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Legislating Open Access: Making the Case for a Secondary Publishing Right in Canada

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Abstract

This paper examines the potential of secondary publishing rights (SPR) as a legal solution to safeguard Green Open Access and promote free and global access to Canadian research. SPR grants journal article authors the right to deposit a version of a finished article in an institutional or disciplinary repository, regardless of publisher agreements. If implemented in Canada, SPR will empower researchers, allowing them to make their work open access while also providing them with an easy path to ensuring compliance with open access mandates set by funding agencies. In this paper, we compare SPR to alternatives such as the Rights Retention Strategy and collective licensing, highlighting the variations of SPR implemented in Germany, Austria, the Netherlands, France, Belgium, Italy, Spain and Bulgaria. Adopting SPR in Canada will significantly improve public access to research, strengthen Canada's global research impact, and create a more equitable scholarly publishing landscape.

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Introduction

Green Open Access (OA) allows authors to deposit, or "self-archive," a version of their completed article in an institutional or subject-specific repository. While it is technically free for the author in that no payment is required, it is often costly in terms of the labor needed to determine whether these rights may be retained in accordance with publisher policies, or to negotiate with publishers in cases where policies are unclear or do not allow self-archiving. Indeed, the "Green Route" is at risk as pay-to-publish OA models become more dominant. These pay-to-publish models are by nature exclusionary to non-grant-funded researchers or those without access to institutional OA funds,[1] making Green routes an important equity concern.

We argue that secondary publishing rights (SPR) are necessary to continue bolstering Green OA, while acknowledging that Diamond OA (where neither the author nor the reader pay) is the preferred path forward. There have been recent debates over the utility of Green OA (Hinchcliffe, 2024; Schearer, 2024). Recognizing that Green OA has value for its discoverability and impact (Schearer, 2024), we emphasize that it is an accessible and equitable route to increasing OA. While this proposal may not necessarily fix all of the problems with scholarly publishing, it buys us all time to continue working on the alternatives to commercial publishers and closed systems. An amendment to the Copyright Act (CA) would ensure that Canadian scholars not only meet the requirements of their funding agency, but that Canadian research remains competitive worldwide.

> From an instrument of freedom and responsibility, [scholarly publishing] has been transformed into an instrument for commodifying scientific knowledge that is held by a few. Economic rights do not serve to disseminate the work, but, on the contrary, to restrict its circulation. (Caso & Dore, 2021, p. 15)

Scholarly publishing has evolved historically very differently from creative publishing, with different motivations, incentives, rewards—and ultimately, purposes—to creative works. Caso and Dore (2021) covered much of this history, pointing out that academic authors' motivation for scholarly publication is not directly economic and is not served by the restricted circulation encouraged by the current copyright regime. Scholarly motivations typically include claiming a discovery or viewpoint (and claiming it is important via publication), disseminating as widely as possible, associating the impact or value of the work with themselves as the author, and opening it to public comment, citation, criticism, and review (Caso & Dore, 2021, pp. 10–15; Majekolagbe, 2024, pp. 8–35; Shavell, 2009, pp. 7–9, 20; Willinsky, 2022, Chapter 2).

These purposes do not align well with how remuneration and exploitation of a work commonly takes place. Indeed, these interests are at odds with the exploitation practiced by most commercial scholarly publishers, which typically gain value through restricting access as one mechanism of building exclusivity and prestige. Authors of scholarly articles do not benefit from traditional economic copyright incentives, as they receive no remuneration for the distribution of copies in the vast majority of cases. Since many authors are paid a salary through their employers, they extract

[1] As defined by the Scholarly Publishing and Academic Resources Coalition (SPARC), a "campus open access fund is a fund set aside by an institution specifically to cover costs for researchers who publish in journals with article processing charges (APC). The fundamental goal of an open-access fund is to support publication models that enable free, immediate, online distribution of, and access to, scholarly research" (SPARC, n.d.-a, para. 1).

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primarily non-monetary benefits from their publications through increased visibility and reputation. This feeds into the tenure and promotion system, which is better served by wide, nonexclusive distribution, rather than limited, paywalled distribution. Similarly, funders and institutions generally also want a wide distribution of results.

As OA advocates of all political stripes have argued for years, the general public's interest in scholarly works is unique and important. The availability of scientific, medical, and social knowledge is key for an informed public and informed decision-makers, even if it alone is not always sufficient to overcome power imbalances. Open knowledge can potentially accelerate and democratize knowledge discovery and help close global knowledge gaps. Not only is it in the public interest to have research works available to the public, it should be in the public interest for research itself to be decommodified as much as possible, so that profit imperatives—to publish faster, to publish more—are not skewing scholarly imperatives of transparency, reproducibility, and integrity of scholarship (see European Commission: Directorate-General for Research and Innovation, 2024).

> While copyright is primarily an author's right, the reality is that it has become a publisher's right, especially in the context of research works published in journals and edited books. (Majekolagbe, 2024, pp. 6.)

If copyright is meant to incentivize creation and benefit the public interest in the dissemination of knowledge, it is failing with respect to scholarly publishing. In systems theory, there is a phrase: *the purpose of a system is what it does*. If the purpose of a system is what it does, copyright in academic publishing appears to be one of the mechanisms for a vast transfer of public funds to private wealth, by providing the mini monopolies of exclusive access to articles in the control of commercial publishers.

The aim of this paper is to show that in order to equitably protect the Green route to OA, and meet OA implementation goals in Canada, a secondary publishing right is a way to protect the author's ability to deposit their work in an institutional or subject repository, when it may not be possible otherwise. Following this introduction, the paper is further divided into four sections: section 2 gives an overview of the current trends in OA in Canada; section 3 discusses other avenues of copyright reforms aimed at OA; section 4 provides a legal analysis of the SPR, and section 5 offers a conclusion and discussion, focusing on implementation in Canada.

Current Trends in Canadian Open Access

On June 4th, 2023, Canada's federal research-granting agencies (the Tri-Agency) announced a review of the Tri-Agency Open Access Policy on Publications, with the goal of requiring immediate open and free access to all academic publications generated through Tri-Agency–supported research by the end of 2025 (Government of Canada: Science and Innovation, 2024). This announcement represents a significant opportunity for the Government of Canada and the Tri-Agency to reimagine their approach to opening up publicly funded research outputs. This section delves into the intricacies of the current policy, highlighting the hurdles faced by researchers and institutions in complying with the current OA mandates in Canada and also examines international models that can inform the approach taken in Canada.

