

# Journal Copyright Transfer Agreements: their effect on author self-archiving

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This paper reports on the results of an analysis of 80 copyright transfer agreements (CTAs) with particular regard to their effect on author self-archiving. It shows the number of CTAs asking for copyright assignment, the time of assignment and what happens when copyright cannot be assigned. It outlines the warranties required of the author, and the exceptions granted back to the author by which they may use their own work. In particular it focuses on the number of CTAs allowing self-archiving and the conditions under which they may do so. It concludes that whether an author can safely self-archive or not depends on a complex matrix of the following factors: i) whether copyright assignment or a non-exclusive licence is required; ii) the time of copyright assignment; iii) if (and when) CTA's actually allow self-archiving; iv) if publishers do not allow self-archiving, but do not see it as 'prior publication'; v) whether the preprint is legally a separate copyright work to the refereed postprint; and vi) whether the author wishes to self-archive a pre-print, postprint or both.

**Keywords:** copyright; authors; self-archiving; open-access; copyright transfer agreements; journal publishers.

## INTRODUCTION

Major changes to the scholarly communication chain are being proposed by the self-archiving movement – where authors make their research papers available on open-access websites. There are many motivations behind the initiative: some claim that the sole motive should be the immediate 'freeing' of the research literature from 'toll-gate access barriers' [1]. However, librarians cannot fail to see the potential for solving the so-called 'serials crisis' caused by the fact that academics give their copyright away to publishers, and their libraries buy it back in the form of highly priced journals [2]. There are also discussions amongst digital preservation experts who hope it may provide a possible way forward for digital archiving. Lecturers are hoping that it will aid the development of Virtual Learning Environments, and many hope that it may go some way to bridging the information rich-poor divide.

However, one of the major barriers to this new form of e-publishing is the practice of copyright assignment. If academics assign copyright, they may lose the right to perform any activities – including self-archiving – with their own work. If they self-archive the work before assigning copyright, they may find that a publisher will not publish the work. Indeed, surveys of academic authors have shown that these are some of their deepest fears about self-archiving [3,4]. In order to prove the validity, or otherwise, of such fears, the UK JISC-funded RoMEO (Rights Metadata for Open archiving) Project [5] decided to perform an analysis of journal publishers' copyright transfer agreements (CTAs). It was hoped that this would shine some light onto the author-publisher relationship in general, as well as providing insight into the effect of such agreements on the practice of self-archiving.

## METHODOLOGY

Two approaches were taken in order to select journal publishers for the CTA analysis: a targeted approach and a self-selecting approach. It was important that the project focused on publishers of high-impact, refereed academic journals as opposed to popular titles. The pressure to publish in quality journals is considerable amongst academics for reasons of promotion and tenure, and in the UK, for a good Research Assessment Exercise (RAE) rating [6]. A target list of publishers was therefore drawn from:

- The top 50 journals by impact factor in ISI's Journal Citation Reports SCI and SSCI editions for 2001;
- The top 53 journal publishers by the number of academic refereed titles, as kindly supplied by Ulrichs Periodicals Directory;
- The top 20 STM journal publishers by the number of ISI-rated titles they owned, as taken from The UK Office for Fair Trading report into the market for STM journals.

The resulting list after removal of duplicates (and merged publishers) amounted to 84 journal publishers. Contact details for all 84 were identified and an email advertising the project and asking for copies of copyright transfer agreements or licences was sent out to each. In addition to the targeted approach, it was decided to send out a general call for agreements via two professional bodies for academic journal publishers: the Association of Learned and Professional Society Publishers in the UK [7], and the Society for Scholarly Publishing in the US [8].

Agreements were collected between August and December 2002. An initial examination of a small number of agreements was undertaken and a list of criteria against which all agreements would be analysed was developed. The analysis fell into eleven categories:

- What rights were assigned (the assignment statement itself);
- Whether the publisher provided a licence option;
- Whether the publisher provided an option for employers that retain copyright, or for government-owned works;
- Whether the publisher specified why they require copyright assignment
- What rights were kept? (e.g. moral rights);
- When were they assigned? (pre- or post- refereeing);
- What the author had to warrant;
- Exceptions to those rights (e.g. what the author was allowed to do with their own work);
- Conditions applying to the above exceptions;
- Conditions specifically applying to self-archiving;
- What the publisher would do in return for copyright assignment.

