

Publishing without Exclusive Rights

PETER SUBER

Journal publishers don't need exclusive rights. More precisely, they don't need them for publishing. They don't need exclusive rights to make a work public or to add value in the form of peer review, copyediting, metadata, formatting, discoverability, preservation, and so on. Nor do they need exclusive rights to make enough money to pay their bills and grow.

They only need exclusive rights for monopoly control over the published work and the revenue it might yield. Publishers who say they need exclusive rights are saying they need this monopoly control.

The best evidence that journal publishers don't need exclusive rights is that so many peer-reviewed journals do without them. I'm thinking about open access (OA) journals that put open licenses on their published articles, especially those that use CC-BY.

As of November 3, 2021, CC-BY was the most frequently used license by journals in the Directory of Open Access Journals (DOAJ).¹ CC-BY was used by 8,325 (48.8%) listed journals, more than twice as many as the runner-up, CC-BY-NC-ND, at 3,827 (22.4%). The journals using CC-BY were published by Elsevier (525), BMC (310), MDPI (301), Hindawi (216), Wiley (194), SpringerOpen (191), SAGE (173), Taylor & Francis (172), and Frontiers (196), among many others.

These publishers are not breaking the law. Nonexclusive rights suffice to protect them. Moreover, many of these publishers make substantial profits or surpluses. If publishing without exclusive rights didn't permit that kind of revenue, many or most of them would stop doing it.

Those in the bottom pecuniary tier (not the same as the bottom quality tier) undoubtedly struggle to make ends meet. But the same is true for the bottom pecuniary tier of non-OA journals holding exclusive rights.

I highlight publishers using CC-BY because they don't ask for exclusive rights to create commercial uses or derivative works. They don't ask for any exclusive rights except

1. See the Directory of Open Access Journals: <https://doaj.org>.

For the numbers and percentages of DOAJ-listed journals using various open licenses as of November 3, 2021, see the summary I posted to Twitter: <https://twitter.com/petersuber/status/1455946385631502340>.

perhaps the exclusive right of first publication (more on this under the first objection, below).

CC-BY-NC and CC-BY-ND licenses are like CC-BY in one respect relevant here. Publishers could use them without holding exclusive rights, even if this is rare in practice. Authors could hold the exclusive rights to make commercial uses or derivative works, and publishers could apply these licenses at their request.

If I weren't limiting this argument to journal articles, I could also cite publishers of public domain books, such as Jane Austen's novels and John Locke's treatises. These publishers choose public domain works with their eyes open, knowing they won't have exclusive rights, and they do well enough to keep at it.

For the purpose of my thesis, I could also cite the thousands of OA *repositories* that lawfully make work public, usually with added value (metadata, discoverability, preservation, and so on) and without exclusive rights.² But I acknowledge that there are other reasons not to consider OA repositories to be "publishers."

The simplest way for journal publishers to operate without exclusive rights is to stop demanding exclusive rights in their publishing contracts. Authors hold all rights in their work before they transfer rights to others, that is, after they write a new piece and before they sign a publishing contract. If publishing contracts didn't ask for exclusive rights, then authors would continue to hold these rights and publishers would not acquire them.

This would make author rights retention as easy as possible, both to understand and to implement. Authors wouldn't have to think about how to retain rights, which rights to retain, or how to negotiate to retain them. Author rights retention would be the default, an automatic side effect of the publishing contract. Authors could exercise rights over their own publications (for example, to authorize OA, reuse, translation, or mining) without risk of copyright infringement or breach of contract.

For the sake of facilitating research, fostering OA to research, and maximizing the use and reuse of research, more publishers should drop their demands for exclusive rights, and more authors should favor publishers who do so.

Publishers who have already dropped the demand for exclusive rights and adopted open licenses like CC-BY should say so conspicuously. This would help authors find publishers who support rights retention and open licenses. It would also help publishers themselves by boosting submissions. Dropping the demand for exclusive rights will attract some authors and deter none. No authors will shun a journal just because the journal shuns exclusive rights.

2. As of November 2021, OpenDOAR listed 5,762 OA repositories worldwide: https://v2.sherpa.ac.uk/view/repository_visualisations/1.html.

Three objections

1. Some publishers might object that they need exclusive rights and monopoly control to make the revenue they need to survive.

I don't know of any publishers who started without exclusive rights, or spent a testing period without them, and discovered from experience that they needed them. (But if there are examples, I will gladly acknowledge them.) In that sense, publishers who believe they need exclusive rights did not do the experiment.

But let's agree that some publishers have good reason to believe they need exclusive rights to make enough revenue to pay their bills and grow their enterprise. Let's also assume that the belief can be true. However, even when it's true, publishers should be satisfied with temporary or expiring exclusive rights – exclusive rights that morph into nonexclusive rights after a certain time. If we set an adequate time period, this solution will give publishers the exclusivity they need until they make the revenue they need. That answers the objection and shifts the question to what counts as an adequate time period.

