other models include diamond/platinum OA, which involves immediate and permanent OA publication of a work without the requirement for the author to pay a fee; bronze OA, which involves a temporary OA publication of a work by the publisher without the requirement for the author to pay a fee; and hybrid OA, which describes subscription-based journals that allow some articles to be published on an OA basis subject to the payment of a fee by the author (see Barnes, *supra* note 9).

49 Marc-André Simard et al, "National Differences in Dissemination and Use of Open Access Literature" (2022) 17:8 PLoS One, No e0272730 at 1. See also Budapest Open Access Initiative, "Read the Declaration: Budapest Open Access Initiative" (14 February 2002), online: <budapestopenaccessinitiative.org> [perma.cc/WD84-QLHV].

50 Barnes, *supra* note 9.

51 See generally Guibault, *supra* note 11 at 153. See also Shavell, *supra* note 11 at 333.

available to the public at no cost immediately upon publication of the work and become discoverable through online search engines.[52] Authors who take the gold road also typically retain their copyrights when publishing on an open-access basis, giving publishers a non-exclusive licence to publish and distribute the work.[53] However, in most cases of OA publishing, whether in an OA journal or hybrid journal, research authors must pay APCs in exchange for the publication of their work on an OA basis by the journal.[54] When researchers do not pay APCs and an article is published on an OA basis in a hybrid journal on the "generosity" of the journal, the publisher is often able to restrict public access to the article at any time.[55] The gold road to OA can be achieved through publications in "platinum or diamond" OA journals that do not require authors to pay APCs and keep public access to the work permanently;[56] however, platinum OA journals are comparatively very few, perhaps because of the expenses involved in running them.[57]

The APCs for journals can be prohibitively expensive for authors to bear the costs, and only a few institutions and funders support researchers to pay APCs.[58] From an access to research perspective, paying for APCs is comparatively cheaper than having everyone pay to access a single work for the entire duration of the copyright, which can be up to a century. Notwithstanding, there is little incentive for researchers to pay out of pocket to publish on an OA basis when they can publish the same work on a closed-access basis at no immediate and direct cost to them.

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52 See also Guibault, *supra* note 11 at 154.

53 *Ibid* at 160.

54 See generally Denicola, *supra* note 13 at 358. See also EU, European Commission, "Towards Better Access to Scientific Information: Boosting the Benefits of Public Investments in Research", CELEX No 52012DC0401 (25 July 2012) at 5, online: <eur-lex.europa.eu> [perma.cc/T7R5-R6GE]. See also Katharine Sanderson, "Who Will Pay for Scientific Publishing?" (2023) 623:7987 Nature 472 at 472, DOI: <10.1038/d41586-023-03506-4>.

55 This model is referred to as bronze OA (see Barnes, *supra* note 9).

56 *Ibid*.

57 Michael Hagner, "Open Access, Data Capitalism and Academic Publishing" (2018) 148:0708 Swiss Medical Weekly, No w14600 at 1, 6, DOI: <10.4414/smw.2018.14600>; Joshua Pearce, "When Open Source Meets Academic Publishing: Platinum Open Access Journals" (13 May 2022), online: <opensource.com> [perma.cc/MP7S-PUVE].

58 See also Hagner, *supra* note 57 at 7.

For institutions and funders, APCs add to the cost of funding research activities and do not offset the costs of journal subscriptions in the short or medium term since the amount of research works institutions need to access is exponentially more than what their own researchers publish. Gold OA publishing, however, provides immediate access benefits to members of the public who would otherwise not have an alternate means of access to the published work. When researchers do not provide OA through the gold road, the alternative OA route to permanently opening access to their works is to self-archive.

2. The Green Road to Open Access

The green road to OA requires the research author to deposit a version of the published research article in an open digital repository or platform from which the public can access it at no cost.[59] The deposited version of the work should be the final version of the author's work that has been approved for publication after the journal review process, but that has yet to be copy-edited unilaterally by the journal publisher. This version is sometimes called the accepted author manuscript or author's accepted manuscript (AAM).[60] This version contains the approved text following the journal's review process, including any copy-editing done collaboratively between the author and the journal.[61] The AAM is distinct from the version of record (VOR), a term used to describe the version of the work that has been copy-edited unilaterally by the journal publisher and published on the publisher's platform.[62]

The AAM does not usually have the same look and feel, pagination, or file format as the VOR,[63] and the AAM should also be distinguished from the submitted version or the author's original version of the published research work. The AAM provides the public with free access to a complete and reliable version of the work, and it creates an alternative source of access to the VOR published by the journal publishers while the

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59 Denicola, *supra* note 13 at 361. See also Guibault, *supra* note 11 at 156; Priest, *supra* note 13 at 394; Pappalardo et al, *supra* note 43 at 111.

60 Berkman Klein Center, "Drafting a Policy" (last modified 18 January 2024), online: <cyber.harvard.edu> [perma.cc/2JVE-EHXB].

61 *Ibid*.

62 *Ibid*.

63 *Ibid*.

submitted version or author's original version does not. Self-archiving the AAM provides OA to published research works in journals because access to the submitted version or author's original version raises reliability issues. The changes made during the review process may or may not be consequential, but without having access to the reviewed version (AAM) or VOR, it is impossible to know.

Providing OA to research through self-archival of AAMs is, however, fraught with challenges. In order to make the AAM of a research work available for viewing or download online, the research author must have the necessary rights under copyright law. In other words, the research author must have retained either the entire bundle of their copyrights to their AAM under the publishing agreement with the journal publisher or the specific rights that the author needs to provide public access to the AAM through self-archiving.[64] Most closed-access journals do not allow authors to retain any or some of their copyrights and research authors are only able to retain their rights when they publish in an OA journal or on an OA basis in a closed-access journal (after paying APCs).[65] As such, it is in cases where researchers must rely solely on self-archiving as the road to opening access to their work that they lack the right(s) to do so. In such cases, whether researchers will be able to self-archive their AAMs in a way that provides public access to the work depends on the terms of their publishing agreement.

There is an inequality in bargaining power between research authors and journal publishers which leaves little to no room for negotiations on rights retention or permissions for self-archiving AAMs when authors are not publishing on an open-access basis.[66] When authors are permitted to self-archive their AAMs, they are often subject to observing an embargo period of between six months and eighteen months or longer.[67] Yet, for timely access, it is preferable for works to be deposited in online repositories at the time the work is accepted for publication (post-review), or no later than the date of publication of the VOR by the journal publisher.

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64 See generally Canadian Federation of Library Associations, *supra* note 21 at 1.

65 *Ibid*.

66 *Ibid*.

67 See Priest, *supra* note 13 at 392; Guibault, *supra* note 11 at 157.

Despite the barriers of insufficient rights or licences to self-archive and embargoes on the timing of self-archival, self-archiving or the green road to OA remains the less costly, and thus, arguably more sustainable, of the two roads to OA. For example, it is estimated that green OA costs at most $15 per article (most of these costs relate to the upkeep of the digital repository),[68] whereas APCs connected to gold OA can cost thousands of dollars per article.[69]

B. Government Open Access Policies and the Limits

Governments have a fundamental interest in the early and widespread dissemination of and access to research outputs. Governments fund research to generate solutions to key problems, and this research becomes impactful through widespread dissemination and public access. This impact is not possible where research is held behind expensive and unaffordable paywalls. As such, the research funding agencies of governments, mostly in the developed world, have adopted OA policies and mandates that often permit compliance by way of the green and gold roads to OA. In fact, the large increase in the volume of journal articles available on OA has been attributed largely to government OA policies.[70] Government OA policies are targeted at providing the public, as taxpayers, with taxpayer-funded research without cost or delay.

In this section, I consider government-designed OA policies in three peer jurisdictions (Canada, the EU, and the United States) that seek to promote wider dissemination and use of research outputs through OA. The limits of these policies are also discussed. In most cases, limited government funding for APCs or reluctance to pay for APCs and the inclusion of green OA as an acceptable road for compliance with government OA policies suggests a preference for the green road to OA. Taking the green road to OA helps governments avoid situations where taxpayers

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68 Claudio Aspesi for SPARC, "Public Research Benefits and Publishers' Profits" (last visited 29 September 2025), online (pdf): <sparcopen.org> [perma.cc/93PM-J2XR].

69 Sanderson, *supra* note 54 at 472. See also Jingshan S Du, "Opinion: Is Open Access Worth the Cost?", *The Scientist* (1 June 2022), online: <the-scientist.com> [perma.cc/L6CU-ANLG]; Aspesi, *supra* note 68. For rates of APCs, see generally Directory of Open Access Journals, "Find Open Access Journals & Articles" (last visited 19 May 2024), online: <doaj.org> [perma.cc/Z92P-QB28].

70 Huang et al, *supra* note 6 at 8.

pay twice for research publications—once to fund the research and again to see the results. However, the implementation of green OA policies is often challenged by the non-retention of rights to republish AAMs on an OA basis under publishing contracts.

While the design and adoption of OA policies have not been limited to national and supranational government institutions,[71] government OA policies are the focus here because of the unique position of governments as both key funders of research disseminated in journals and the grantors of copyright protection that are utilized by journal publishers to constrain access to research articles.

1. Open Access Policy in the United States

In the United States, the federal government spends approximately US$150 billion on research every year "in order to advance discovery, spur the economy, accelerate innovation, and improve the lives of citizens."[72] Out of this sum, it is estimated that American taxpayers spend between $390 million and $789 million to fund the writing of journal articles that record the findings of the research.[73] However, many of the journal articles are locked behind high paywalls.[74] As President Biden once noted, "The taxpayers fund $5 billion a year in cancer research, but once it's published, nearly all of that sits behind [pay]walls. Tell me how this is moving the [scientific] process along more rapidly."[75] In 2020, the

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71 Policies and soft law documents on OA have been issued by intergovernmental organizations, private funding organizations, and civil society organizations. The scope of this article does not however include OA policies issued by such organizations.

72 Scholarly Publishing and Academic Resources Coalition, "Taxpayers to Get Immediate Access to Publicly Funded Research" (25 August 2022), online: <sparcopen.org> [perma.cc/ZK37-J33A]. See also US, Office of Science and Technology Policy, *Economic Landscape of Federal Public Access Policy*, SuDoc No PREX 23.2:EC 7 (Washington, DC: OSTP, 2022) at 11 [Office of Science and Technology Policy, *Economic Landscape*].