Where a publisher had different agreements for different journals, an agreement from a high-impact journal was taken where possible for analysis. If a publisher had a general agreement for a group of journals, and specific agreements for others, the general agreement was used for this analysis.

To keep the analysis objective, it was based only on what was explicitly written in the agreement documents. This produced some surprising results at times, thus indicating that CTAs, whilst representing the legal contract between the two parties, did not always 'paint the whole picture' of the author-publisher relationship.

## RESULTS

Forty-eight agreements were collected from the target group of 84 publishers. This was a response rate of 57.1%. Between them, the 48 target group respondents published 6,960 academic journal titles [9]. A further 32 agreements were collected from other sources (e.g., the ALPSP mailing) representing a further 342 titles.

#### **COPYRIGHT ASSIGNMENT OR LICENSING**

In a guest editorial for *Learned Publishing*, Sally Morris wrote, “it is...hard to find a justification, other than convenience, for insisting on taking the author’s copyright [10].” However, 72 of the 80 agreements (90%), representing 94% of the journal titles, asked authors for copyright assignment. Four of these (2.4% of titles) also gave authors the option of signing an exclusive licence agreement instead. Five of the remaining eight just asked for an exclusive licence (4.9% of journal titles) and left ‘copyright’ with the author or copyright holder. Three asked only for a non-exclusive licence (0.9% of titles).

The statements used by which authors assigned copyright varied from the long exhaustive clauses through to single phrases such as “I/we hereby assign to [Publisher Name], full copyright in all formats and media in the said contribution”. Interestingly, the clauses by which authors were asked to grant exclusive licences to publishers were no less lengthy or exhaustive in the rights they required. This may have been because publishers asking for exclusive licences have to spell out exactly what rights they need to perform their business. In contrast, publishers asking for copyright transfer have their rights spelled out by copyright law.

Three agreements explicitly stated that substitute forms or amendments to the agreement document were unacceptable. In the worst case scenario such forms would be rejected; at best they would considerably slow down the publication process. The remainder of this analysis covers all agreements whether for copyright transfer or copyright licensing unless otherwise stated.

#### **EMPLOYER OWNERSHIP**

In certain circumstances, authors are not in a position to assign copyright to journal publishers. Copyright in work produced by employees as part of their employment (known as ‘work-for-hire’ in the US) may belong to the employer. Also, in some countries, work produced by government employees is governed by different copyright rules. For example, in the US, government-owned works automatically belong in the public domain and are not protected by copyright.

##### **‘Work-for-hire’**

Forty-four agreements (55%) representing 72.1% of journal titles, made provision for copyright works owned by an employer (other than government-owned works). Twelve of these gave employers more liberal terms than authors were offered either by asking employers only for a non-exclusive licence, or by offering them more exceptions to use the work than authors were offered. In the 32 other agreements where work-for-hire provisions were made, the employer simply had to sign either instead of, or as well as, the employee.

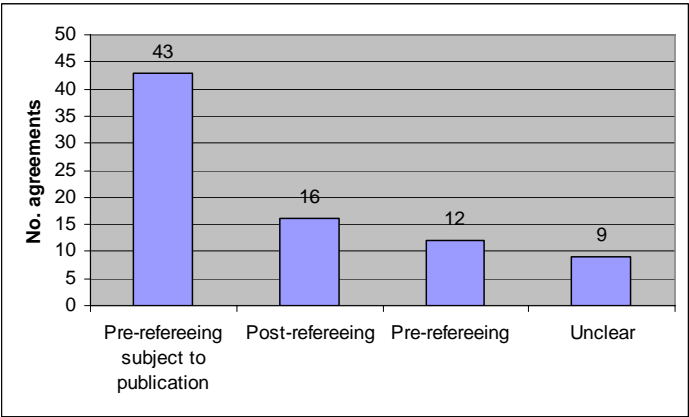
##### **Government-owned works**

Forty-six agreements explicitly gave options for US government owned works and 17 for crown copyright. However, other agreements may have encompassed government-owned works under their “Work for hire” option.