The idea of temporary or expiring exclusive rights may sound novel, but all rights under copyright are already temporary. They lapse after the statutory term of copyright (in most countries, the life of the author plus 70 years). The question here is whether an author and a publisher could agree by contract that the publisher's exclusive rights will expire, or flip to nonexclusive rights, well before the end of the standard term of copyright, for example in 6 to 12 months.

The idea is perfectly coherent and even precedented. There may be many examples, but I can cite one from my own experience. My 2012 book on OA included a mix of earlier material published under CC-BY and new material written for the book.³ MIT Press acknowledged the CC-BY license for the earlier material and published the new material under an “all rights reserved” copyright. It also agreed in advance to shift the new material to CC-BY-NC after one year. Basically, it agreed that all its exclusive rights, except the exclusive right to commercial use, would automatically morph into nonexclusive rights after one year. The details may sound complicated, but the concept is legally simple. It was just a matter of contract.⁴

3. Peter Suber, *Open Access* (Cambridge, MA: MIT Press, 2012). See the MIT Press page for the book: <https://mitpress.mit.edu/books/open-access>. Also see my book home page, which includes a growing collection of updates and supplements: [https://cyber.harvard.edu/hoap/Open_Access_\(the_book\)](https://cyber.harvard.edu/hoap/Open_Access_(the_book)).

4. The story has another chapter. In April 2019, the press shifted the CC-BY-NC parts of the book to CC-BY. I wanted this outcome all along, but we did not have a prior contract to ensure it. The whole book has been CC-BY ever since.

Since the book came out in 2012, the press has become friendlier to OA books, and authors have not had to make the compromises I made. For example, the full text of my 2016 book, *Knowledge Unbound*, was CC-BY from birth. See <https://mitpress.mit.edu/books/knowledge-unbound>.

A similar idea called Library License was proposed in 2012 by Jeff Goldenson and his colleagues at the Harvard Library Lab.⁵ The Library License was a contract between an author and book publisher to let the original license on the book morph into a less restrictive license for libraries when certain triggering events occurred, such as “Publisher’s failure to sell more than 5 copies of the Work per month for 3 consecutive months” or “publication of a substantially new edition of the Work.” Another triggering event was the lapse of a certain period of time.

For now we need not discuss the large gap in bargaining power that would make it hard for an author to persuade a publisher to accept expiring exclusive rights. The topic here is what publishers do and don’t need, not how to persuade them to demand no more than they need. But if they wanted, funders could help authors on this front. For example, a funder could adopt a policy that grantees may not give publishers exclusive rights to articles arising from grant-funded research unless those rights expire (or flip to nonexclusive rights) after x months. Publishers who wanted to reject those terms would have to reject research funded by those funders.

A very simple kind of expiring exclusive right is the exclusive right of first publication. It has no continuing effect after publication. Although I acknowledge its importance for publishers, it’s compatible with my thesis because, in principle and in practice, publishers don’t need the exclusive right of first publication in order to create and deliver the first publication. However, it’s entirely reasonable (and harmless) for publishers to want to ensure their right to do this before they start preparing an unpublished work for publication. Authors needn’t hesitate to give this temporary exclusive right.

A variation on the theme is an expiring license restriction. If a publisher holds the exclusive right to make commercial uses and applies a CC-BY-NC license, then after x months the NC restriction on the license could expire and the rest would remain standing. The publisher’s exclusive right to make commercial uses would flip to nonexclusive after x months, and the revised license would inform the world.

We should not confuse expiring exclusive rights with embargoes. Expiring exclusive rights could apply even to unembargoed works (OA or non-OA). Delaying the flip from exclusive to nonexclusive rights is not the same as delaying the release of an OA edition. However, expiring exclusive rights could give some publishers the benefits they previously sought from embargoes.

At the start of this section, I asked us to assume that some publishers might be right to believe they need exclusive rights to make enough revenue to cover their expenses. But now let me put the question another way. Either these publishers are right or

5. See the Library License home page: <https://www.buildingways.co/librarylicense/index.html>.

wrong to believe they need exclusive rights to make that much revenue. If they are wrong, then we make a mistake to grant them exclusive rights. If they are right, then we make a mistake to let them be the sole or even primary vehicles for distributing peer-reviewed research.

2. Some publishers might object that they need exclusive rights to take action against copyright infringers.

That's almost true. At least it's true in the United States that the party suing for infringement must hold exclusive rights.⁶

But while the plaintiff in an infringement case must hold the relevant exclusive right, the plaintiff need not be the publisher. If a publisher doesn't hold the relevant exclusive right, but the author does, then the publisher could not sue for infringement, but the author could.