73 Office of Science and Technology Policy, *Economic Landscape*, *supra* note 72 at 13.

74 Scholarly Publishing and Academic Resources Coalition, *supra* note 72.

75 Jeffrey Brainard & Jocelyn Kaiser, "U.S. to Require Free Access to Papers on All Research It Funds" (2022) 377:6610 Science 1026 at 1027, citing Joe Biden, "What I Said to the Largest Convening of Cancer Researchers in the Country Yesterday" (Remarks delivered at the 2016 American Association for Cancer Research Annual Meeting,

US Office of Science and Technology Policy estimated that federal research funds produced 195,000 to 263,000 (roughly 7–9 per cent) of the 2.9 million peer-reviewed articles published worldwide.[76]

Although works of the US government are not copyrightable and are thus in the public domain,[77] a "work of the United States Government" is narrowly defined in the US *Copyright Act* as "a work prepared by an officer or employee of the United States Government as part of that person's official duties."[78] Thus, works resulting from government funding in non-US federal government institutions and works of non-federal government employees are eligible for copyright. Most research-intensive academic institutions in the United States are not owned by the US (federal) government, making researchers at these institutions non-employees of the US government. Further, the journal articles produced by civilian members of the faculty of certain military institutions of the US government are eligible for copyright, with copyright belonging to the author.[79] As such, most research works arising from government-funded research in the United States are subject to copyright and suffer from the routine transfer of copyrights to journal publishers. As a result, in the last two decades, OA advocates, including libraries, have relentlessly pushed for public access (used interchangeably with OA) to the results of publicly funded research.[80]

Over the years, there have been numerous administrative and legislative actions taken on the issue of public access to government-funded research in the US. In 2004, the National Institutes of Health (NIH) first drafted an OA mandate for the research it funds. The NIH Public Access Policy was adopted in 2008; it requires that the results of NIH-funded research be made available at no cost to the public through the National

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New Orleans, 20 April 2016) (21 April 2016), online (blog): <medium.com> [perma.cc/DT5U-DJUG].

76 *Economic Landscape*, *supra* note 72 at 12.

77 17 USC § 105 (2024).

78 *Ibid*, § 101.

79 *Ibid*, § 105.

80 Andrew Albanese, "Biden Administration Announces Historic Open Access Policy for Taxpayer-Funded Research", *Publishers Weekly* (25 August 2022), online: <publishersweekly.com> [perma.cc/VD2U-YB8T].

Library of Medicine's PubMed Central repository.[81] Specifically, researchers are to submit an "electronic version of their final, peer-reviewed manuscripts upon acceptance for publication, to be made publicly available no later than twelve months after the official date of publication,"[82] making this a green OA policy. The policy applies to research articles resulting from NIH-funded research.[83] Therefore, only a fraction of taxpayer-funded research was subject to the policy. The optional twelve-month embargo period also means that the public is not guaranteed immediate access to the research results that are subject to the policy. The NIH is also required to "implement the public access policy in a manner consistent with copyright law,"[84] recognizing that copyright may pose a barrier to the implementation of this green OA policy in cases where researchers do not retain copyrights under the publication agreement with journal publishers.

Invariably, the NIH policy could only be implemented to the extent that the researchers retain the right to make their peer-reviewed manuscripts publicly available or have obtained permission from the publisher to make it so available. In some cases, NIH was able to establish agreements with publishers to deposit NIH-funded research publications directly into the PubMed Central repository, where they are made available within twelve months after publication.[85] While NIH recognizes costs associated with publishing on a gold OA basis as an allowable expense,[86] it is reluctant to pay APCs as a precondition to public access. APCs cost taxpayers an additional $150–200 million per year for NIH-funded research.[87]

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81 National Institutes of Health, "NIH Public Access Policy Overview" (23 June 2025), online: <sharing.nih.gov> [perma.cc/C8LU-KXX7].

82 *Department of Labor Appropriations Act, 2009*, Pub L 111-8, § 217, 123 Stat 763 at 782 (codified as amended in scattered sections of 42 USC).

83 National Institutes of Health, *supra* note 81.

84 *Ibid*.

85 United States Government Accountability Office, *Federal Research: Additional Actions Needed to Improve Public Access to Research Results* (GAO-20-81) (Washington, DC: 21 November 2019) at 12.

86 Office of Science and Technology Policy, *Economic Landscape*, *supra* note 72 at 13.

87 *Ibid*.

In a bid to make more government-funded research available to the public and to reduce the wait time for OA to research through the green road, in 2006, a bill for the *Federal Research Public Access Act* (*FRPAA*) was introduced.[88] Modelled after the NIH Public Access Policy, the *FRPAA* would require federal departments and agencies with an annual extramural research budget of $100 million or more to make their research available to the public within six months of publication.[89] The bill, however, failed, despite being reintroduced twice in 2010 and 2012, mainly because of opposition from scholarly journal publishers.[90]

In 2013, the US government, through the Office of Science and Technology Policy (OSTP), issued a policy memorandum directing federal agencies with more than $100 million in research and development expenditures to "develop a plan to support increased public access to the results of research funded by the Federal Government."[91] This includes results published in journal publications.[92] The policy directive was partially in response to a petition signed by thousands of members of the US public asking for expanded public access to the results of taxpayer-funded research.[93] The 2013 OSTP policy memorandum led to the adoption of public access plans by relevant agencies that established or identified federally owned or managed repositories to support public access to publications arising from federally-funded research no later than one year after publication.[94] However, most of the agencies had not fully developed and implemented mechanisms to ensure compliance with their

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88 Andrew Albanese, "U.S. Congress Moves on Open Public Access Bill", *Publishers Weekly* (19 April 2010), online: <publishersweekly.com> [perma.cc/7R4Q-ZD4W].

89 *Ibid*.

90 Berkman Klein Center for Internet & Society, "Notes on the Federal Research Public Access Act" (last modified 3 June 2021), online (wiki): <cyber.harvard.edu> [perma.cc/B4WB-8XB9]. See also "Publishers Oppose Bill on Scholarly Open Access", *Inside Higher Ed* (5 March 2012), online: <insidehighered.com> [perma.cc/72HE-KQKK].

91 John P Holdren, "Increasing Access to the Results of Federally Funded Scientific Research" (22 February 2013) at 2, online (pdf): <obamawhitehouse.archives.gov> [perma.cc/DPG2-MJ4S].

92 *Ibid*.

93 Michael Stebbins, "Expanding Public Access to the Results of Federally Funded Research" (22 February 2013), online (blog): <obamawhitehouse.archives.gov> [perma.cc/QM38-P6XU].

94 United States Government Accountability Office, *supra* note 85.

public access plans and requirements, including mechanisms that would enable researchers to comply with deposit requirements.[95] The public access plans did not involve any non-financial strategy to help researchers retain rights under publishing agreements that would enable them to make their accepted manuscripts publicly available. The general embargo period of twelve months between the initial publication of journal articles and public access to the articles through an open repository implemented in the public access plans also prevented immediate public access to research results.

To address the limited scope of prior government OA mandates and more importantly, the twelve-month embargo on public access to research articles,[96] in August 2022, the US government, through another memorandum from the OSTP, provided a public access policy guidance to all federal agencies with research and development expenditures.[97] The 2022 OSTP memorandum requires the agencies to develop new or update existing public access plans no later than December 31, 2025, to ensure that "all peer-reviewed scholarly publications authored or co-authored by individuals or institutions resulting from federally funded research are made freely available and publicly accessible by default in agency-designated repositories without any embargo or delay after publication."[98] Under the memorandum, the deposit of AAMs of published articles in such repositories suffices. The 2022 memorandum seeks to ensure that everyone has an equal opportunity to immediately access the results of federally funded research published in journals through open digital repositories.

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95 *Ibid* at 28–33.

96 As noted by the US Office of Science and Technology Policy:

> Years of public feedback have indicated that the primary limitation of the 2013 Memorandum is the optional 12-month embargo from public access of any publication resulting from federally funded research. This provision has limited immediate access of federally funded research results to only those able to pay for it or who have privileged access through libraries or other institutions. Financial means and privileged access must never be the prerequisites to realizing the benefits of federally funded research that the American public deserves ("Ensuring Access", *supra* note 7 at 2).

97 *Ibid* at 1.

98 *Ibid* at 3 [footnotes and emphasis omitted].

Federal agencies are however expected to develop or update their public access policies "to the extent consistent with applicable law."[99] There is no doubt that the law being referenced is copyright law because it is the only directly applicable law to the implementation of any public access policy that is built on the green OA policy. Moreover, the NIH Public Access Policy also requires that the policy be implemented "in a manner consistent with copyright law."[100] The 2022 memorandum notes that the public access plans should describe "[t]he circumstances or prerequisites needed to make the publications freely and publicly available by default."[101] In response to the OSTP memorandum, the NIH adopted a new public access policy in 2024, which went into effect on July 1, 2025.[102] The 2024 NIH Public Access Policy requires AAMs of research publications resulting from NIH funding "to be submitted to PubMed Central upon acceptance for publication, for public availability without embargo upon the Official Date of Publication."[103] It remains to be seen how researchers will comply with this policy and similar policies that would be adopted in response to the OSTP memorandum. However, without concretely addressing the constraints of journal publication agreements on immediate self-archiving of AAMs, any OA plan built on the green road to OA is bound to fail. Yet, given the huge additional costs of article publishing charges and the limited number of platinum OA journals, the green road to OA remains the most sustainable and viable means of providing public access to research articles. It avoids taxing the public twice for the same research, allowing for the judicious use of public funds.

Without directly addressing copyrights, including the issue of rights retention by researchers, the implementation of any OA policy or mandate in the United States, no matter how ambitious, is bound to be significantly limited. It is therefore not surprising that in the ten years between 2011 and 2021, the US has seen the number of subscription-only articles decrease by more than 20 per cent and gold OA articles increase by 20 per cent while the percentage of green OA remains static (standing at 18 per

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99 *Ibid* at 1, 3.

100 National Institutes of Health, *supra* note 81.

101 Office of Science and Technology Policy, "Ensuring Access", *supra* note 7 at 4.

102 National Institutes of Health, *supra* note 81.

103 *Ibid*.

cent of all articles in 2021).[104] This statistic is consistent with the policy reality. The catalyst for more gold OA articles is the willingness to fund APCs for authors and there have been considerable expenditures in that regard by federal and non-federal funders in the United States.[105] On the other hand, the required catalyst for an increase in green OA is authors' retention of rights that make green OA possible. If authors are not empowered to retain their copyrights when not publishing on a gold OA basis, there is a great likelihood that the percentage of subscription-only articles will remain high, and the percentage of green OA articles will remain the same.