The Current Tri-Agency Policy

Since 2015, the Tri-Agency has implemented an OA policy (Government of Canada: Science and Innovation, 2016), that requires recipients of funding from any of the three federal granting

agencies—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 (SSHRC)—make their peer-reviewed journal articles freely available online within 12 months of publication. To comply with this policy, grant recipients can either publish in a journal that allows for immediate OA (the Gold or Diamond route) or publish in a paywalled journal and make the final, peer-reviewed version of their article openly available in an institutional or disciplinary repository within 12 months of publication (the Green route).

This policy is simple in that it only mandates free access: It does not require that authors apply a Creative Commons License to the freely accessible version of their article and does not specify how rights should be retained. Authors can also publish in any journal that facilitates compliance with this policy; for example, there are no black-or-white lists like those that are used in Norway,[2] and the policy encourages authors to deposit their work in an institutional repository even when they have published in a fully OA journal (Government of Canada: Science and Innovation, 2016, section 3.1).

While the current policy seems simple, implementation is far from it. Grant recipients who choose to publish in a gold OA journal have a very straightforward route to compliance in that an article is open right away, but this route has been complicated by the rise of the pay-to-publish OA model, where authors are required to pay an article processing charge (APC) in order to make an article OA. And while these costs are an eligible expense for funding, using grant fees on APCs can come at the expense of other uses of funds that may have a more tangible impact on the research conducted, including hiring graduate students. Additionally, because of the often-long timeframe for articles to reach publication, publication costs can come up after the grant money has been spent.

Paying to publish OA is not inherently the wrong approach, as there are costs associated with publishing journals and APCs can help offset publication expenses for nonprofit publishers. However, many journal publishers, including the major commercial oligopoly publishers (Elsevier, Sage, Springer-Nature, Taylor & Francis, and Wiley), have commodified openness, transforming OA publishing into a significant revenue stream (Borrego, 2023; Brembs et al., 2023; Butler et al. 2023). For these publishers, cost recovery is not the main driver of APC pricing; rather, considerations such as "journal reputation, the market power of publishers, and the market concentration of disciplines" (Budzinski et al., 2020, p. 2206) significantly correlate with an increase in the cost of individual APCs. These journals are either fully OA (Gold) or a mix of OA and closed access articles (hybrid), meaning that authors can either publish their work behind a paywall or pay an APC to make their article OA. Notably, the oligopoly publishers have made almost all of their journals hybrid, a strategy that has led to higher APCs: For example, Budzinski et al. found that "journals with a hybrid-OA strategy on average charge 1467 USD more in APC than non-hybrid" (Budzinski et al., 2020, p. 2201)

These costs are significant for both researchers and universities worldwide. In a recent study of APC expenditures, Leigh-Ann Butler et al. (2023) found that global APC payments to the five large commercial publishers was estimated to be US$1.06 billion dollars from 2015 to 2018, with US$612.15 million spent on Gold OA journal publishing and US$448.2 million spent on hybrid journal APCs (p. 22). Another study estimated that the global revenues among major publishers in 2022 exceeded US$2 billion annually (Zhang et al., 2022, p. 7654).

2 The Norwegian Register for Scientific Journals, Series and Publishers is published by the Norwegian Directorate for Higher Education and Skills. See https://kanalregister.hkdir.no/en.

Many APCs are paid on a transactional basis by the authors, but publishers are also packaging the right to publish OA into the agreements they have with institutions and their libraries. These agreements (which are frequently referred to as transformative or read-and-publish agreements) both give access to paywalled journals and allow "associated authors" to publish without direct cost to the individual researcher. As the paywall loses value with OA publishing becoming dominant due to funder policies and mandates, university mandates, and more, these agreements ensure that researchers and universities continue to be locked into big publisher platforms (Chan, 2019), further entrenching the big-deal economic model that the oligopoly journal publishers have used for decades.

The second Green route is even more complicated for authors: While there are no costs associated with publishing, authors are limited by the terms of the publication agreements that they sign. These agreements are complex and terms vary, so much so that Jisc built a free online tool called Sherpa Romeo that aggregates and provides a summary of open access archiving policies on a journal-by-journal basis. Jisc replaced Sherpa Romeo with the Open Policy Finder (https://openpolicyfinder.jisc.ac.uk/) while this article was in press.

The Open Policy Finder summaries specify what authors can do with varied versions of their manuscripts: from the submitted version or preprint, on to the accepted version or postprint, to the published version. For each of these versions, the Open Policy Finder outlines the conditions that publishers place on authors, through their publication agreements, in order to make an article OA on a website or a repository. In addition to listing provisions such as the length of embargo term and approved locations, these summaries also include any additional conditions that the publisher places on authors, including things like acknowledging the publisher version and using a specific license for the posted article.

Figure 1: The open access pathway for the accepted version of a Nature Cancer journal article, as summarized in the Open Policy Finder.

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Open Policy Finder summaries are provided by community members, and as such the potential exists that they may be out of date or inaccurate. The Scholarly Communications team at the University of Winnipeg wanted to look at changes to these self-archiving policies over time, but the Jisc data does not lend itself to longitudinal analysis. The Open Policy Finder summaries are also aimed at the UK audience, focusing on funder-negotiated agreements with particular publishers that do not apply to other jurisdictions. While this is indicated on the pages, they require a fair bit of reading and digging to understand. These ambiguities have led many university libraries to offer mediated deposit services, where authors can submit a list of published articles and library staff will check for compliance with publisher policies before depositing articles into the repository on the authors' behalf.

While compliance with the policy is a requirement of funding, there does not appear to be any compliance monitoring by the funding bodies. Grant recipients are not informed if they did not comply with this policy, and there are no known adverse outcomes (for example, on future funding opportunities) tied to noncompliance. This means that there is very little incentive, other than contributing to the public good, for grant recipients to make their article open as specified in this policy, leading to low compliance rates.

In 2018, Vincent Lariviere and Cassidy Sugimoto published the results of an OA compliance study that showed that the Canadian funders (SSHRC and CIHR) had a markedly lower rate of compliance than many of the funders from other countries. Notably, SSHRC had the lowest rate of compliance of any funders, with only 21% of funded papers made OA. CIHR was better, with a 55% rate of compliance, but in all cases, comparable funders in other jurisdictions had better rates of OA than Canada (Larivière & Sugimoto, 2018, p. 484). Additionally, in a study of the prevalence of OA in Canadian research published in academic journals from 2015 to 2019, Paquet et al. (2022) found that "generally, for each province, 40% to 50% of the published articles are available in OA, with an average of 44% at the national level" (Paquet et al., 2022, p. 17).