#### **TIME OF ASSIGNMENT**

The agreements were analysed to see whether publishers tended to ask for copyright transfer prior to the refereeing process, or after the contribution had been accepted for

publication (pre-refereeing and post-refereeing in Figure 1). In nine cases this was unclear. However, it was possible by the wording of the remaining agreements to ascertain when the authors were expected to sign.

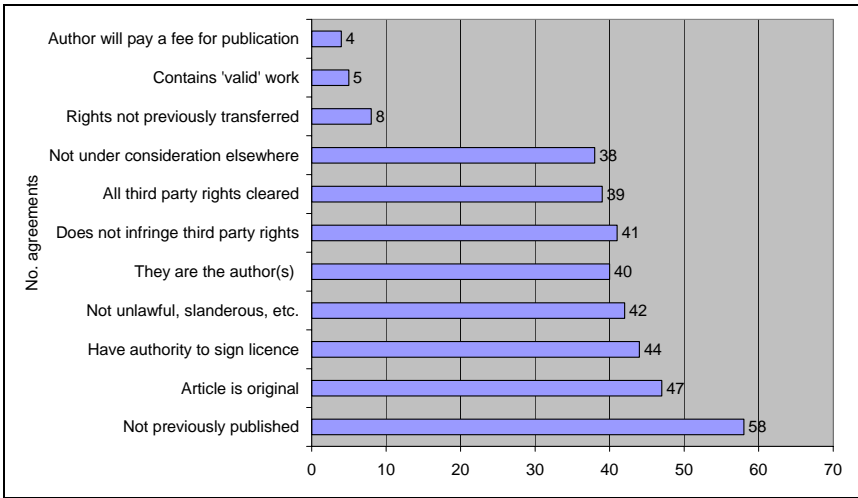


**FIGURE 1 WHEN COPYRIGHT IS ASSIGNED (OR LICENSED)**

In the majority of cases (53.7% of CTA’s representing 79.5% of journal titles) authors were asked to assign copyright prior to the refereeing process but assignment was subject to the paper actually being accepted for publication. Worryingly, there were cases (15% representing 10.8% of titles) where authors were asked to assign copyright prior to refereeing, but there was no mention of copyright reverting to the author if the paper was rejected. In 20% of agreements authors assigned copyright post-refereeing, once the paper had been accepted for publication.

**AUTHOR WARRANTIES**

In addition to the copyright assignment or licence statement, agreements require authors to make certain warranties to publishers with respect to their work. Eleven types of warranties were found on the analysed agreements. Some of these had areas of overlap, but each was considered a distinct area of consideration.



**FIGURE 2 WARRANTIES REQUIRED OF AUTHORS**

Figure 2 shows that the most common warranty required of authors was that the work had not been previously published – the so-called Ingelfinger rule [11,12]. In total, 72.5% of

agreements specified this. Only two agreements were explicit that self-archived web versions of the work were, or may be, considered to be prior publication. Far fewer agreements (47.5%) asked authors to confirm that the work was not *under consideration* for publication elsewhere.

The second most frequent warranty was that the work was ‘original’ (58.7%). No agreements defined the term ‘original’ (although a very small number used the phrase ‘original with the author’) and considerably fewer (50%) asked authors to warrant that they were in fact the creator of the work. Some agreements asked all authors to warrant that they had made a significant enough contribution for it to be attributed to them. In consideration of the fact that authors are not always the owner of copyright, 55% of agreements (44) asked them to warrant that they had the authority to sign the agreement. However, fifteen of these (34%) omitted to ask whether the author in fact had the right to sign. Very few agreements (10%) asked that rights had not previously been transferred.

A recurring warranty in 52.5% of agreements was that the article contained no unlawful, libellous, or slanderous material. Similar numbers asked authors to confirm that the article did not infringe third-party rights and that all third-party rights had been cleared. Although these warranties seem similar, into the latter category fell statements relating to copyright permissions for reproducing others’ work, whereas the former category contained statements relating to ownership of the submitted work.