2. Open Access Policy in Canada

Developments around OA policy in Canada have occurred in parallel with those in the United States. This is unsurprising given the geographical proximity of both countries and the considerable influence of the United States on Canada. Over the years, the Canadian government has sought to make research works publicly available through OA mandates and policies. In 2008, the Canadian Institutes of Health Research (CIHR), like the US NIH, adopted an OA policy to "improve open access of research funded by CIHR, and to increase the diffusion of research results".[106] The CIHR Open Access Policy requires recipients of CIHR grants from January 1, 2008, and onward to ensure that peer-reviewed journal publications arising from the funded research are freely accessible through the publisher's website (gold OA) or an online repository (green OA) within twelve months of publication.[107] Researchers are responsible for determining which journals allow them to retain copyright and/or allow them to archive their publications in accordance with this policy.[108] There is no concomitant policy to ensure that researchers can retain the rights necessary for self-archiving or compel publishers to permit them to do so. The policy, instead, encourages researchers to submit their

104 Jack McKenna, "Open Access in the USA" (24 August 2023), online (blog): <blog.mdpi.com> [perma.cc/5TA9-ZQ4T].

105 Office of Science and Technology Policy, *Economic Landscape*, *supra* note 72 at 13–14.

106 Canadian Institutes of Health Research, "CIHR Open Access Policy" (last modified 5 March 2015), online: <cihr-irsc.gc.ca> [perma.cc/K8SJ-WBN6].

107 *Ibid*.

108 *Ibid*.

manuscripts to journals that provide immediate OA to public articles (gold OA), if such a journal is suitable for the research. The CIHR considers the cost of publishing in OA journals (article publication charges) as an eligible expense under its grants.[109] Thus, the only effective way to provide OA to research under the CIHR OA policy is gold OA, which often involves further payment of fees to ensure free public access to articles, thereby imposing significant costs on taxpayers. Another limitation of the CIHR OA policy is that it does not seek to provide immediate free public access to research works. Also, because the policy only applies to funds from one of the three federal research grant agencies in Canada, the policy is limited in the scope of research works emanating from Canadian researchers that it can make available to the public.

In 2015, to facilitate OA to the results of all federally funded research in Canada, the three federal research granting agencies[110] that promote and support research and innovation in Canada adopted the *Tri-Agency Open Access Policy on Publications*.[111] Modelled after the CIHR Open Access Policy, the *Tri-Agency OA Policy* seeks to improve access to results of research funded by all three agencies and increase the dissemination and exchange of research results.[112] The agencies recognize that "[s]ocietal advancement is made possible through widespread and barrier-free access to cutting-edge research and knowledge, enabling researchers, scholars, clinicians, policymakers, private sector and not-for-profit organizations and the public to use and build on this knowledge."[113] The *Tri-Agency OA Policy* requires recipients of research funding from any of the three agencies to ensure that any peer-reviewed journal publications arising from the funded research are freely accessible within twelve months of publication.[114] This requirement can be fulfilled either through the green or the gold road to OA.[115] Although the agencies note that they

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109 *Ibid*.

110 The Canadian Institutes of Health Research (CIHR), the Natural Sciences and Engineering Research Council of Canada (NSERC) and the Social Sciences and Humanities Research Council of Canada (SSHRC).

111 Canada, "Tri-Agency", *supra* note 7.

112 *Ibid*.

113 *Ibid*.

114 *Ibid*.

115 *Ibid*.

have a fundamental interest in promoting the availability of results from the research they fund to the public at the earliest opportunity,[116] the twelve-month optional embargo in their policy does not reflect this.

Like the CIHR Open Access Policy, the *Tri-Agency OA Policy* does not provide any solution to the rights retention challenge that impedes green OA, despite the commonly known imbalance in bargaining power between research authors and publishers. It makes authors responsible for determining which publishers allow rights retention or archival of AAMs within twelve months of first publication.[117] It recognizes APCs charged by journals for gold OA as an eligible expense under its funding policy. This recognition, coupled with the absence of any government policy to empower research authors to retain the rights necessary for self-archiving their works, makes gold OA the most feasible way of providing public access to funded research. Given that many journals require payment of APCs, this policy imposes additional costs on the public to access the results of research funded by them. A study shows that academic researchers who received tri-agency grants in Canada paid at least $27.6 million to publish on a gold and hybrid OA basis.[118] These costs can be eliminated if the copyright barriers to green OA are addressed. In Canada, while there has been a steady decline in articles published as subscription-only since 2011 (from 71 per cent of all articles in 2011 to 49 per cent in 2021) and an increase in those published as gold OA (from 8 per cent of all articles in 2011 to 33 per cent in 2021), the statistics show that Canadian scholars are not turning to green OA as only 9 per cent of all articles are deposited into a repository from which the public can freely access them. This percentage has remained the same from 2011 to 2021, showing that the adoption of the *Tri-Agency OA Policy* has not led to any changes to green OA. One very plausible explanation for this is the absence of any effective legislative or policy strategy to empower research authors to retain the rights necessary to provide OA to their work through self-archiving.

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116 *Ibid*.

117 *Ibid*.

118 Leigh-Ann Butler et al, "The Oligopoly's Shift to Open Access Publishing: How For-Profit Publishers Benefit from Gold and Hybrid Article Processing Charges" [2022] Proceedings Annual Conference CAIS, DOI: <10.29173/cais1262>.

Canada's federal research granting agencies have announced a review of the *Tri-Agency OA Policy*, and a renewed OA policy is expected to be released before the end of 2026.[119] The goal of the review is to update the OA policy to require that any journal publications arising from agency-supported research be freely available to the public immediately upon publication.[120] According to a draft of the revised OA policy, recipients of grants and awards awarded on or after January 1, 2026, will be required to "deposit their research article in a Canadian institutional repository at the time of publication, [and] ... [t]he version deposited may be either the version of record (VoR) or author-accepted manuscript (AAM)."[121] The draft revised OA policy requires funding recipients to "retain rights over the dissemination of any peer-reviewed research article arising from agency-funded research"[122] despite the absence of any mechanism for empowering researchers to retain rights. Although the draft revised OA policy allows research authors to deposit preprints (i.e., unrefereed version) of their publication if the journal or publisher prohibits them from depositing the VoR or AAM at the time of the publication,[123] it remains to be seen if this would be retained in the final revised OA policy. While this carve-out will provide researchers with another pathway for compliance with the OA policy, it would not lead to public access to the more reliable refereed versions of research publications.

3. Open Access Policy in the European Union

Open access to research publications in journals is considered part of the research and innovation strategy of the European Union, which is considered a leader in championing OA initiatives.[124] In 2000, the

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119 Canada, "Delayed Release", *supra* note 16.

120 Canada, "Draft", *supra* note 17.

121 *Ibid*.

122 *Ibid*.

123 *Ibid*.

124 EU, European Commission, Directorate-General for Research and Innovation, *Improving Access to and Reuse of Research Results, Publications and Data for Scientific Purposes: Study to Evaluate the Effects of the EU Copyright Framework on Research and the Effects of Potential Interventions and to Identify and Present Relevant Provisions for Research in EU Data and Digital Legislation, with a Focus on Rights and Obligations*, Catalogue No KI-02-24-037-EN-N (Luxembourg: Publications Office of the European

European Research Area (ERA) was launched to create a single, borderless market for research and innovation by fostering the free movement of researchers, scientific knowledge, and innovation within the EU.[125] Achieving the ERA rose to the level of an EU objective in 2009, when the ERA was explicitly recognized in article 179(1) of the *Treaty on the Functioning of the European Union*.[126] To achieve the ERA, open and accessible research knowledge became important. Thus, in 2012, the European Commission (EC) issued a *Recommendation on Access to and Preservation of Scientific Information* that called for EU member states to make clear policies to ensure there is "open access to publications resulting from publicly funded research as soon as possible, preferably immediately and in any case no more than six months after the date of publication, and twelve months for social sciences and humanities."[127] The EC recommendation was adopted just before the EU launched its then-biggest research and innovation funding program, Horizon 2020,[128] which ran between 2014 and 2020 and provided nearly €80 billion of funding.[129] To foster open and accessible knowledge, the Horizon 2020 Framework Regulation made OA to research publications resulting from the funding program mandatory.[130] To comply with the OA mandate, researchers were required to make the AAM or VOR of their article available promptly, preferably immediately upon publication or within six months of publication

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Union, 2024) at 59 [Directorate-General for Research and Innovation, *Access to Research Results*].

125 EU, European Commission, "ERA History" (last visited 16 June 2025), online: <ec.europa.eu> [perma.cc/H2PA-9REP].

126 EU, *Consolidated Version of the Treaty on the Functioning of the European Union*, [2012] OJ, C 326/47, art 179(1).

127 EU, *Commission Recommendation of 17 July 2012 on Access to and Preservation of Scientific Information (2012/417/EU)*, [2012] OJ, L 194/39, art 1 [*EC Recommendation*].

128 EU, *Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC*, [2013] OJ, L 347/104 at 104 [*H2020 Framework Programme*].

129 EU, European Commission, "What is Horizon 2020?", online: <ec.europa.eu> [perma.cc/TR8Q-K8QQ].

130 *H2020 Framework Programme*, *supra* note 128, art 18(1).

(twelve months for publications in the social sciences and humanities).[131] Compliance could be through gold or green OA. Costs incurred by researchers to provide OA to journal publications, including payment of APCs, were eligible for reimbursement under Horizon 2020.[132]

In the course of the Horizon 2020 program, the EU also adopted two policy documents on OA (open science), *Open Innovation, Open Science, Open to the World: A Vision for Europe* and *Open Science Policy Platform Recommendations*, that sought to increase the openness and impact of research by encouraging researchers to integrate OA principles into the design of their research projects.[133]

The final report on Horizon 2020's OA mandate shows significant positive impact on the proportion of publications that were made freely and publicly available online.[134] The level of compliance with the OA mandate for research publications was 83.1 per cent of all peer-reviewed publications resulting from the research funding program.[135] The report notes that both gold and green routes were viable options for researchers.[136] Of the 86,767 OA articles, 33,536 (approximately 40 per cent) were green OA, while 53,231 (approximately 60 per cent) were gold OA

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131 European Commission, "General Multi-Beneficiary Model Grant Agreement for the Horizon 2020 Programme (H2020 General MGA — Multi)" (September 2014), art 29.2, online (pdf): <ec.europa.eu> [perma.cc/GNE2-BYLF].

132 EU, *Regulation 1290/2013 of the European Parliament and of the Council of 11 December 2013 laying down the rules for participation and dissemination in "Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020)" and repealing Regulation 2006/1906/EC*, [2013] OJ, L 347/81, art 43(2).

133 See EU, European Commission, Directorate-General for Research and Innovation, *Open Innovation, Open Science, Open to the World: A Vision for Europe*, Catalogue No KI-04-16-263-EN-N (Luxembourg: Publications Office of the European Union, 2016), online: <data.europa.eu> [perma.cc/V2L6-TF7D]. See also EU, European Commission, Directorate-General for Research and Innovation, *OSPP-REC: Open Science Policy Platform Recommendations*, Catalogue No KI-04-18-600-EN-N (Luxembourg: Publications Office of the European Union, 2018), online: <data.europa.eu> [perma.cc/HRK9-UU52] [Directorate-General for Research and Innovation, *OSPP-REC*].