OA Policy Trends in Other Countries

Canada will not be the first country to implement immediate OA policies for journal articles funded through public grants. For example, members of cOAlition S, an international consortium of research-funding and research-performing organizations focused primarily in Europe, launched an OA publishing initiative called Plan S in September 2018 and implemented it in 2021. Notably, cOAlition S already has one Canadian member: The Fonds de recherche du Québec (FRQ) announced they were joining Plan S on June 1st, 2021 (Fonds de recherche du Québec, 2021).

Plan S, which is based on 10 principles for scholarly publishing (cOAlition S, n.d.-d) mandates that articles must be published immediately OA with no embargo periods, and allows three routes for compliance. Authors can publish in fully open access journals with or without publishing fees, in subscription journals by depositing the full-text accepted manuscript in a OA repository (supported by the rights retention strategy), or in hybrid OA journals supported through transformative/pay-to-publish agreements. Plan S prohibits the payment of Article Processing Charges (APCs) for hybrid journals (COAlition S, n.d.-c), and, in 2023, cOAlition S announced that they will no longer financially support transformative agreements, although individual cOAlition S funders can continue to financially contribute to these agreements at their discretion (cOAlition S, n.d.- a).

The European Commission has even funded a free publishing platform to support this shift.[3] In the United Kingdom, for instance, works must be deposited in institutional repositories to be eligible for the Research Excellence Framework (Ten Holter, 2020), and future grants are contingent on compliance with these Open Access policies.

In 2022, all of the federal funding agencies in the United States signalled a move to an immediate OA policy with the release of a memo (known as "the Nelson memo") from the White House Office of Science and Technology Policy. This change moved the United States from a policy that was similar to what is currently in place in Canada (with a 12-month embargo) to one that requires that peer-reviewed scholarly publications and publication-associated scientific data be made freely available and publicly accessible in a repository immediately upon publication. Many agencies have already begun implementation, according to the SPARC (n.d.-b) maintained list.

While comparing the policy landscapes across different countries and policy changes is difficult, there seems to be a general increase in the Gold route, coupled with transformative/read-and-publish agreements at the institutional level to cover hybrid journals, which otherwise have no route to compliance in Plan S jurisdictions (see Huang, C.K. et. al, 2020, for analysis of earlier shifts; see also Sivertsen & Zhang, 2022). Any introduction of such a barrier to paying for hybrid APCs will have very real implications for Canadian library budgets, as it will increase our reliance on read-and-publish agreements to be able to provide a route to compliance, if there is no protected Green route. These agreements represent a large portion of library budgets and, despite best efforts, often have above-inflationary increases. If these agreements are the only way to fulfill Tri-Agency policy requirements, it becomes even more difficult to cancel them, and libraries lose even more autonomy over their budgets. Additionally, more of the library budgets are taken up supporting inequitable routes to OA such as hybrid or APC routes, at the expense of investing in Diamond routes and a more sustainable publishing system. Early-adopter jurisdictions such as Sweden are signalling a desire to move away from transformative agreements for these very reasons (Stockholm University Communications Office, 2023).

Other Potential Alternatives

Questions of ownership and control of intellectual property in academic journal publishing have been at the heart of OA conversations from the start. Sally Rumsey (2022) reframed the relationship as such:

> Control of when, how, and to whom research findings are disseminated, and ownership of the content, should not be handed over to a third party service provider, i.e. a publisher. A service provider should be paid for services—not take control and ownership of content. (para. 31)

In addition to the key issues of ownership and control, copyright reform for scholarly publishing has often been seen as a potential way to short-circuit the monopoly role copyright plays in creating the current market consolidation and concomitant price gouging. Copyright-focused suggestions have included reducing academic copyright to only moral (not economic) rights, mandating the exercise of rights through collective societies, and Rights Retention Strategies by funders, universities, or both.

[3] https://open-research-europe.ec.europa.eu/

No Copyright

One solution discussed in some circles would consist of denying the existence of economic rights on scholarly articles and similar publications (Caso & Dore, 2021; Shavell, 2009). This suggestion only makes sense if one takes a utilitarian approach to the copyright regime, according to which protection serves as an economic incentive for the creation of works that are eventually conveyed to the public. Where researchers employed by an institution receive a salary and benefits in consideration of their work, the argument holds that researchers do not need the extra economic incentive from copyright to continue working. On the other hand, since researchers potentially derive significant reputational benefits from their publications, they benefit from their moral rights, namely the right to receive attribution and the right to oppose the distortion and mutilation of their work.

The rationale behind this proposal is that when publishers cannot rely on exclusive rights, they adapt their business model and are, at least in theory, more willing to grant access to their product. Withholding exclusive rights on scholarly works would need to occur either through legislative amendment or through contractual arrangement. A legislative amendment on this point would be difficult to achieve, as there would undeniably be a serious pushback against creating an exclusion from protection solely aimed at scholarly output. The more viable avenue is to go through licensing arrangements.

Creative Commons (CC) licenses actually do just that. All licenses in the CC suite allow authors to retain their rights, but the more open CC licenses in particular (CC-BY and CC-BY-SA) grant all permissions to reproduce and communicate a work to the public for any purpose on a worldwide, nonexclusive, perpetual, royalty-free basis. No economic rights are transferred to a publisher, and profits are not generated on the basis of royalties. CC licenses support the growing Gold and Diamond OA routes for scholarly publication. The business model underlying Gold OA is not without critique, however. As discussed, the frequent use of opaque and prohibitive article processing charges (APCs) and new article development charges (ADCs; ACS Publications, n.d.) have led to increasing inequities and barriers right at the outset as to who is published and read. As Shavell (2009) and Majekolagbe (2024) observed, the removal of profit/exploitation from articles operates a shift in the system to one of paying to publish, rather than paying for the end result. On the other hand, the CC licensing suite is also at the core of Diamond OA to scholarly publishing, where systems (such as RedAlyc and AmeliCA, and existing library and nonprofit Diamond publishing) and newly developed ones (such as Open Research Europe) operate outside of profit imperatives. Ideally, the possibilities offered through Diamond OA are more poised to replace the commodified publishing world than skeptics realize.