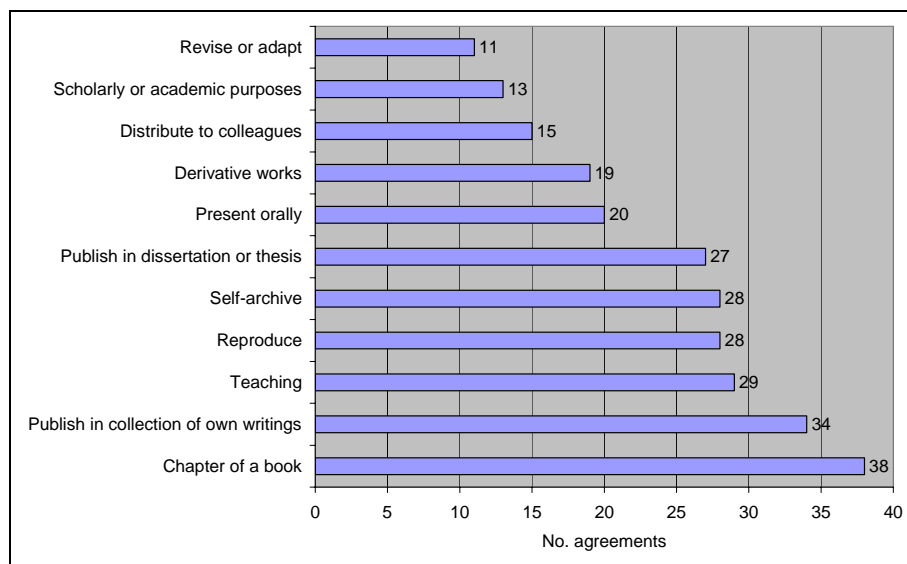
A very small number of publishers asked authors to make warranties with regards to the quality of the submitted work, although one publisher required a statement that the work “contains an important scientific discovery”. Another demanded a statement that “proper reference is made to the preceding literature on this topic”. Only four agreements expected authors to pay a fee for publication – usually for graphics or colour illustrations. Fifteen publishers (18.7%) asked authors to indemnify them in respect of their warranties.

#### **NUMBER OF AGREEMENTS OFFERING EXCEPTIONS**

The agreements were studied to see what provisions were made for authors to use their own works once copyright had been assigned. For the three non-exclusive licences, this part of the analysis was not applicable. Of the remaining 77 agreements, 22 (28.5%) representing 651 journal titles (8.9%) made no exceptions at all for authors to use their own works. Such authors would only legally be able to re-use their works in accordance with copyright law. Three agreements representing 122 titles (1.6%) were at the other end of the spectrum and allowed authors unlimited exceptions with their own works. The remaining 52 agreements allowed limited exceptions.

#### **TYPES OF EXCEPTION**

Eleven different types of exception were identified. Some agreements stated that they would allow authors to use their work in a certain way, but only if the publisher’s permission was sought. Such allowances were not considered true exceptions and were omitted from this analysis. The number of agreements listing the various exceptions is illustrated in Figure 3.