134 See EU, European Commission, Directorate-General for Research and Innovation, *Monitoring the Open Access Policy of Horizon 2020: Final Report*, by Athena Research & Innovation Center, PPMI & UNU-Merit, Catalogue No KI-05-21-227-EN-N (Luxembourg: Publications Office of the European Union, 2021) at 10.

135 *Ibid* at 20.

136 *Ibid* at 22.

articles.[137] The average cost of APCs for each gold OA and hybrid OA article was around €2,200 and €2,600 respectively, resulting in a total cost of costing well over €100 million for gold publications.[138] Although the gold OA route provided immediate public access to research results while green OA provided access about a year after publication (still within the Horizon 2020 OA mandate),[139] green OA was the more financially sustainable option. With the right policies in place, immediate green OA is possible.

The uptake of OA to research results under the EU Horizon 2020 program was significant and the average success rate of 83 per cent of all articles was comparatively better than what has been achieved under any other governmental OA policy.[140] Horizon 2020's OA policy requirements and principles were, however, not significantly different from other governmental OA policies adopted around the same time. As such, the OA mandate alone does not explain the marked differences in outcome, especially the substantial difference in the proportion of green OA articles.

The EU's OA policies spurred the adoption of similar policies and strategies at the national level within EU member states. Many countries implemented OA measures that stressed the importance of making publicly funded research openly accessible.[141] Researchers were encouraged to utilize gold and green OA mechanisms to ensure public access to their research.[142] Notably, some EU member states took the bold step of introducing a secondary publication right for research authors, which provides greater freedom to researchers to utilize green OA mechanisms to facilitate public access to their research.

In 2013, Germany became the first European country to amend its copyright law to recognize and grant a secondary publication right (SPR) for research authors to republish and make publicly available their

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137 *Ibid*.

138 *Ibid* at 44.

139 *Ibid* at 22.

140 *Ibid* at 9–10.

141 See Directorate-General for Research and Innovation, *Access to Research Results*, *supra* note 124 at 411ff.

142 Directorate-General for Research and Innovation, *OSPP-REC*, *supra* note 133 at 9.

research publications through digital platforms.[143] Section 38(4) of the German *Copyright Act* gives authors of research works that are at least 50 per cent publicly funded and have been published in a journal or other periodical that publishes at least biannually, the right to make the accepted author's manuscript of their research work publicly available, for non-commercial purposes, twelve months after the first publication by the journal publishers, and regardless of any agreement to the contrary with the journal publishers.[144] Accordingly, since 2013, research authors in Germany have been able to self-archive their AAMs after an embargo period of twelve months from the date of first publication without the need to obtain permission from the publisher and notwithstanding any agreement to the contrary with the journal publisher. In 2015, Austria adopted the secondary publication right, designed to operate in the same way and on the same terms as the German provision.[145]

The Netherlands introduced a similar provision in its *Copyright Act* in 2015, granting the author of a short scientific (research) work that has been entirely or partly funded by public funds the right to make the work available for free after a reasonable period from the first publication of

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143 *Urheberrechtsgesetz* [Copyright Act], BGBI(I), 9 September 1965, 1273, s 38(4) [*Copyright Act* Germany], as amended by *Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes* [Law on the Use of Orphaned and Out-of-Print Works and a Further Amendment to the Copyright Act], BGBI(I), 8 October 2013, 3728 (Germany).

144 *Copyright Act* Germany, *supra* note 143, s 38(4).

145 The Austrian provision reads:

> The author of a scientific contribution that was created by him as a member of the scientific staff of a research institution that is at least half financed with public funds and that has appeared in a collection that appears periodically at least twice a year, retains, even after he grants the publisher or editor a right to use the work, the right to make the article available to the public in the accepted manuscript version after twelve months have elapsed since it was first published, provided that this does not serve a commercial purpose. The source of the first publication must be indicated. Any deviating agreement to the detriment of the author is invalid (see *Urheberrechtsgesetz* [Copyright Act], BGBI, 9 April 1936, No 11, s 37a [*Copyright Act* Austria], as amended by *Urheberrechtsgesetz-Novelle 2015* [Copyright Amendment 2015], BGBI(I), 13 August 2015, No 99 (Austria), translated by Knowledge Rights 21, "A Position Statement from Knowledge Rights 21 on Secondary Publishing Rights" (October 2022) at 5).

the work.[146] Like the German and Austrian provisions, the Dutch secondary publication right is exercisable without the need for permission from the copyright owner of the research work and notwithstanding any agreement to the contrary between the researcher and the copyright owner.[147] The Dutch version, unlike the German and Austrian ones, does not specify where the work should be published and does not require at least 50 per cent of public funding contribution for the right to be triggered. It therefore applies to more research works than Germany's and Austria's as it is not limited to the frequency of the publications of the venue in which the work appears, and would most likely cover works published in journals as well as edited books. Public funding in the Dutch context also encompasses indirect public funding; the research works of persons employed by public universities and research institutions are deemed to be financed by public funds, thereby covering a broader spectrum of works.[148] Although "short scientific work" is not defined in the act, it is likely a research work that is short enough to be published as part of a collection of research works. The generality of the embargo period indicated in the Dutch legislation ("after a reasonable period") suggests flexibility but sacrifices the much-needed certainty that specificity offers. This lack of precision can hinder researchers seeking to utilize the secondary publication right as a firmer and easier footing to implement green OA measures. The Dutch legislation does not indicate the version of the work to which the right should be applied, suggesting that the right can be used to make any version of the research work publicly available.

France adopted the SPR in 2016, granting authors of research writings arising from a research activity that is at least 50 per cent publicly funded and has been published in a periodical issued at least once a year the right to make available their AAM free of charge in an open format by digital means for non-commercial purposes, notwithstanding any agreement to the contrary between the authors and publishers. [149]

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146 *Auteurswet* [Copyright Act], Stb, 23 September 1912, No 308, s 25fa [*Copyright Act* Netherlands], as amended by *Wet auteurscontractenrecht* [Copyright Contracts Act], Stb, 30 June 2015, No 257 (Netherlands).

147 *Copyright Act* Netherlands, *supra* note 146, s 25h.

148 Dirk Visser, "The Open Access Provision in Dutch Copyright Contract Law" (2015) J IP L & Practice 10:11 872.

149 Art L533-4(I) *Code de la recherche* [C res], as amended by *Loi nº 2016-1321 du 7 octobre 2016*, JO, 8 October 2016, no 1, art 30 (France).

However, France unnecessarily subjects the exercise of the right to the agreement of co-authors.[150] France was the first to provide different embargo periods for different fields of research, requiring a six-month embargo period for research writings in exact sciences (science, technology, and medicine) and one year for social sciences and humanities.[151] Two years later, Belgium followed this model. It grants authors of scientific (research) articles arising from research that is at least 50 per cent publicly funded and published in a periodical, the right to make their AAM available to the public free of charge and for non-commercial purposes six months or one year after the first publication of the work.[152] Notably, Belgium implemented the SPR retroactively to all research works that were not in the public domain and that were created before the right came into force.[153]

In 2023 (post–Horizon 2020), Bulgaria introduced the SPR into its copyright law, becoming the sixth EU member state to do so.[154] Bulgaria grants authors of works of scientific literature (research works) that were publicly funded in whole or in part the right to make the work or parts of the work available to the public for non-commercial purposes through non-commercial repositories, notwithstanding any agreement to the contrary between the authors and publishers.[155] Notably, the Bulgarian SPR is not subject to any embargo period, making it the first country to implement a zero embargo SPR. Additionally, there is no limitation on the version of the research work that can be made available to the public in reliance on the right.[156]

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150 Art L533-4(I) C res, *supra* note 149.

151 *Ibid*.

152 Art XI.196§2/1 *Code de droit économique* [C éco], as amended by *Loi du 30 juillet 2018 portant dispositions diverses en matière d'Economie*, MB, 5 September 2018, 68687, art 29 (Belgium).

153 Art XI.196§2/1 C éco, *supra* note 152.

154 *Zakon za avtorskoto pravo i srodnite mu* prava [Copyright and Neighbouring Rights Act], SG, 29 June 1993, 2, art 60 [*Copyright Act* Bulgaria], as amended by *Zakon za izmenenie i dopŭlnenie na Zakona za avtorskoto pravo i srodnite mu prava* [Law on Amendments and Supplements to the Copyright and Neighboring Rights Act], SG, 1 December 2023, 4 (Bulgaria).

155 *Copyright Act* Bulgaria, *supra* note 154.

156 *Ibid*.

Most recently, on May 23, 2025, Slovenia adopted the SPR in an amendment to its *Scientific Research and Innovation Activities Act*.[157] The new provisions on SPR in the act allow researchers and research institutions to make available to the public the results of a scientific research activity in an OA repository as soon as the results of the research have been accepted for publication.[158] Any contractual provisions to the contrary are rendered null and void by the act.[159] Like Bulgaria, Slovenia has adopted a zero embargo SPR and imposes no limitation on the version of research work that can be made publicly available under the right.[160]

The countries that provided legislative support for green OA through the grant of the SPR were also some of the countries with the highest percentage of green OA publications under the Horizon 2020 program.[161] This may explain some of the significant success that the EU has had in comparison with other jurisdictions globally in making research works openly accessible, as well as the substantial uptake in the utilization of green OA to provide public access.

Alongside the Horizon 2020 program, in 2018, the European Commission and the European Research Council supported a group of national research funding organizations ("cOAlition S") in launching "Plan S," an "initiative to make immediate OA to research publications a reality."[162] The OA policy of cOAlition S states that from 2021 onwards, all research publications arising from research funded by public or private funding bodies must be published in OA journals or platforms or made available through OA repositories without embargo. This is a more ambitious OA policy than the Horizon 2020 OA policy that allowed a six-to-twelve-month embargo on OA through the green route. Also, Plan S is the first government-supported OA policy that calls for OA to the outputs of research funded by private funding bodies, recognizing the importance of providing OA to research outputs beyond those arising from

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157 *Zakon o znanstvenoraziskovalni in inovacijski dejavnosti* [Scientific Research and Innovation Activities Act], ULRS, 30 November 2021, 10929, art 41(6) (Slovenia) [*ZZrID*].

158 *Ibid*.

159 *Ibid*, art 41(7).

160 *Ibid*, art 41(6).