Collective Societies

It has been suggested that collective rights management organisations (CMOs) could play a role in the administration and licensing of OA scholarly publications. John Willinsky has argued that the tried-and-true solution to market failure is a statutory license regime in which "publishers would be required to offer immediate open access to research publications for which they are to be fairly compensated by the institutional users and funders of such publications" (2023, para. 4). In the Canadian context, this suggestion makes little theoretical or practical sense, however, and is likely unpalatable to many in the Canadian university sector because of previous experiences.

In scholarly publishing, market failure could be said to occur because publishers exercise oli-

gopolistic power over authors, which manifests itself through inflated prices or restrictive conditions—this is the market failure Willinsky focuses on, that of unfair prices and unreasonable profits (2022, p. 88). Market failure could also be said to occur due to an asymmetry of information, which tips the balance of knowledge in favor of the publisher. However, the market failure is not particularly due to excessively high transaction costs between parties: Authors have no issue finding publishers to conclude publishing agreements. This is the typical scenario where collective societies normally intervene—the aggregation of the repertoire allows collective societies to represent smaller parties more efficiently by increasing the societies' negotiating power, thereby reducing transaction costs. While Willinsky proposes the collective society may, through cases pleaded by researchers and libraries to a panel of judges, arrive at more "reasonable pricing" (2022, p. 88), having a CMO intervene as a contractual party for the entire publishing endeavor may be more expensive and burdensome than anyone would like to bargain for. This may result in a system that is unpredictable and costly for both universities and libraries (for discussion of some of the risks, see Band & Butler, 2013), at a time when Canadian higher education is in financial crisis (Ngan, 2023).

Finally, a system relying on the intervention of a CMO presupposes the existence of a healthy culture of collective rights management, one characterized by mutual trust between all stakeholders. The acrimonious and long-lasting legal dispute that Access Copyright brought against York University and others concerning the reproduction of works inside course materials is not likely conducive to a harmonious and constructive cooperation between the parties. In the absence of trust between them, the CMO's intervention in the licensing practices of universities and their researchers would inevitably be seen as an unwarranted administrative burden on universities. Collective societies may be an attractive solution in other jurisdictions, but they are unlikely to be a popular solution in the Canadian context.

Rights Retention

A third approach, which is gaining traction especially in the United Kingdom but also with cOAlition S, is institutional rights retention, where universities essentially claim a nonexclusive, irrevocable, worldwide license to make the accepted manuscript of each article publicly available under the terms of a CC BY license. As Samuel Moore notes, retaining the control over copyrights has always been an element of OA politics, and efforts to retain or control those rights (and deny publishers the monopoly) have been part of OA strategies dating back to the earliest days (Moore, 2023, p. 2). Wellcome and the National Institute of Health were early leaders in requiring grantees to retain the rights needed to implement OA, language that has been refined in Harvard-style rights retention policies and the Plan S method (Suber, 2024).

In the Plan S method, funders add language that requires the CC-BY license to apply to all Author Accepted Manuscripts (AAMs), or sometimes Version of Record (VoR), resulting from the grant. Funders may require either prior license or prior obligation.

> Some cOAlition S Organisations will, as of the commencement of the grant, require their grantees to apply a CC BY license to all future AAMs which arise from their funding (prior licence). Other cOAlition S Organisations will impose an obligation on their grantees that their research articles (either the AAM or VoR) are licensed CC BY (*prior obligation*). In either case (prior license or prior obligation) all research articles which arise from funding from a cOAlition S Organisation must be licensed CC BY. (cOAlition S, n.d.-b, para. 2)

Funder rights retention language typically delegates down to the author needing to retain their

rights. Institutional or university rights retention policies in these landscapes try to ease some of the burden of figuring out copyright retention language from the level of the individual.

To date, 31 universities in the United Kingdom have adopted a Rights Retention Policy (RRP; Eglen, 2023). The RRP option consists in a dual contractual arrangement, one between the university and its employees, and a second one between the employee-author and the publisher. It does not require legislative amendment and it can coexist with the Secondary Publishing Rights option. While the mechanisms are different, SPR would provide a default/base option if the parties are unable to negotiate a Rights Retention Strategy (RRS) because of lack of capacity or negotiating power. While the RRS is preferable in that it results in a CC-licensed work being available, because it is purely contractual there is higher risk of inequities across institutions, across researchers, and with different publishers, or with the potential that Canadian collective bargaining is not so amenable to the adoptions of RRSs. The SPR exists with national funder Plan S Rights Retention Policies in the Netherlands, France, and Austria (de Castro et al., 2024, p. 50).

Universities across the United Kingdom use similar wording in their respective policies. Section XVI - 9 of the University of Oxford Statute's (n.d.-b) offers one example of such Rights Retention Policy:

> 9. (1) The University operates an Open Access Publications Policy which promotes making peer-reviewed research outputs available on an open access basis to increase their availability and use by others. Pursuant to the Open Access Publications Policy, those persons covered by the circumstances in section[s] 5 (1) (a)[, (c) and (d)] automatically and in advance grant to the University a non-exclusive, irrevocable, worldwide, sublicensable licence of the copyright which they own in certain peer-reviewed research outputs, to make those outputs publicly available under the terms of a Creative Commons Attribution (CC BY) licence, or alternative licence terms if requested, provided that such licence complies with any applicable funder requirements. The peer-reviewed research outputs licensed by those persons to the University are: articles, reviews and conference papers, which are accepted for final publication in a journal, conference proceeding or publishing platform. [emphasis added] (2) Those persons to whom section 9 (1) applies shall, upon request by the University, take any steps and/or sign any documents necessary in order to give effect to the license set out in Section 9 (1).

The Oxford Policy applies to AAMs, such as peer-reviewed research outputs, generated by any person employed by the university, except for students, unless they are co-authors with a person at the employment of the university. As the university's website explains,

> this means that, by virtue of their employment and without requiring any action on their part, employees at the University provide the rights to make author accepted manuscript versions of their articles and conference proceedings available under a Creative Commons Attribution Licence (CC BY 4.0) at the point of publication. (University of Oxford, n.d.-a, para. 4) Researchers who wish to opt out of this system may do so by contract with the uni versity on a work-by-work basis.

According to the Oxford policy, researchers are expected to add a statement to their manuscript upon submitting it to a publisher:

> This research was funded in whole or in part by [Funder] [Grant number]. For the purpose of Open Access, the author has applied a CC BY public copyright license to any Author

> Accepted Manuscript (AAM) version arising from this submission. (University of Oxford, n.d.-a, para. 7)

This requirement presupposes that authors have enough bargaining power vis-à-vis publishers to get publishers to agree to the statement. In practice, this is rarely the case for individual authors. Even institutions are hardly in a position to negotiate more favorable terms of publication on behalf of their employees. The only weight in the balance is the fact that so many UK universities are joining rank and adopting similar policies. This common action may be sufficient to sway the publishers' minds.