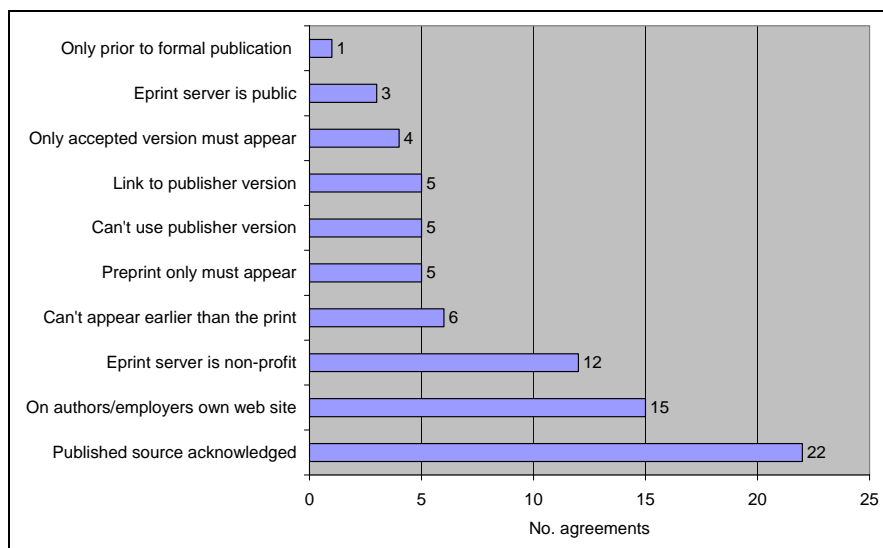
**FIGURE 3 EXCEPTIONS TO COPYRIGHT ASSIGNMENT**

Of the 52 agreements allowing limited exceptions, 36 allowed authors to reuse their article as a chapter of a book (69.2%). Slightly fewer (34) specified that the publication must be a collection of the author’s own writings. Fewer again (27), specified that the work could be used in a dissertation or thesis. Teaching and general ‘reproduction’ were allowed by 29 and 28 agreements respectively, although ‘distribution to colleagues’ and uses for ‘scholarly or academic purposes’ were mentioned by far fewer (15 and 13). Twenty agreements allowed authors to present their paper orally. Nineteen explicitly permitted the creation of derivative works, and eleven allowed revisions or adaptations.

Self-archiving (making the work available on a freely-accessible web server, not just on an intranet) was permitted by 28 agreements. Including the three non-exclusive licences and the three unlimited exceptions, a total 42.5% of the agreements overall allowed self-archiving. These agreements represented approximately 3,590 journal titles – 49.1% of the total represented by this survey. A further four agreements were unclear on this point and may have allowed self-archiving if clarification was sought. They used ambiguous phrases such as “authors need not seek permission to use their own materials in other publications appearing under their own name”.

**CONDITIONS PLACED OVER SELF-ARCHIVING EXCEPTIONS**

The thirty-one agreements allowing self-archiving (including the three non-exclusive licences) did so under the conditions specified in Figure 4.



**FIGURE 4 CONDITIONS PLACED OVER SELF-ARCHIVING**

Once again, acknowledging the published source was important to the largest group of publishers (22 or 70.9%) and five publishers asked for a link from the self-archived version back to the publisher version. The type of eprint server was important to a good proportion of the publishers. About half would only allow self-archiving on either the author's personal web site or on the institutional site. Twelve specified that the server had to be non-profit and three stated that it must be publicly accessible.

Timing was also important to publishers – although different views on this emerged. Six said that the eprint *cannot* appear earlier than the print, one said the eprint must *only* appear earlier than the print (i.e. it should be removed once the published version was available). Five said that only the *preprint* (pre-refereed version) must appear, and four said that only the *post-print* (the accepted version) must appear. Five specified that the publisher version (i.e. the publisher pdf) must not be used for self-archiving (although another said that this was permissible).

## DISCUSSION

### COPYRIGHT ASSIGNMENT

For the vast majority of responding publishers (90%), copyright assignment is still something they seek from authors. However, the 1999 ALPSP survey *What authors want*, found that “61% of respondents thought that copyright should remain with the author, rather than being signed over to the publisher [13].” Project RoMEO's 2003 academic author survey found that 49% assigned copyright to publishers reluctantly [14]. Thus, it seems that authors are increasingly reluctant to assign rights. The six per cent of publishers that asked only for an exclusive licence may have moved away from copyright assignment in response to such author demands. Indeed, the ALPSP itself has developed a Model Exclusive Licence that it is promoting to its members. However, the exclusive licence statements analysed in this survey often leave just as few rights with the author as the copyright assignment statements.

### EMPLOYER OWNERSHIP

Of the 44 agreements (55% of the total) providing a work-for-hire clause, just over one-quarter (12 or 27.2%) gave employers more liberal terms than authors. There is pressure on universities to assert copyright in research outputs to save the ‘copyright drain’ out of universities [15]. Our finding provides further motivation for universities to do so. Even

where agreements ask employers to accept the same terms as authors, an employer may carry more weight in the negotiation process than an individual author.

#### **GOVERNMENT OWNERSHIP**

Interestingly, 57.5% of agreements contained clauses to cater for manuscripts that belonged to the US government. Such works are, by definition, in the public domain. This is an important finding, indicating that the majority of publishers are in fact willing and able to support a dual publication system where results are both in the public domain and published in a peer-reviewed journal.

#### **TIME OF ASSIGNMENT**

##### Pre-refereeing

The time of copyright assignment has a significant effect on the self-archiving process. The majority of publishers (68.7%) asked for assignment prior to peer-review. The majority of these (53.7%) stipulated that copyright would revert to the author if the paper was rejected. However, 15% (representing 10.8% of titles) did not. This may simply have been an oversight. Alternatively, such publishers may have very low rejection rates. However, technically, authors in this position have lost the right to publish their paper elsewhere.