161 Directorate-General for Research and Innovation, *Monitoring Horizon 2020*, *supra* note 134 at 23.

162 Plan S, "What Is cOAlition S?", online: <coalition-s.org> [perma.cc/8PAN-45S3].

publicly funded research activities. Several private research funding organizations have joined cOAlition S and adopted the Plan S.[163]

Plan S is now in operation in the EU, alongside the OA mandate of Horizon Europe, the successor to Horizon 2020. Horizon Europe runs from 2021 to 2027 and there remains an obligation to provide OA to research publications arising from research projects funded through Horizon Europe.[164] It requires immediate OA to the published version or AAM version of the research publication either through the green or gold road to OA.[165] At the end of Horizon 2020, the European Commission also published its communication "A New ERA for Research and Innovation," which announced four objectives, including the need to improve access to excellent research and innovation for researchers across the EU and make progress on the free circulation of knowledge.[166] The EU Pact for Research and Innovation was also adopted and defined four priority areas, two of which are connected to improving OA to knowledge.[167] In connection with this, the ERA Policy Agenda was adopted for the period 2022–2024 to contribute to the priority areas.[168] To foster the dissemination and access to research knowledge, the ERA Policy Agenda lists as one of its planned actions the development of an EU copyright

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163 Plan S, "Organisations Endorsing Plan S and Working Jointly on Its Implementation", online: <coalition-s.org> [perma.cc/G7PY-3H9N].

164 See EU, *Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, and repealing Regulations (EU) No 1290/2013 and (EU) No 1291/2013*, [2021] OJ, L 170/1, art 39 [*Regulation 2021/695*]. See also Horizon Europe, "Model Grant Agreement" (1 April 2024) at 95, online (pdf): <ec.europa.eu> [perma.cc/843M-PVY2].

165 See *Regulation 2021/695*, *supra* note 164, art 39; Horizon Europe, *supra* note 164 at 95.

166 EU, European Commission, "A New ERA for Research and Innovation", CELEX No 52020DC0628 (9 September 2020), online: <eur-lex.europa.eu> [perma.cc/5B92-VRLJ].

167 EU, European Commission, Press Release, "Commission Welcomes Approval of the Pact for Research and Innovation in Europe and Future Governance of the European Research Area" (25 November 2021), online: <ec.europa.eu> [perma.cc/24RV-3UXR].

168 EU, European Commission, Directorate-General for Research and Innovation, *European Research Area Policy Agenda: Overview of Actions for the Period 2022–2024*, Catalogue No KI-01-21-450-EN-N (Luxembourg: Publications Office of the European Union, 2022) at 3.

framework that is fit for research.[169] The adoption of an EU-wide SPR is being considered as part of this copyright framework for research, in particular, to serve as a legislative measure for rights retention and to increase the adoption of green OA by researchers.[170]

III. SECONDARY PUBLICATION RIGHTS FOR GREEN OPEN ACCESS

In their OA policies, governments are moving toward ensuring immediate communication of research results to the public at no further cost to them. While the gold road to OA appears to be the most likely to achieve the goal of immediate OA to research publications, green OA is more desirable as it could offer a more sustainable and affordable route to public access to research outputs, given limited public resources. However, for green OA to deliver on its potential to provide immediate OA to research publications, the mere adoption of OA mandates and policies that require immediate self-archiving of research publications is not enough. Publishers are not required to permit immediate self-archiving even when researchers are subject to government OA mandates. Public access to research cannot be premised on the hope that publishers will permit immediate self-archiving of the AAM version of their research publications. A legislative strategy for green OA that empowers authors to retain the rights necessary to self-archive their research works at the earliest opportunity possible must, therefore, be included in the overall strategy of governments for OA to research. Governments as the grantors of copyright protection being misused by publishers stand in a position to use the law to empower researchers to take the green road to OA. Moreover, as key funders of research disseminated in journals and trustees of public funds, governments have the legitimacy to adopt a legislative strategy to drive green OA in the public interest. I argue that the legislative strategy must be rooted in copyright law and should be in the

169 *Ibid* at 5.

170 *Ibid*. See also EU, European Commission, Directorate-General for Research and Innovation, *Study on EU Copyright and Related Rights and Access to and Reuse of Scientific Publications, Including Open Access: Exceptions and Limitations, Rights Retention Strategies and the Secondary Publication Right*, by Christina Angelopoulos, Catalogue No KI-08-22-206-EN-N (Luxembourg: Publications Office of the European Union, 2022) at 35.

form of the grant of secondary publication rights to authors of research works.[171]

If adopted by governments, SPR is likely to facilitate researchers' commitment to OA as it takes away the hurdle of negotiating contract terms that permit immediate green OA with publishers for every research publication. For governments, SPR has the potential to lead to higher levels of compliance with OA policies, making research works open without additional government spending for APCs and where other non-fee routes to OA are not available to the researchers. For the public, the introduction of SPR can increase the total number of research publications published as OA and available to the public. If properly designed, the grant of a SPR to authors can be a potent legislative strategy to facilitate immediate public access to research using the more financially sustainable green OA model.

This part first examines how countries can design the SPR to effectively support the use of green OA measures, ensuring that published research works are made openly accessible as soon as possible. It draws on the desirable features of existing SPR implementations in the seven EU states and identifies where deviations are necessary in defining the features of SPR to achieve an effective SPR regime. Next, the limitations of SPR and alternatives legislative or policy mechanisms to the SPR are considered.

A. Defining the Features of a Secondary Publication Right

An SPR allows the author of an eligible work that has been formally published on one platform to republish the work on another platform from which the public can access it free of charge, without the permission of the initial publisher. Based on existing implementations of the SPR in EU states, any legislation granting SPR to authors must indicate (i) the category of copyrighted works that would be covered, (ii) the version of the work to which the right applies, (iii) whether and what percentage of public funding should be required, (iv) the scope of the right, (v) whether the exercise of the right can be overridden or restricted by contracts, (vi)

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171 Majekolagbe, *supra* note 3 at 7. See also Roberto Caso & Giulia Dore, "Academic Copyright, Open Access and the 'Moral' Second Publication Right" (2022) 44:6 Eur IP Rev 332 at 342.

whether the right is subject to an embargo period, (vii) whether the author must mention the source of the first publication, and (viii) whether the right can be exercised retrospectively. The definition of these features is crucial to implementing an effective SPR regime for public access to research outputs.

1. Category of Copyrighted Works

The introduction of the SPR has been tied to public access to research outputs, and countries have narrowed the category of copyrighted works to which the SPR applies to. Nonetheless, there are variations across the seven EU member states regarding the scope of research outputs covered by the right. Germany and Austria have limited it to research contributions appearing in collections periodically published at least twice a year, which invariably means the right is limited to articles in journals that publish at least two issues a year.[172] For France, it is enough if the research writing appears in a journal that publishes at least one issue a year.[173] Belgium specifies that research articles published in a periodical are covered, and does not require a certain number of issues per year.[174] The Netherlands does not require that the research work be published in periodicals, but indicates that the right applies only to short works of science (short research works).[175] Short works of science could be interpreted to include research works appearing in collections whether periodically published like journals or non-periodicals like edited books and conference proceedings, but excludes research works that are not published in collections which are often long works of research, such as monographs. Bulgaria simply states that this right applies to "a work of academic literature created on the occasion of a research."[176] There is no requirement concerning the work's length or that it be published in periodicals, implying that it covers any research work appearing in any outlet.

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172 *Copyright Act* Germany, *supra* note 143, s 38(4); *Copyright Act* Austria, *supra* note 145, §37a.

173 Art L533-4 C res, *supra* note 149.

174 Art XI.196§2/1 C éco, *supra* note 152.

175 *Copyright Act* Netherlands, *supra* note 145, art 25fa.

176 *Copyright Act* Bulgaria, *supra* note 154, art 60(2), translated by Ana Lazarova, "Introducing a Zero-Embargo Secondary Publication Right in Bulgaria" (9 February 2024), online (blog): <legalblogs.wolterskluwer.com> [perma.cc/AYW2-RRMJ].

Similarly, Slovenia, the latest jurisdiction to adopt the SPR, does not require the work to be of a certain length, nor does it prescribe a format or forum for publication.[177] In Slovenia, the right attaches to the results of a scientific research activity.[178]

It is more beneficial for public access to research for the SPR to cover different types of research outputs, not only those appearing in periodicals or journals. While research outputs are mostly disseminated through publication in journals, they are increasingly being published in edited books and other forms of research collections.[179] In a recent survey concerning the SPR in five EU member states, researchers noted that it is important for the SPR to cover research outputs relevant to all disciplines.[180] For example, conference proceedings are a significant outlet for research in computer science,[181] but they are not covered under SPR provisions that narrowly define eligible research outputs as those published in periodicals. Defining the SPR to include research works published in various formats beyond journal articles enhances public access to research as it allows researchers to provide free access to a wider range of research outputs. However, is adopting an open-ended approach, similar to Bulgaria and Slovenia, the optimal approach? The open-ended approach adopted by Bulgaria and Slovenia would allow the SPR to be applied to works ranging from those published as journal articles to those published as monographs. There is a general reluctance to extend the SPR to research publications in books, including both edited books and monographs, with a stronger hesitation towards monographs. Publishers have expressed that applying SPR to books would draw away a significant source of revenue that helped offset the original cost of publication, and this could deter them from publishing research books.[182] This is perhaps because institutional subscriptions to books are often on a title-to-title basis, whereas the periodical nature of journal publications means that

177 *ZZrID*, *supra* note 157, art 41(6).

178 *Ibid*.

179 Mary Anne Kennan & Kim M Thompson, "Research Writing and Dissemination" in Kirsty Williamson & Graeme Johanson, eds, *Research Methods: Information, Systems, and Contexts*, 2nd ed (Cambridge, Mass: Chandos, 2017) 517 at 525–28.

180 Directorate-General for Research and Innovation, *Access to Research Results*, *supra* note 124 at 86.

181 *Ibid*.

182 *Ibid* at 103.

libraries subscribe to the journal titles and not individual journal articles.[183] Also, unlike journal articles, conference proceedings, edited books, and similar publications for which authors receive no remuneration from publishers in exchange for publication, research authors receive royalties for the sale and distribution of their monographs. This makes it more difficult to justify applying SPR to monographs.

Considering the foregoing, it is in the public's best interest for the SPR to encompass a wide array of research publications, including journal articles, edited books, conference proceedings, and similar formats. However, for the reasons previously mentioned, extending the SPR to monographs may not be ideal. Although restricting research published in monographs could leave valuable knowledge behind paywalls, most research outputs are typically published in journal articles and edited books rather than monographs, and government OA policies are often limited to research published in journals.[184]

2. The Version of the Work to Which the Right Applies

The spread of misinformation and the need for the public to be able to rely on the information from the version most easily accessible to them make it important that the SPR applies at a minimum to the AAM version of research works—i.e., the final peer-reviewed manuscript accepted for publication. In Germany, Austria, France, and Belgium, an author can rely on the SPR to make available to the public the AAM version of their research work. In the Netherlands, Bulgaria, and Slovenia, there is no such limitation, and the SPR can be used by the author to republish even the version on record. One of the main differences between gold OA and green OA is that the former leads to public access to the version on record, while the latter generally leads to public access to the AAM version.[185] It is the trade-off between the public double-paying for access to research in cases where the journal is not platinum, and not double-paying while receiving access to the same work, in substance, that the public would have had access to through gold OA. The SPR comes into play mainly to ensure that the public does not have to double-pay to receive access to

183 Larivière, Haustein & Mongeon, *supra* note 33 at 12.

184 See e.g. Canada, "Draft", *supra* note 17.

185 Guibault, *supra* note 11 at 154, 156.

research outputs. Thus, limiting the application of SPR to the AAM version of research outputs aligns with this objective as well as the objective of government OA policies.