The enforcement of the contractual arrangement between the university and its employees may be cause for concern. It has been argued that institutions could be tempted to abuse their position in relation to authors. The fact is that this solution does put the control over the publication of any article, review, or conference paper written by any person at the employment of a university in the hands of the university. If authors do not deposit their AAM in the institutional repository of their own volition, the university has the right to demand that they take the necessary measures to comply with the policy. Following the Oxford example, however, it is not clear who is entitled to speak on behalf of the university. Would it be the university librarian, the head of the department, or the dean? What would be the consequence of noncompliance on the part of the author? If the author is incapable of negotiating the inclusion of the clause in the publishing contract, would the author not be caught between a rock and a hard place? Might it not jeopardize the working relationship?

Shaun Khoo (2021) pointed out that we, in fact, have a long history with a similar mechanism that centers the negotiation of copyrights between authors and journals—the SPARC author's addendum. However, the author's addendum seems to have met with limited success in the long run, as 98% of contracts were signed with no modifications, in no small part due to the imbalance in negotiating power between an individual author and a journal/publisher (Khoo, 2021, p. 2). Khoo also pointed out the difficulties in applying the CC license and the legal complexities of a CC license. In any case, the burden of the RRS falls to individual authors (and we would note, the Librarians who often are assisting them):

> Proponents of the RRS overlook the significant administrative and legal burdens that the RRS places on authors and readers. Even though compliance with existing green open access (self-archiving) policies is poor at best, the RRS is likely to rely on authors to successfully execute the CC licensing of their work in the face of publisher resistance. (Khoo, 2021, p. 1)

Any time a policy falls to the people with the least structural power to implement it, it is highly likely to increase inequities for marginalized individuals. Will every author be supported by their institution in these negotiations? Will already-marginalized authors engage in these processes of negotiation at the risk of rejection from journals and bad relationships in their publishing community? Who has the privilege of time and risk, and who will have to make difficult choices about not publishing at all?

The path followed by UK institutions has varied. Some, as at Oxford, require their authors to submit language with every submission indicating that there is a prior agreement in place. Others, such as Cambridge, have sent out mass notices to publishers as prior notification. Moore (2023) noted that by including overt prior notifications in submissions, as in some UK institution policies, and as required by Plan S, more publisher attention is being drawn to these policies than in the United States, where it has been tacitly ignored at the publisher level (p. 6). This seems to have increased tensions and conflicts at the journal level, as publishers add guidance in author submissions disallowing this and rely on editors to enforce it.

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cOAlition S (2021) has noted, in an open letter titled *The Rights Retention Strategy and Publisher Equivocation,* that publishers have responded to their policies with a number of practices "that seek to undermine author's [sic] intellectual ownership rights and circumvent cOAlition S funders' open access policies" (para. 10). They note that these strategies are often not being communicated at the submission phase, but later in the process, which is creating confusion and wariness. These practices have included confusing and misleading guidance to authors, instructing authors that they can only comply with funders' policies by paying APCs for Gold Open Access, trying to reroute submissions from subscription or hybrid journals to APC/Gold journals, modifying submission screens and forms so that authors agree on submission to pay APCs for hybrid journals (not covered by Plan S), and encouraging authors to breach funders' grant conditions. At the individual level, authors have reported being asked to remove rights retention language, facing outright rejection of their submission, and confusion from editors as to which policies apply (Moore, 2022).

In the face of these strategies, authors who are required to include RRP wording directly on their submissions may be at a distinct disadvantage to those from institutions that consider the general prior notifications to publishers sufficient. It suggests that having a coordinated, national strategy with consistent legal advice is key for any equitable implementation of an RRP. As Moore notes, there is significant work and complexity introduced by rights retention: "Rights retention is not a seamless activity and introduces new levels of complexity to the political economy of publishing, while also requiring library workers to provide the labour for compliance" (Moore, 2023, p. 6).

To us, this makes having a national Secondary Publishing Right preferable, as it moves the locus of conflict from the individual researcher or their institution (usually their libraries) to a much more amorphous national level. As well as reducing this conflict, it makes it more difficult for publishers to employ strategies and practices aimed at circumventing national legislation.

Secondary Publishing Rights

While UK funders and universities are pursuing the RRS route, some countries of the European Union have opted to go the SPR way. SPRs give authors the right to "republish scientific articles on an infrastructure that by its nature (public and not-for-profit) is coherent with the (public) nature of the funding source" (Tsakonas et al., 2023, p.18), typically following an embargo period after the first publication of a formal version. Germany was the first country to crystallize an SPR in its copyright law, followed by Austria, the Netherlands, France, Belgium, Italy, Spain, and most recently, Bulgaria. In Italy, a provision was introduced in the Copyright Act to promote OA through the secondary publication of scholarly articles, but it does not give the author an unwaivable right against the publisher (Cherubini 2024, p. 25). Rather than amending its Intellectual Property Code, France created an unwaivable right of the author to deposit articles in an institutional repository inside the Research Code. Spain followed a similar route when it incorporated a provision in Law 14/2011 on Science, Technology and Innovation. The Spanish provision does not create a right for the author but an obligation on the researcher. Meanwhile, the call for a European Union–wide SPR regulation is growing louder, for example through research-performing organizations and scholarly associations, such as Knowledge Rights 21 and the European Federation of Academies of Sciences

and Humanities (ALLEA).[4]

The need to harmonize SPR provisions across the European Union not only arises from the fact that SPRs are recognized in some EU Member States and not in others, but also from the variations in the conditions of the rights' statutory recognition. In the interest of solidifying OA across the European Union, not only it is important to require the implementation of the right in every member state, but that right should be harmonized in its contents as well. Since the very first directive on the legal protection of computer programs in 1991, the EU *acquis communautaire* has grown to cover key areas of copyright law, thanks to subsequent adoptions of secondary legislation and the judicial interpretation of EU law by the Court of Justice of the European Union. The harmonization of rights through various directives has alleviated numerous discrepancies between the member states that had an impact on the functioning of the internal market. The latest example of EU harmonization in the field of copyright law is the adoption of Directive 2019⁄790 on Copyright in the Digital Single Market, which contains several provisions strengthening authors' position in their contractual relation with publishers.