Once authors have assigned their copyright in the unrefereed preprint of their article, they cannot make it available without the publisher's permission. However, the Harnad-Oppenheim (H-O) proposal [16], argues that if a work is self-archived *prior* to copyright assignment, then the preprint does not infringe the terms of the CTA because at the time of self-archiving the copyright belonged to the author. The H-O proposal depends upon the date of copyright assignment to protect all activities performed prior to it. Of course, the publisher may refuse to publish the article knowing it has previously been communicated to the public (the Ingelfinger rule), but the fact remains that the original act of publishing was not an infringing one.

##### Post-refereeing

In cases where copyright assignment is only required after refereeing, authors have more time in which to self-archive their work, as they hold onto their copyright for much longer. The author could even legally publish the post-refereed version if they implement the referees' changes prior to signing the copyright transfer. However, again, they may have problems with the Ingelfinger rule adopted by most agreements.

##### Pre- and post-prints: separate copyright works?

An important issue relating to the time of assignment is whether the preprint and the postprint are actually separate copyright works. If they are, publishers requiring copyright transfer pre-refereeing may only have obtained rights in the preprint, and the author is free to do what s/he likes with the postprint. Publishers requiring transfer post-refereeing have the opposite problem. Only one agreement addressed the question of when a work becomes a new work. It read,

“...authors may revise their [Publisher]-copyrighted work and post the new version on non-[Publisher] servers...If the new version differs by 25% or more from the copyrighted version, it is treated as a new work not copyrighted by [Publisher]; otherwise it is treated as a revision and is still copyrighted by [Publisher].”

According to these rules, most refereed works would not constitute a separate work as they would not usually differ by 25% from the pre-refereed version. UK copyright law states that copyright is infringed if a “substantial amount” of an original has been copied. Assuming the preprint and post-print are substantially the same, posting one after assigning rights in the other would be considered an infringing act. Kahin has considered this issue from a US



perspective and concluded that a different copyright actually rests in each draft. Thus, “If copyright in [the] final version is assigned to the publisher, the earlier versions are not necessarily assigned, so the author can take the prior version and adapt it into derivative works. [17]”

To pre-empt this problem, one agreement asked for copyright in both the work and in “any prior versions thereof”. Another agreement obtained rights only in the preprint by asserting copyright in subsequent ‘revisions and versions’ of the work.

#### **AUTHOR WARRANTIES**

##### **Prior publication**

The success of the self-archiving initiative depends to some extent on the meaning of ‘prior publication’ to publishers. Just under three-quarters of agreements (72.5%) asked authors to warrant that the work had not been previously published. Only two agreements were explicit that self-archiving the work on the web was considered prior publication, but it may be assumed that those that did not allow self-archiving hold the same view.

Whilst to most academics, ‘publication’ means formal publication in a recognised peer-reviewed vehicle, in most debates publishers have adopted a broader definition of ‘publication’, such as, “the act or an instance of making information public. [18]” The difference between the two views is, of course, the difference between the raw manuscript or preprint, and the value-added post-print. A report to the International Association of STM Publishers drew a distinction between ‘first publication’ (the preprint) and ‘definitive publication’ (the post-print) [19]. It is arguable that academics see self-archiving as communication, and journal publishing as publication.

Where publishers do prohibit prior publication, and view self-archiving as publication, authors that have *already self-archived their preprint* have two options. They either sign to say the item has not been previously published (in their interpretation of ‘published’) and risk breach of contract later on, or they amend the assignment form and/or negotiate with the publisher, and risk not being published. They may be asked to remove the preprint prior to formal publication.

Authors that have *not self-archived a preprint*, can sign freely, but would have to negotiate the right to self-archive the post-print later on. As the publisher has already gained copyright transfer, this may be difficult to do.

#### **NUMBER OF AGREEMENTS ALLOWING EXCEPTIONS**

A surprisingly high number of agreements (31.1%) gave authors no privileges with their own works. This figure includes two that made exceptions only subject to ‘fair use provisions’, putting them in the same category as those with no exceptions at all. Academic authors are often unaware of the implications of this until they come to ask their Librarian to make multiple copies of their own paper for their students, and are refused. In many cases, publishers will not refuse their authors the permission to make copies, but they have to make a specific application each time they wish to do so.