However, in a recent survey of research institutions in five of the countries where the SPR has been implemented, more than eighty per cent of the respondents indicated a need for SPR provisions to apply to the VoR due to the insufficiency of the AAM version for "quoting and effective exploitation."[186] Some researchers also believe that in certain cases "the circulation of several versions harm the effective dissemination and exploitation of research; therefore, they do not wish to share an AAM and see the need to rely solely on VoR."[187] In both cases, the sufficiency of the SPR is being considered from the perspective of the research author or researcher-user. The distribution of the AAM when the VoR is also in circulation, albeit closed access, could give rise to a situation where some people have access to the VoR and use the publisher's citation in any research output for which they have used the work, while others have access only to the AAM and cite the repository where they accessed the work. The research author may not want such split citations, especially if the citation index for their work is tied to citing the VoR. The researcher-user who has access to the AAM would only have to cite page numbers and other citation information that do not correspond with those for the VoR.

Undoubtedly, republishing the VoR resolves these issues by allowing everyone access and use of the same version. However, defining the SPR to allow the republication of the VoR in an open repository when the initial publication made by the publisher is in a closed repository might make the SPR less tolerable for publishers, leading to a situation where publishers change their publishing model to direct open publishing but subject to the payment of APCs.[188] This would lead to public access to the VoR, and even obviate the need for SPR, but increase research costs as the public would have to pay APCs to access research works. In the likely

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186 Directorate-General for Research and Innovation, *Access to Research Results*, *supra* note 124 at 90.

187 *Ibid*.

188 Publishers have already indicated that a move from AAM to VoR would have financial implications as it would make their current subscription model non-viable and would result in a fundamental reshaping of their business model (*ibid* at 95).

event that the public cannot cover the costs of APCs for every research output arising from a research activity, the pool of research knowledge being published and accessible to the public could be reduced.

The citation issues associated with AAM version of research works could be ameliorated by requiring that researchers include the full citation of the VoR in the AAM version. Researchers who are using the AAM version can then include the VoR citation in their citation of the AAM version. This solution might not entirely satisfy the research author since it is already required in six of the seven EU countries that have implemented the SPR,[189] and research authors still indicate a desire to move away from the AAM version. However, since it is not just researchers that exploit research works, the citation problems of the AAM version would not always apply to every exploitation of research works. Furthermore, researchers must accept that the SPR, while an author's right, is meant to cater primarily to the interests of the public who fund research activities and have an interest in accessing and using the outputs of such activities for purposes that may not require citations. For instance, a member of the public who would like to inform themselves of the scientific evidence for climate change by reading the results of research projects would be satisfied with the AAM version and would not need to cite the pages of the VoR. The SPR also allows researchers to more easily comply with government OA mandates that aim to promote public access to and exploitation of research outputs without undue financial burden on the public.

3. Whether and What Percentage of Public Funding Should Be Required

Since the SPR was initially designed as a legislative solution to the challenges researchers face in self-archiving their works to comply with government mandates for public access to publications from publicly funded research, existing SPR provisions are linked to publicly funded research. Therefore, anyone wishing to use the SPR to provide green OA to their research must ensure that the project from which the publication originates is fully or partially publicly funded, with some jurisdictions

189 France is the only country that does not require an indication of the citation of the initial place of publication, i.e., where the VoR was published (see art L533-4 C res, *supra* note 149).

requiring at least 50 per cent public funding.[190] The SPR, however, need not be so narrowly defined. Governments could consider using the SPR to address broadly the challenges that researchers face in self-archiving their works where their research publications would otherwise be behind a paywall and inaccessible to the public, regardless of whether their research project was directly publicly funded. There are multiple ways that the public contributes to research activities beyond situations where researchers are directly funded by government agencies. For example, the research activities of all researchers employed by government institutions are funded by the public since the government remunerates them for the time spent conducting their research. Such researchers also use the institution's equipment, facilities, and resources like laboratories, computers, and libraries to undertake research. Given that the government funds these researchers' projects through basic institutional funding, designing the SPR to be exercisable only in respect of works arising from research projects funded through government agencies limits public returns on research investments. Researchers at private institutions, including those working on projects without government grants, benefit from indirect government funding through tax exemptions.

Another argument in favour of extending the SPR to all research publications regardless of funding status is that copyright law does not provide incentives for research authors to create research works (publicly funded or not) since they do not exploit copyrights in the economic manner envisaged under copyright law.[191] Copyright law incentivizes the creation and distribution of authorial works through economic rights. It assumes all authors are motivated by money and that exclusive rights benefit all types of works. However, it often overlooks the interests of research authors, who are motivated by the desire to disseminate their research findings as widely and quickly as possible.[192] Granting this category of authors a secondary publication right that allows them to republish their works immediately for wider public access will bring copyright

190 See the discussion of SPRs in seven EU countries in Part II(B)(iii).

191 Majekolagbe, *supra* note 3 at 6, 21. See also Suber, *Open Access*, *supra* note 2 at 129–32.

192 Majekolagbe, *supra* note 3 at 39. See also Suber, *Open Access*, *supra* note 2 at 129–32.

law in alignment with its goals of incentivizing authors and furthering access to authorial works.[193]

The SPR should be defined without the necessity of public funding. While publishers might oppose SPR being isolated from publicly funded research, the legitimacy of SPR associated with public funding also applies to privately funded projects. If an individual or entity, other than the publisher, has invested in the research project and seeks to recoup its investment through increased public access and societal impact, this should be facilitated as well through a legislative tool like the SPR. Where the SPR is nonetheless linked to publicly funded research, it is advisable that what constitutes publicly funded research be defined broadly to include not only research funding by government grants, but research undertaken by those employed by government institutions. There should be no requirement as to a percentage of public funding, any research funded wholly or partly by government funding should qualify. The requirement of funding percentage adds an unnecessary layer of complexity to the SPR as it is sometimes difficult to determine the actual percentage of government funding that went into a project, and in cases of uncertainty, researchers may choose to err on the side of caution and refrain from exercising the SPR, thereby limiting compliance with government OA policies as well.

4. The Scope of the Right

Authors exercising the SPR should be allowed to make the AAM version of their work available to the public digitally free of charge. This would allow research authors to publish their work in an open digital repository or any digital platform accessible to the public and make it discoverable to the public through an online search.

There is a growing desire for the broadening of the scope of rights provided by the SPR to include a right to permit the public to use the work in ways that would otherwise be within the scope of exclusive rights

193 Majekolagbe, *supra* note 3 at 7. See also *Théberge v Galerie d'Art du Petit Champlain Inc*, 2002 SCC 34 ("[t]he *Copyright Act* is usually presented as a *balance* between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator" at para 30 [emphasis added]).

of the copyright owner.[194] While the public needs to be able to use research works in other ways beyond reading it, the SPR is not the ideal method to achieve it. The proper place for expanding the scope of what the public can do with a copyrighted work is through the mechanism of copyright limitations and exceptions, otherwise called user rights. The SPR should be limited to providing public access to a copy of the work which the public can then use for purposes that are consistent with their rights under the scope of copyright limitations and exceptions available to them in that country. If there are limited user rights that hinder the public from making more meaningful use of copyrighted works, then pursuing an expansion of user rights through copyright exceptions is the ideal move. Extending the scope of the SPR beyond the right to make a work available would significantly impact publishers by stripping them of all exclusive rights transferred by authors, potentially necessitating a shift to an author-pays publishing model.[195]

5. Whether the Exercise of the Right Can Be Overridden or Restricted by Contracts

One of the main reasons why countries who are keen to provide public access to the results of publicly funded research should adopt the SPR is to empower researchers to comply with OA mandates in a manner that is financially sustainable through green OA. Namely, without the need to always source for finances to pay the APC that is often required to publish on a gold OA. To achieve this goal, it is important to grant researchers an SPR and safeguard their rights from any publishers' contracts that may seek to undermine the exercise of their rights. To be effective, the SPR must be defined as a right that cannot be waived, overridden, or otherwise restricted by contract. It is so defined in all seven EU countries that have implemented the SPR. By adopting the SPR and describing it as a right that cannot be overridden or limited by contract, authors would be able to provide public access to research publications on the exact terms provided in enabling legislation, thereby preventing the right from being subjected to private reordering.

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194 Directorate-General for Research and Innovation, *Access to Research Results*, *supra* note 124 at 98.

195 *Ibid* at 103.

6. Whether the Right is Subject to an Embargo Period

In defining the features of the SPR, countries must decide whether the right will be subject to an embargo period (including the duration of the embargo) or not. Where the exercise of the SPR is subject to an embargo period, the author will not be able to rely on the SPR to make the work publicly available until the expiration of the time specified in the legislation. In contrast, where the SPR is not subject to an embargo period, the author can choose to exercise the SPR to make the work available to the public any time after the initial publication of the work.

Except for Bulgaria and Slovenia, all EU countries that have implemented the SPR have subjected its exercise to an embargo period, ranging from six months to twelve months and the Netherlands' ambiguous "reasonable period." An embargo gives the publisher exclusive rights to provide access to the research work for a set period on a paid subscription basis, thereby preventing immediate public access to the work. The adoption of an embargo period in most EU countries is not unconnected with the EC Recommendation on Access to and Preservation of Scientific Information which created the initial impetus for the implementation of the SPR and required that public access to research should be provided no later than twelve months post publication of the work.[196] A majority of publishers that responded to a recent survey on adopting an EU-wide SPR that permits publication without any embargo period or only contains a short embargo period, such as six months, noted that such a move would result in a fundamental reshaping of their business model.[197] The publishers surveyed may have answered the survey question in the manner they did because the designers of the survey also expressed an interest in defining the SPR to cover the VoR—the same version as available through the publisher's platform.[198] It is, however, doubtful that a zero embargo would have any significant impact on the revenue of publishers when limited to the publication of the AAM given that the mere availability of a SPR with zero embargo on republication of AAM would hardly affect institutional subscriptions to publications because publishers would retain the exclusive right to provide access to the VoR. On the

196 *EC Recommendation*, *supra* note 127, art 1.