This discussion is certainly relevant for countries such as Canada: As scholarly research is a global endeavor, Canada should be wary not to lag behind in harmonizing its legal regime with those of its partners, or Canadian authors may stand at a severe disadvantage. When considering whether, or how, to implement an SPR provision in the Canadian Copyright Act, it is important to first clarify the legal nature of the right, before discussing its main features.

Legal Nature of SPRs Under European Member States' Law

Determining the legal nature of SPRs is key to ascertaining whether the statutory provision that recognizes the right is subject to other conditions. The issue of the legal nature of the SPRs recognized in Europe has been discussed by a few commentators. Opinions vary. Some of these arguments may or may not be convincing in the Canadian context.

Caso and Dore (2021) argued that SPRs can be seen as a moral right of the author, while Angelopoulos saw them as an exception to copyright that is subject to the requirements of the "three-step test" (2022, p. 37). The more-recent Study of the European Commission remains ambivalent regarding the nature of SPRs, stating that

> an assessment of compliance with the three-step test in international copyright law may be necessary when the SPR is seen as an exception to copyright that falls within the field of application of the three-step test. No such additional assessment is necessary when, instead, the SPR is regarded as an exponent of an author's moral and economic rights, or as a rule of copyright contract law. (European Commission: Directorate-General for Research and Innovation, 2024)

Strictly speaking, SPRs do not qualify as a moral right of the author. Moral rights are personality rights recognized by law to reflect the inherently close connection between an author and their work. The two basic moral rights recognized in Canada, in application of article 6bis of the Berne Convention on the Protection of Literary and Artistic Works are the right of paternity (i.e., the right to have one's name mentioned as author of a work) and the right of integrity (i.e., the right to oppose the mutilation of the work that is to the prejudice of the author's honor or reputation).

[4] For information about Knowledge Rights 21, see https://doi.org/10.5281/zenodo.8428315. For information about European Federation of Academies of Sciences and Humanities (ALLEA), see https://copyrightblog.kluweriplaw.com/2024/10/23/allea-statement-in-support-of-secondary-publication-rights-for-scholarly-articles/

Additional moral rights have been recognized either by statute or case law in some countries outside of Canada. France, Italy, and Germany protect the right of first disclosure (i.e., the right of the author to decide when the work is ready to be conveyed to the public), the right of destination (i.e., the right of the author to decide in which form the work can be exploited), and the right of withdrawal (i.e., the right of the author to withdraw a work from public circulation following a change of conviction).

The SPR, that is, the right to "republish scientific articles on an infrastructure that by its nature (public and not-for-profit) is coherent with the (public) nature of the funding source" (Tsakonas et al., 2023, p. 18) is not comparable in nature or purpose to the personality rights mentioned above, not even in European countries that admit the existence of broader moral rights. SPRs are in no way aimed at preserving the author's honor or reputation. Contrary to what Caso and Dore (2021) suggested, SPR is not a manifestation of the moral right of disclosure, or the right of destination: In the case of SPR, the work has long been disclosed to the public when the right is meant to kick in, and the republication takes the same form as the initial publication. The unwaivable character of SPR in most countries is not sufficient in and of itself to warrant the qualification of moral right. Such a qualification would be difficult to justify under Canadian law, which recognizes no other moral right than the rights of paternity and integrity.

SPRs do not qualify as exceptions to copyright. Exceptions and limitations (E&Ls) create flexibility in the copyright regime for the benefit of specific uses and users. E&Ls generally provide that "it is not an infringement of copyright" to engage in certain unauthorized uses specified in the Copyright Act, provided the conditions of exercise of E&Ls are met (Majekolagbe, 2024, p. 42). The contours of E&Ls must meet the requirements of the internationally recognized standard known as the "three-step test" (Berne Convention, Art. 9(2); WIPO Copyright Treaty, Art. 10). This test demands that exceptions a) be confined to certain special cases that b) do not conflict with a normal exploitation of the work and c) do not unreasonably prejudice the legitimate interests of the author. Typical beneficiaries of E&Ls are third parties using existing works, such as cultural heritage institutions, broadcasting organizations, individuals making private copies, and anyone reproducing a work for the purpose of quotation or parody. The justification for the uses permitted under statutory E&Ls range from the promotion of the users' freedom of expression, to respect of users' right to privacy or the alleviation of symptoms of market failure. By contrast, SPRs concern the right of the original author of a scholarly work to deposit that work in a repository after the transfer or license of that author's right to the publisher. Original authors are not users of their own works. Moreover, the deposit of a work in a repository is not a use that is comparable in justification or in purpose to the permissions granted to users under the act. In this sense, it is very telling that no country chose to enact SPRs within the framework of E&Ls. As such, the three-step test simply does not apply, and there is no reason to let its spectre hover over SPR.

The most thorough analysis of the legal nature of SPR under European law was written by Lazarova (2024). After careful analysis of the statutory SPR provisions enacted in Europe, she dismisses the moral rights and the exceptions arguments. She notes that in all but two countries, the provision dealing with SPR was inserted in the section on authors' rights or authors' contract law in the copyright act. For example, the Dutch SPR is contained in the chapter on authors' contract law of the Copyright Act. Section 25fa on SPR falls within the scope of section 25(1), which states that "this chapter applies to an agreement whose purpose is the grant of exploitation rights in respect of

the creator's copyright to an opposing party." The same observation can be made for the Austrian provision that was added in Section V, Rights Reserved to the Author, immediately preceding Section Va. on fair remuneration of authors in exploitation contracts. The amendment to the German Copyright Act follows an identical logic. The Belgian provision was inserted in Title 5, Chapter 2, Section 8 of Book XI of the Code of Economic Law, which deals with publishing contracts. Similarly, the Bulgarian provision was inserted in "Chapter 7, Section IV. Contract for publication in the press or in another periodical" of the Copyright Act at section 60. The Italian provision was introduced by adding a paragraph at the end of Article 15 of Law No. 633 of April 22, 1941, which is the Italian Copyright Act.