#### **SELF-ARCHIVING EXCEPTIONS**

To some extent, CTAs would not have such a negative effect on self-archiving if they subsequently licensed back to authors the right to self-archive. However, whilst just under 50% of journal titles allowed self-archiving in some form, that still left over 50% that did not. Thus, as we have argued elsewhere [20], the practice of copyright assignment has to be reconsidered if self-archiving is to become widely adopted.

#### **SELF-ARCHIVING CONDITIONS**

Personal or institutional servers

Interestingly, just under half the publishers allowing self-archiving would only let authors do so on a personal or institutional web site. The motivation for this would appear to be that dissemination of the article is limited to an immediate circle of colleagues and students. However, under the OAI eprints initiative it does not matter where the full-text is located, as long as its whereabouts (and related metadata) is widely disseminated by Data Providers and harvested into searchable services by Service Providers. Using personal OAI-compliant software such as Kepler [21] individuals can also act as OAI Data Providers, thus adhering to publisher requirements but achieving wide dissemination at the same time. Since this analysis, one agreement has been drawn to the authors' attention that specifically, "excludes the enabling or permitting of linking or harvesting of metadata [22]". It remains to be seen whether this is an increasing trend.

Preprint or post-print

There was mixed opinion over whether the preprint, the post-print or both could be self-archived. Just under half (48.4%) were happy for either to appear. However, 32.2% specified that only the post-print should appear, and 19.3% specified that only the preprint should appear. The former were presumably concerned to ensure that the formally published version was the only one on the market to avoid versioning problems. The six publishers that wanted the post-print to only appear after printed publication, wanted to ensure that they had the 'scoop'. The latter group were probably concerned to retain exclusive rights over the quality-assured post-refereed version as a means of maintaining their role as preservers of the scientific record. One publisher even asked for the preprint to be removed once the formally published version was available.

Does it matter? To proponents of open-access, publishers would ideally allow both to be made available. The publication of preprints allows authors to immediately disseminate, and gain priority over, their research. Many welcome this opportunity because getting an article published with a high-impact journal can take years. Preprints also allow peers to discuss and comment on the paper, which may undergo a number of revisions before being submitted to a journal. The publication of post-prints gives everyone access to the quality-assured article – including those from countries or institutions that may not be able to afford a journal subscription.

#### **CONCLUSIONS: THE EFFECT OF CTA'S ON AUTHOR SELF-ARCHIVING**

Whether an author can safely self-archive or not depends on a complex matrix of the following factors: i) whether copyright assignment or a non-exclusive licence is required; ii) the time of copyright assignment; iii) if (and when) CTA's actually allow self-archiving; iv) if publishers do not allow self-archiving, but do not see it as 'prior publication'; v) whether the preprint is legally a separate copyright work to the refereed postprint; and vi) whether the author wishes to self-archive a pre-print, postprint or both.

Currently, the majority of publishers are asking for copyright assignment and the majority of authors are granting it (albeit reluctantly in an increasing number of cases). Just over half of those agreements do not allow author self-archiving, and almost three-quarters prohibit prior publication. There is no consensus amongst the publishers that do allow self-archiving as to the conditions under which it may take place – in particular whether authors may self-archive the preprint, postprint or both.

From an author's perspective, the ideal scenario would be one in which they did not assign copyright to publishers, but only licensed them the rights necessary for 'definitive publication'. Failing this, publishers would allow self-archiving of both the preprint and the postprint. However, it is not authors' desire to self-archive that should be considered, but

how authors would like *others* to be able to use their papers. Research by the RoMEO Project has suggested that academic authors are prepared to allow far more liberal usage of their works than either copyright law or most e-journal licences allow [23,24].

One thing is certain: with the introduction of new models of scholarly communication, the copyright transfer chain from university to academic author to publisher will need revisiting. To this end, the Zwolle *Copyright and Universities*[25] conferences have performed an important service by facilitating discussions amongst stakeholders to ensure an optimal distribution of rights. We propose that an important aspect of that work should be a revisiting of author-publisher agreements to find an balanced solution that addresses the changing needs of all parties.

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**NOTE:**

A longer version of this paper has been submitted to *Learned Publishing* and it is hoped it will appear in late 2003.