197 Directorate-General for Research and Innovation, *Access to Research Results*, *supra* note 124 at 104.

198 *Ibid*.

other hand, most people who will rely on researchers' exercise of the SPR to obtain access, i.e., those without institutional access to publishers' VoR, are unlikely to buy a copy of the publication from the publisher even if an embargo is put in place.

The current implementation of embargo periods on the republication of AAMs—particularly their adoption in most EU countries that have implemented the SPR—does not appear to be grounded in empirical evidence regarding the impact of embargoes on journal subscriptions. As far back as 2013, the UK House of Commons Select Committee on Business, Innovation and Skills already concluded that "there is no available evidence base to indicate that short or even zero embargoes cause cancellation of subscriptions."[199] The absence of evidence that short or zero embargos harm subscription publishers has led the UK Research and Innovation (UKRI) to adopt a new OA policy that requires at the minimum an immediate deposit of AAM of publications from publicly funded research in an open repository immediately upon publication.[200] In the US, the government has adopted a similar policy mandating the AAMs of all research publications from federally funded research be deposited in publicly accessible repositories immediately upon publication,[201] and publishers have not posed any significant objections.[202] The EU's Publishing and the Ecology of European Research (PEER) project also showed that rather than harm subscription journals, traffic to journal websites increased when articles were made available through a publicly accessible repository.[203] Overall, evidence indicates that subscription journals can coexist harmoniously with zero embargo green OA

199 UK, Business, Innovations, and Skills Committee, *Open Access: Fifth Report of Session 2013–14*, vol 1, *Report, Together with Formal Minutes, Oral and Written Evidence* (Report HC 99-1) (London: The Stationery Office, 2013) at 18.

200 UK Research and Innovation, "UK Research and Innovation Open Access Policy" (24 May 2013), online: <ukri.org> [perma.cc/A7QS-8BW8].

201 Office of Science and Technology Policy, "Ensuring Access", *supra* note 7 at 1.

202 See e.g. Leila Moore, "Public Access to the Results of Federally Funded Research in the US" (14 March 2023), online: <wiley.com> [perma.cc/S7PQ-SJCM]. See also National Information Standards Organization, "IOP Publishing's Response to White House OSTP Memo" (31 August 2022), online: <niso.org> [perma.cc/MS7K-83FA].

203 Business, Innovation and Skills Committee, *supra* note 199 at 18, ev 120.

policies.[204] Furthermore, the increased dissemination and citations provide significant benefits to both publishers and authors, outweighing any potential negative impacts.[205]

While it is doubtful that defining the SPR as a right that can be exercised at any time after the first publication of the work by the publisher would have a significant effect on subscriptions, the effect of an embargo period (even a short one) on public access to research knowledge is significant.[206] There is a need for immediate public access to the results of research activities.[207] For the majority of members of the public who have no institutional affiliation through which they may access the VoR of publications behind paywalls, the only way they can obtain access without incurring an additional (and often significant) expense is if the work has been secondarily published by the research author in an open digital format. When an embargo period is imposed, such persons may not be able to access the work as and when needed if their time of need for such works falls within the embargo period. Governments are shifting away from OA mandates that grant recipients twelve months to make their research outputs publicly available to OA mandates that require immediate public access to research outputs to provide equal access opportunities in society.[208] Implementing an SPR regime with an embargo period in the face of government OA policies that require immediate public access to research could compel researchers to publish in undesired venues to comply with such policies, especially when there is limited funding to cover the article processing charges that are required by non-platinum OA journals.

In addition to the impact of an embargo period on immediate public access to research, it has been found that embargo periods discourage

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204 Jonathan P Tennant et al, "Ten Hot Topics Around Scholarly Publishing" (2019) 7:2 Publications 34 at 14.

205 *Ibid*.

206 *Ibid* at 13–14.

207 Office of Science and Technology Policy, "Ensuring Access", *supra* note 7 ("[t]he shift in practice during COVID-19 demonstrated how delivering immediate public access to federally funded research publications and data can provide near real-time returns on American taxpayer investments in science and technology" at 2).

208 See e.g. Canada, "Draft", *supra* note 17. See also Office of Science and Technology Policy, "Ensuring Access", *supra* note 7 at 1.

authors from using SPR.[209] While authors are more likely to exercise SPR immediately after their work is published, they become less likely to do so over time.[210] As a result, the SPR may not yield its intended results of providing the public access to research works that they may otherwise be unable to access. This is even more likely to be the case where researchers are not subject to OA mandates or compliance with such mandates is not monitored.

Although it has been suggested that discriminatory embargo periods should be adopted, i.e., whether and what embargo period would be adopted should be based on the research field to which the research work is related,[211] this approach is not advisable for at least three reasons. First, while different research disciplines have different characteristics and provide the public with different information, the differences should not be correlated with relevancy and significance of the information to the public. Members of the public might have reasons to value research works published in the sciences in the same way as those in the humanities even if conventional bias may suggest otherwise. As noted by the US Office of Science and Technology, all research work is valuable to the public, regardless of the field, and no single field should be prioritized over others in terms of public access.[212] Second, there is no evidence that short embargo periods are harmful to journal subscriptions in some fields when compared to other fields.[213] Third, in jurisdictions where discriminatory embargo periods were implemented in their SPR regimes, this approach led to confusion among some researchers about which field their work belonged to when they wanted to exercise the SPR.[214] For instance, in France, a six-month embargo applies to research works in science, technology and medicine while one year applies to those in humanities and social sciences.[215] However, "[i]n practice, it is not always easy to

209 Directorate-General for Research and Innovation, *Access to Research Results*, *supra* note 124 at 88.

210 *Ibid*.

211 *Ibid* at 95.

212 Office of Science and Technology Policy, "Ensuring Access", *supra* note 7 at 2–3.

213 Business, Innovation, and Skills Committee, *supra* note 199 at 18.

214 Directorate-General for Research and Innovation, *Access to Research Results*, *supra* note 125 at 89.

215 Art L533-4 C res, *supra* note 149.

determine the discipline for a particular manuscript and, therefore, the embargo period that applies."[216] Uniformity in embargo rules is therefore recommended as it provides certainty regarding what embargo rule applies which is important as any uncertainty could lead researchers to refrain from using the SPR to provide public access to research for fear of copyright infringement liabilities.

Overall, it is recommended that the SPR be defined without any embargo period for all research works, ensuring immediate public access to research works across all disciplines in line with government OA policies. However, if a country chooses to implement an embargo period to "appease" publishers despite the absence of evidence that zero embargos harm subscription publishers, it should be limited to no more than three months.[217] Even a six-month embargo has been deemed too long, hindering researchers' use of the SPR.[218] Additionally, a three-month period allows the public to access research work free of charge relatively soon after its initial publication.[219] That said, any embargo period would run counter a government OA policy requiring immediate public access and would undermine the usefulness of the SPR as a legal instrument for facilitating compliance with such OA policy.

7. Whether the Author Must Mention the Source of the First Publication

To help the public confirm that they are reading research works that have been accepted for publication following the publishers' quality review process, a feature of SPR provisions should be a requirement that authors mention the source of the first publication of the work when making the AAM version of work available to the public. As argued earlier in this paper, this feature could also help point researcher-users of the work to citation information that could be included when quoting or otherwise citing the content of the work.

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216 Directorate-General for Research and Innovation, *Access to Research Results*, *supra* note 124 at 89.

217 *Ibid*.

218 *Ibid* at 88.

219 *Ibid* at 98.

8. Whether the Right Can Be Exercised Retrospectively

Countries should consider defining the SPR as a right that can be exercised retroactively. This would allow public access to research works published before the SPR's introduction, potentially expanding the pool of accessible research if researchers choose to exercise their right to publish the AAM versions of their earlier published research works. When a new right is added to the suite of author's rights in copyright law, it often applies to previously published and future works, and the SPR should not be different. It is also less likely that publishers will oppose the publication of those earlier works as they would have been the sole source of access for a long time.

If adopted by governments, the SPR is likely to facilitate researchers' commitment to OA as it takes away the hurdle of negotiating contract terms that permit green OA with publishers for every research publication and of ascertaining the terms of those contracts. For governments, SPR has the potential to lead to higher levels of compliance with OA policies requiring immediate public access to research, making research works publicly accessible without additional government spending on article processing charges and where other non-fee routes to OA are not available to researchers. For the public, the introduction of SPR can increase the share or total number of research publications published as OA and available to the public.

B. Limitations of the SPR and Alternatives to the SPR

Providing research authors with the legal backing to retain rights that enable them to take the green route to OA will not only further widespread dissemination and access to the results of research activities, but also allow copyright law to truly cater to the interests of research authors in the wide dissemination and public availability of their work.[220] Using copyright law to facilitate OA to research through the SPR also redefines the function of private rights in copyright law as tools that can be inherently inclusionary rather than exclusionary. Through the implementation of the SPR, governments can expand access to research works to a broader

220 Majekolagbe, *supra* note 3 at 55–56.

pool of users who might otherwise be excluded when research knowledge is only accessible through subscriptions.

The grant of the SPR to facilitate OA to research is also consistent with the objectives of copyright in many countries. In Canada, for instance, the objective of copyright law is to promote the public interest in the "encouragement and dissemination of works of the arts and intellect and obtaining a just reward for authors."[221] Therefore, if granted in Canada, the SPR would align with this objective given that it will further the dissemination of works of intellect. Likewise, in the US, the primary purpose of copyright law is to foster the creation and dissemination of works for the benefit of the public[222] or as the US Constitution puts it, "To promote the Progress of Science and useful Arts."[223] To the extent that the SPR facilitates the dissemination of works to the public, it aligns with the objectives of copyright law.

SPR is, however, not without limitations and challenges. The key limitation of the SPR for OA is that it relies on the author's willingness to exercise the right, and where the right is not exercised, public access to research works would not be achieved. The benefits of the SPR are, therefore, directly tied to the extent of its exploitation by researchers. Another limitation of the SPR is that it may not lead to true openness of research works. The United Nations Educational, Scientific and Cultural Organization (UNESCO) considers research publications to be truly open when they are under an open licence that allows access, re-use, repurpose, adaptation and distribution under specified conditions to all actors immediately upon publication, or as quickly as possible.[224] Authors who will rely on the SPR would have, in most cases, transferred their copyrights or granted an exclusive licence to publishers and may not be legally able to provide an open licence to the public to re-use, repurpose, adapt or distribute the research work. Members of the public can only engage in

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221 *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 23. The purpose of the *Copyright Act* is also stated as such in Canadian Intellectual Property Office, "A Guide to Copyright" (last modified 15 October 2024), online: <ised-isde.canada.ca> [perma.cc/3AHA-RUX5].