Along with Lazarova, we conclude that SPR can only qualify as an imperative contract adjustment mechanism, the purpose of which is to "promote democratic access to knowledge, [and] its immediate effect is to safeguard the interests of the individual academic by regulating the disbalance in bargaining power between author and publisher" (Lazarova, 2024, p. 19). In Europe, authors' contract law rules often take the form of mandatory rules, usually designed to protect individual authors against more powerful publishers. That contract clauses contrary to SPR be declared null and void fits within the general scheme of authors' contract law. That France and Spain chose a different route to achieve the same result does not change the nature of the measure: Researchers either retain the right or have the legal obligation, against the publisher, to deposit a version of their article in an institutional repository. Paragraph 3 of article 37 of the Spanish Law is worth noting:

> Beneficiaries of research, development or innovation projects financed mainly with public funds shall at all times comply with the open access obligations set out in the grant conditions or grant agreements of the calls concerned. Beneficiaries of public support and grants shall ensure that they retain the intellectual property rights necessary to comply with open access requirements.

Features of SPR under European Member States' Laws

The common features of SPR provisions have been discussed at length by other commentators (Angelopoulos, 2022; Majekolagbe, 2024). The table below offers a summary of these features, modified from the Knowledge Rights 21 analysis in *Secondary Publishing Rights in Europe* (Tsakonas et al., 2023, p. 25.), to indicate a slightly different interpretation of which provisions protect or enable the author via the copyright act, or via a research mandate.

In designing a new provision on SPR, the lawmakers must determine how to balance the respective interests of the original author and the publisher, while still achieving the intended goal of enabling the deposit of articles in institutional repositories. Two features of SPR implemented in Europe appear somewhat less controversial than the others: On the one hand, SPR should be a mandatory rule. Without it, publishers could too easily try to set it aside by contract and prevent the work from being deposited in the repository. On the other hand, in support of the publisher's position, the work deposited should mention the source of the original publication. As discussed below, other features of the right may give rise to debate.

Extent of public funding

The ALLEA *Statement in Support of Secondary Publishing Rights* (ALLEA & Hugenholtz, 2024) suggests:

	Protect/Enable the Creator					OA Research		
Country	**Austria**	**Germany**	**Neth-er-lands**	**Belgium**	**Bulgaria**	**Italy**	**Spain**	**France**
Source	https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2015_I_99/BGBLA_2015_I_99.pdfsig	https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0273	https://zoek.officielebekendmakingen.nl/stb-2015-257.html	https://www.ejustice.just.fgov.be/eli/loi/2013/02/28/2013A11134/justel#Art.XI.197	https://dv.parliament.bg/DVWeb/showMaterialDV.jsp?idMat=201485	https://www.gazzettaufficiale.it/eli/u/2013/08/09/186/sg/pdf	https://www.boe.es/eli/es/l/2022/09/05/17/con	https://www.legifrance.gouv.fr/jorf/article_jo/JORFARTI000033202841
Statutory provision	§ 37a	§ 38(4)	S. 25fa	Art. XI.196	Art. 60	Art. 15	S. 37(2) (3)	Art. L. 533-4
Scope of Use	NC	NC			NC			NC
Mandatory provision	Y	Y	Y	Y	Y			Y
Citation of First Source	Y	Y	Y	Y	Y			
Manifestation	AAM	AAM					AAM	AAM
Extent of Funding	>50%	50%	"in part"	>50%	"some"	50%	"mainly"	50%
Embargo Period	>12	>12	"reasonable"	>12/6 or shorter if agreed		<12/6	0	<12/6
Definition of Periodicals	2/yr	2/yr		"journal"		2/yr		1/yr
Additional restrictions	Employment							Consent of co-authors

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> The SPR should apply to all published scientific articles, studies, dissertations, reports, and conference proceedings, insofar as these are the product of research that is publicly funded, directly or indirectly, by at least 50%. Note that this would include all research outputs produced by researchers employed in state-funded universities and research institutions.

This passage gives rise to two remarks: First, not all countries have established the threshold of public funding at "at least 50%." There may be room to argue that if public funding is involved for a lesser but significant portion of the research, the results should be made available through this arrangement. Second, while typical academic output takes the form of articles, studies, dissertations, reports, and conference proceedings, it is conceivable that public funding will support other types of research output, like video or audio recordings. Would these be automatically excluded from the scope of SPR?

Version of article (AAM or VoR)

In a system where research results go through several review steps and iterations before publication, to which version should SPR apply? Most countries have opted expressly for the AAM, rather than the VoR. This choice acknowledges the investment made by the publisher in bringing the work to its final stage of publication. In some jurisdictions, the typesetting and layout of the article may even be deemed sufficiently original to attract copyright protection on its own. From the author's perspective, however, the advantage of applying SPR to the VoR over the AAM relates to the ease of reference for users, with exact page numbers.

The Dutch Copyright Act is silent as to which version of a short work section 25fa applies. During the Parliamentary debates, the government explained:

> Section 25fa of the Copyright Act is mandatory law and, under the circumstances described in the provision, gives the author the right to place his "short work" in open access, regardless of its form of publication. Obviously, this may involve the author's manuscript version that ensures the useful effect that the open access provision is intended to achieve. It should not be ruled out that it also concerns the publisher-designed publication of the work. The provision in question lays down nothing about this. The author and publisher are free to make further agreements with each other about the publication designed by the publisher. (Wijziging van de Auteurswet; original in Dutch, translated by Deep L)

The 2024 Study of the European Commission suggested by contrast that the payment of APCs may have an impact on "the assessment, including the evaluation of an SPR regime permitting VoR publication in the light of the three-step test." The authors added that

> In the case of business models based on APC payments, it may seem legitimate to allow researchers to use the VoR for SPR purposes. Arguably, the publisher has already received an appropriate remuneration in the form of the APC payment. This fact may tip the scales in favour of permitting secondary VoR publication. (European Commission: Directorate-General Research and Innovation, 2024, p. 177)

As mentioned above, SPR is not an exception to copyright; the three-step test is not applicable. In any case, the right retained by the author, or the legal obligation, to give free access to a version of publicly funded research output is not, and should not be, subject to the payment of an APC. Such a payment would seriously undermine the spirit of the SPR provision. Let us recall that the payment of APCs is one of the features of Gold OA, and as such, the payment should lead automatically to the immediate publication of the VoR.

Embargo period

The deposit of the AAM or the VoR in the institutional repository is sometimes linked to the existence of an embargo period. Some laws mandate the deposit of the author's AAM even after a lengthy embargo period to protect the economic interests of publishers. However, the speed and depth of scientific research, understood in its broadest sense, depends on fostering collaborative exchanges between different communities and assuring the widest dissemination of the research. Moreover, timely and cost-efficient access to scientific research contributes to increasing the general economic and social welfare. As the ALLEA statement (ALLEA & Hugenholtz, 2024) proposes, embargo periods can be considered as imposing an unnecessary impediment to the timely dissemination of publicly funded research. Preprint and AAM versions should be immediately available for posting without embargo. In our opinion, embargo periods should be kept to a strict minimum.

Scope of use

In addition to restrictions on the version for deposit and the embargo period, some laws further limit the use of the work as deposited to noncommercial purposes (e.g., Austrian Copyright Act §37a; Bulgarian Act §60(2); French Research Code, art. L-533-4, I; German Copyright Act §38(4)). The ALLEA statement (ALLEA & Hugenholtz) suggests that authors be allowed "to post their research in a variety of suitable fora that do not directly compete with the original publisher, including non-profit repositories, institutional and university websites, personal web pages, and social media" (2024, "Authorised Use"). Such wording covers most potential uses intended by individual researchers, but the most important aspect is that such postings should aim at meeting the open access requirements of the funding agency. Finally, it is worth pointing out that neither individual researchers nor institutional repositories typically engage in the commercial exploitation of research results. Noncommercial restrictions placed on authors and their institutions are superfluous, and they offer no barrier against third parties stepping in and competing with the publishers.

Considerations for a Canadian Implementation

The implementation of an SPR mechanism in Canada would require the adoption of an amendment to the Copyright Act. Following the model of the European countries, such an amendment would find its place in section 13 of the Act, which deals with ownership and exercise of copyright. Subsection 13(4) of the Act sets out the general rule governing assignments and licenses. It states that

> the owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by license, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent.

Before any assignment or license takes place, the "owner" of a work is identified pursuant to either §13(1) of the Copyright Act as the original author, or §13(3) as the employer in the case of works created in the course of employment. In Canada, researchers affiliated with most universities retain the copyright on their writings in accordance with the terms of their collective bargaining agreement. In other words, §13(1) applies, whereby the initial authors of scholarly writings own the rights to their works and are the ones entitled to assign or license those rights to publishers. Publishers are hardly ever the initial owners of rights to scholarly works. They may, if the requirements

are met, obtain copyright protection on the collective works or databases they create through the aggregation of multiple existing works. In most cases, they are merely the secondary acquirers of rights on the individual works they publish. Publishers acquire such rights either through assignment or through exclusive or nonexclusive license, all of which can be subject to specific terms and conditions.

Subsection 13(5) of the Copyright Act adds that

> Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee, with respect to the rights so assigned, and the assignor, with respect to the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and this Act has effect accordingly.

Clearly the Copyright Act allows for the fragmentation of rights between assignees and assignors, in a manner that enables both parties to exercise the portion of rights that they each own. Finally, §14(2) of the Copyright Act is worth mentioning in this context. This provision recognizes a reversionary interest in favor of the initial author's heirs after 25 years following the death of the author. The Act specifies that "any agreement entered into by the author as to the disposition of such reversionary interest is void." This shows that, where Parliament finds it compelling, the parties' freedom of contract can be restricted through a statutory provision.

Since the Copyright Act already admits the possibility for owners to grant partial assignments, a provision on SPR would have no difficulty fitting within this framework. The SPR mechanism represents a particular type of rights arrangement between the initial author and the publisher with respect to a specific category of work. The specific features of an amendment to the Canadian Copyright Act would need to be determined during the Parliamentary process, where the foreign provisions could serve as a model.

Conclusion

As scholarly publishing continues to rapidly change, we may eventually see more support for more radical changes to the bedrock of the system, including the very nature of copyrights for scholars. With the currently growing fear over artificial intelligence and large-language models scraping academic copyright, academic authors are doubling down on the importance of economic as well as moral copyrights, even if they are usually unable to exercise those rights themselves.

Additional pressures are no doubt on the horizon, with the Tri-Agency indicating at the very least a policy change requiring immediate deposit, but likely to be more far-reaching in its scope and impact. Librarians and individual researchers have been carrying the burden of compliance difficulties for years now. Any changes to the Tri Agency policy that require self-archiving in an institutional repository (IR) will increase the complexity and labor required for IR managers and disproportionately burden smaller institutions with fewer staff, leading to the very real possibility of inequitable impact. Currently, the most onerous and labor-intensive part of IR deposit is ascertaining the copyrights and permissions that govern an individual article's deposit. Some strategy that allows this work to be mitigated is crucial for implementation of the policy to be possible. Additionally, IR deposit rights are by no means guaranteed and are at the mercy of the publisher. In an internal analysis at the University of Winnipeg, we found that of the top 250 journals we publish with, almost two thirds—65%—did not allow immediate self-archiving.

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When it comes to streamlining the rights, both Rights Retention Strategies and Secondary Publishing Rights may appear to have the same outcome. Rights Retention Strategies have the benefit of allowing a CC license to be applied to the work, permitting more downstream uses. However, the SPR provides a crucial backup to this: Because it would be included in a piece of federal legislation, it would be applicable uniformly to everyone in Canada at the national level and would erase a lot of the complexities as well as remove individual authors from the locus of conflict (and potential rejections) at the journal level. Additionally, it is more likely to be equitably implemented across institutions of different sizes and resources, as it reduces some (though certainly not all!) of the additional labor required on the ingest side of IRs (Sondervan et. al, 2021; de Vries, 2018.).

We have shown that, at least under the law of the European Member States where it is implemented, the SPR is neither an exception nor an author's moral right. Instead it is seen as a contract adjustment mechanism in keeping with other provisions in the copyright legislation that protect authors against more powerful publishers. For SPR to be successful as an implementation mechanism for the Tri Agency OA policy in Canada, an amendment to the Canadian Copyright Act would be necessary, taking certain considerations into account. First, as with all other SPRs, it would need to be mandatory, with no way for contract terms to override the right. It would need to be without embargo in order to be an implementation route for the anticipated Tri Agency policy change (as well as the existing obligations for FRQ and Horizons grants). Ideally, the wording would specify that it applies to authors at publicly funded universities, which would streamline the implementation burden for libraries, and would apply the SPR to anyone whose salary is publicly funded via a public university. It does not need to restrict uses to noncommercial purposes, as the monitoring of downstream uses of freely accessible works is all but impossible.

An SPR cannot fix all of the problems of scholarly publishing—inflated costs being paid to publishers, as the Gold route is tacitly encouraged by research funders, resulting in inequitable access to publishing—but it can keep the possibility of the Green route open, while we work to build better systems to support scholar-led and Diamond OA in Canada.

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