222 David Nimmer, "A Riff on Fair Use in the Digital Millennium Copyright Act" (2000) 148:3 U Pa L Rev 673 at 680, 718.

223 US Const art I, § 8, cl 8.

224 UNESCO, *UNESCO Recommendation on Open Science*, UNESDOC SC-PCB-SPP/2021/OS/UROS (Paris: UNESCO, 2021) at 9.

these acts to the extent that they are permitted to do so under the scope of copyright limitations and exceptions available in their country's copyright legislation. This weakness is, however, not peculiar to green OA achieved through SPR. Even when research works are available to the public through gold OA, they are not always published under an open licence that permits reuse beyond reading and download.[225]

A challenge with the introduction of SPR is the perceived impact of the SPR on publishers' revenue which then raises the potential for publishers' resistance, especially when zero-embargo becomes a main feature of the SPR. There are concerns that institutions may cancel subscriptions if research publications become more freely and immediately accessible through alternative sources as a result of a wide adoption of the SPR.[226] However, there is as, of yet, no credible indication that institutions would cancel their subscriptions and rely on researchers' deposit of AAMs in open repositories. In a survey of publishers in the EU, researchers found "an almost equal split between those who think there will be no effect on the revenue and those who think that such a provision would lead to a decrease in revenue."[227] Notwithstanding the absence of any evidence that SPR will lead to subscription cancellations, the perceived impact on revenue by some publishers could lead to resistance to the SPR. The deployment of SPR could, therefore, lead publishers, especially publishers of traditional subscription journals, to change their publishing model to one that requires authors to pay to publish.[228] A change in the publishing model to an author-pays model could undermine the SPR as a zero-cost mechanism for facilitating public access to research since research authors would have to pay to publish their work. However, given that more subscription publishers are, on their own, allowing authors to deposit their AAMs in open repositories[229] and the absence of evidence that

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225 Heather Piwowar et al, "The State of OA: A Large-Scale Analysis of the Prevalence and Impact of Open Access Articles" (2018) 6 PeerJ, No e4375 at 1, 16, DOI: <10.7717/peerj.4375>.

226 Directorate-General for Research and Innovation, *Access to Research Results*, *supra* note 124 at 95.

227 *Ibid* at 107.

228 *Ibid* at 114.

229 Jisc maintains a repository of publishers and journals that permit self-archiving (see Jisc, "Open Policy Finder" (last visited 29 September 2025), online: <openpolicyfinder.jisc.ac.uk> [perma.cc/487R-UB2U]).

permitting such deposit without an embargo period affects subscriptions, the potential for a change from a subscription publishing model to an author-pays model is relatively low.

Publishers could also consider the SPR as a limited statutory remuneration granted to research authors for the transfer of their copyright or grant of an exclusive licence to publishers. While it might be argued that research authors already get the publication of their work in exchange for the transfer or licensing of their rights to publishers, this is hardly a fair bargain. It is perhaps only in academic publishing that the publication of the work constitutes the entirety of the remuneration for copyright transfer or licence.

Another argument against SPR is that it infringes on the contractual freedom of authors and publishers.[230] Commercial and institutional publishers often adopt a contractual model where publishers require authors to assign copyright in its entirety, with other publishers predominantly adopting a model that requires authors to grant them an exclusive licence.[231] By granting authors a right to make their work available to the public notwithstanding any agreement to the contrary with publishers, the SPR undermines publishers' contractual freedom. Legal restrictions on contractual freedom are, however, adopted by legislators from time to time to protect the interests of the public or weaker parties to a contract.[232] In fact, many countries have adopted a contractual override protection clause into their copyright laws to void contractual terms that restrict the rights granted to users under copyright law given the weak bargaining

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230 Directorate-General for Research and Innovation, *Access to Research Results*, *supra* note 124 at 114.

231 *Ibid* at 115.

232 For example, the Canadian *Copyright Act* states:

> Where the author of a work is the first owner of the copyright therein, no assignment of the copyright and no grant of any interest therein, made by him, otherwise than by will, after June 4, 1921, is operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, *notwithstanding any agreement to the contrary*, devolve on his legal representatives as part of the estate of the author, and any agreement entered into by the author as to the disposition of such reversionary interest is void (RSC 1985, c C-42, s 14(1) [emphasis added]).

power of individual and institutional users of copyrighted materials.[233] SPR minimally resets the bargain by allowing authors to enhance the impact of their research through offering an alternative way for people to access it, especially those who would otherwise be completely excluded from access via subscription platforms. While the SPR may minimally infringe on the contractual freedom of publishers in the overall public interest in access to research knowledge, it does not infringe significantly on the freedom of authors.

Alternative policies to SPR exist and can be adopted, but they are not without shortcomings. The main alternatives to the SPR are the subscribe-to-open model and transformative agreements. A subscribe-to-open (S2O) model involves subscription-based journals converting journals from subscriptions to OA, one year at a time, if enough subscribers (in the publisher's estimation) are reached for that year.[234] This will make the version of record of the publication available to the public usually after a year from the publication of the work. An advantage of this model is that it gives the public access to the version of the journal with the right paginations, which can be helpful for citation purposes. However, the S2O model will not provide immediate public access to research works since the public needs to wait until the end of the calendar year for the publisher to determine whether they got enough subscriptions to provide OA to the works. Further, the S2O model may not even lead to public access at all. If some subscribers delay renewing their subscription or do not subscribe to the journal that year, then that year's content remains behind the paywall.[235] Only a handful of publishers are using this model and only employ it for a fraction of their journals.[236] For instance, SAGE and Taylor & Francis, two of the biggest commercial publishers, employ the S2O model for only four and three of their journals respectively.[237] Given

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233 See e.g. *Copyright, Designs and Patents Act* (UK), 1988, s 28B(10); *Copyright and Related Rights Act, 2000*, No 28 of 2000, s 2(10) (Ireland); *Copyright Act, 2022*, No 8 of 2022, s 20(3) (Nigeria).

234 Subscribe to Open, "About: Subscribe to Open", online: <subscribetoopencommunity.org> [perma.cc/J622-L9RW].

235 *Ibid*.

236 John Willinsky, "Publishers Employing Subscribe-to-Open with Journal Counts Since 2020" (last modified 30 April 2025), online (table): <docs.google.com> [perma.cc/K47A-EGP3].

237 *Ibid*.

the limited adoption of the model and the uncertainty regarding whether research works would in fact become OA, the S2O model cannot meet the already pressing needs for immediate public access to research and neither can be it relied on by research authors as a viable means for complying with government OA policies.

Transformative agreements (also called transitional agreements) are contracts between institutions (libraries) and publishers that transform the business model underlying scholarly publishing from one based on subscriptions to one in which the institutions pay publishers for the OA publishing of journal articles.[238] The agreements may be between a publisher and an individual library or a library consortium for some or all the titles in a publisher's portfolio.[239] In essence, the library or consortium of libraries negotiating the agreement makes a lumpsum payment for the articles published by researchers affiliated with them in journals covered by the transformative agreements. The researchers would not have to negotiate OA with the publisher or make any payment to publish their articles as OA, making it easier for researchers to comply with OA mandates. Transformative agreements also tend to lead to the author retaining copyright over their work, sometimes with a requirement that the author applies a Creative Commons licence to the published article so that it can be truly open for reuse by others.[240] All the big-five publishers (Elsevier, Springer Nature, Wiley, Taylor & Francis, and SAGE) have signed one or more transformative agreements.[241]

Transformative agreements have been around for a while and were supposed to be a mechanism by which publishers transition from a subscription-based model to an OA model of dissemination.[242] This intended future where subscription-based payments for journals cease to exist is however far from imminent.[243] In a recent report by Jisc, a UK consortium through which transformative agreements have been negotiated with

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238 Lisa Janicke Hinchliffe, "Revisiting – Transformative Agreements: A Primer" (6 February 2020) online (blog): <scholarlykitchen.sspnet.org> [perma.cc/TUX4-X7PX].

239 *Ibid*.

240 *Ibid*.

241 ESAC, "ESAC Transformative Agreement Registry" (last visited 16 June 2025), online: <esac-initiative.org> [perma.cc/RB6X-2QH9].

242 Hinchliffe, *supra* note 238.

243 *Ibid*.

almost fifty publishers, it was observed that "based on the journal flipping rates observed between 2018–2022 it would take at least 70 years for the big five publishers to flip their TA titles to OA."[244] Jisc also observed that the increase in transformative agreements globally has not made a material difference in the levels of OA.[245] Institutions still need to subscribe to publishers' titles that are not subject to transformative agreements as well as articles within covered titles that are not published by authors who can rely on transformative agreements to make them OA. Transformative agreements cannot therefore lead to public access to all research articles. It was found that the top four publishers by volume accounted for 58 per cent of UK closed-access articles in the period between 2017–2022 and that during this period, these publishers either increased or maintained the proportions of closed-access articles within the titles that were covered by transformative agreements.[246] The implication is that institutions still need to subscribe to titles covered by transformative agreements to access the closed-access articles in those titles, potentially leading to double payments for access. At the same time, there is no avenue for the public to access those closed-access articles.

Overall, SPR appears to be a stronger and more reliable mechanism for facilitating immediate public access to the results of research activities without additional cost to the reader, which is the goal of government OA policies. Furthermore, unlike other mechanisms, SPR ensures that the green road to OA is available to researchers as a viable option for complying with government OA policies that require immediate public access to research publications. As long as subscription-based journals and non-subscription journals that charge article processing fees continue, green OA must remain a viable option for providing public access to research, since government resources are limited and cannot be relied on solely to ensure free public access.

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244 Kira Brayman et al, *A Review of Transitional Agreements in the UK* (Bristol: Jisc, 2024) at 14, DOI: <10.5281/zenodo.10787392>.

245 *Ibid*.

246 *Ibid*.

CONCLUSION

The adoption of an OA policy that requires recipients of public research funds to provide the public with immediate access to the results of their research investments is a step in the right direction for Canada's federal granting agencies and other governments. However, such policies should not always result in the public having to pay additional fees, particularly article processing charges, to access content. Governments everywhere should empower researchers to take the cost-effective green road to OA, rather than the gold road, when the gold road is impossible, expensive, or otherwise undesirable. I have argued that governments should implement a secondary publication right in copyright law for researchers. This right would allow researchers to make the accepted manuscript version of their publications accessible immediately and at no further cost to the public.

Enabling researchers to comply with OA policies through the green road to OA would save the public substantial amounts of money that would otherwise be spent on article processing charges for gold OA. Payments for gold OA would be more limited, since fewer people will feel compelled to publish in an outlet that charges article processing fees if they have a viable alternative to publish their research results while also providing immediate public access in compliance with government OA policies. Funds that would otherwise be spent on publication charges could be freed up to support more socially beneficial research projects.