We can concede that publishers might be better equipped to sue, for example, with funding and legal staff. But when an author holds exclusive rights, and a publisher identifies an infringer and wants to sue, it could offer to represent the author.

Some publishers go a step further and say they need exclusive rights in order to prosecute plagiarists, as opposed to infringers. For example, the Association of American Publishers said in 2007 that "exclusive rights . . . provide a legal basis for publishers to . . . enforce copyright claims with respect to plagiarism."⁷ I replied to this position at the time, and my argument has not changed:

It's inaccurate and disingenuous to argue that publishers need exclusive rights to prosecute plagiarists. First, the rights are rarely used this way. Plagiarism is typically punished by the plagiarist's institution, not by courts – that is, by social norms, not by law. Second, if it's ever desirable to pursue a plagiarist in court and authors don't give publishers the right to do so on their own, then authors retain that right to use as they see fit. Third, many authors would rather have a larger audience and impact than give their publisher the seldom-used legal tools to prosecute plagiarists [with the side effect of limiting access to their work]. Authors should make this decision, not publishers. Finally, if an author discovers a plagiarist and the publisher really wants to get involved, the author can always delegate the publisher to act as his/her agent [or

6. See *John Wiley & Sons v. DRK Photo*, 882 F.3d 394, 403–404 (2nd Cir. 2018): "We . . . read the text of the Copyright Act to preclude infringement suits by assignees . . . who do not hold and have not yet held any of the listed exclusive rights." <https://caselaw.findlaw.com/us-2nd-circuit/1889748.html>.

7. See International Association of Scientific, Technical and Medical Publishers (STM), Association of American Publishers Professional and Scholarly Publishing division (AAP PSP), and Association of Learned and Professional Society Publishers (ALPSP), "Author and Publisher Rights for Academic Use: An Appropriate Balance," May 2007, <http://web.archive.org/web/20071107090602/http://www.stm-assoc.org/documents-statements-public-co/2007%20-%202005%20Author%20Publisher%20Rights%20for%20Academic%20Uses--%20an%20Appropriate%20Balance.pdf>. (I link to an archived copy because the original URL is dead.)

legal representative]. For this purpose, publishers don't need rights from the time of publication, nor do they need exclusive rights, let alone a policy to limit access to the author's work.

Behind this [publisher] argument there's a confusion of plagiarism and copyright infringement. Someone can commit plagiarism without infringing copyright (by copying a fair-use excerpt and claiming it as one's own) and infringe copyright without committing plagiarism (by copying a larger excerpt but with attribution). One can also commit both together (by copying a large excerpt and claiming it as one's own), but that doesn't collapse the distinction. One can commit just about any two offenses together.⁸

3. Some publishers might object that they earn or deserve exclusive rights because of the value they add.

Publishers do add value, but far less than authors and funders and even less than referees. If the principle is that those who add value deserve the right to control access, then all contributors should share control, and no single contributor should hold exclusive rights. If the principle is that the right to control access belongs to the contributor who adds the greatest value, then publishers will never hold exclusive rights.⁹

Publishers deserve to be paid for the value they add. But it doesn't follow that publishers deserve exclusive rights, especially when that would harm research and limit the equitable division of rewards to other contributors. Publishers who demand exclusive rights need to go beyond the added-value argument or admit that they are demanding what they want, not what they need or deserve. To me, the most charitable reading of this third objection is that it collapses into the first one, that publishers believe they need exclusive rights to make enough revenue.

Just as publishers deserve to be paid for the value they add, authors and funders deserve suitable rewards (not necessarily financial) for their contributions. For journal articles, these rewards often take the form of nonexclusive rights to use and reuse the works as they see fit, which is impossible when publishers hold exclusive rights.

8. Peter Suber, "Balancing Author and Publisher Rights," *SPARC Open Access Newsletter*, June 2, 2007, <http://nrs.harvard.edu/urn-3:HUL.InstRepos:4391158>.

9. For a longer version of this reply, see the same 2007 piece in which I responded to the second objection above: <http://nrs.harvard.edu/urn-3:HUL.InstRepos:4391158>.

Conclusion

If academic publishers stopped demanding exclusive rights, then author rights retention would be automatic. But why should publishers make this easy for authors? One reason is that publishers compete for authors, and (other things being equal) publishers who drop the demand for exclusive rights will be more attractive to a growing number of authors.

If publishers truly needed exclusive rights, this consideration might carry little weight. We know that publishers often do very well following practices they believe to be necessary even when those practices antagonize authors. But the picture changes if publishers truly don't need exclusive rights.

I've argued (1) that scholarly journal publishers don't need exclusive rights, (2) that they should stop demanding them, (3) that they could gain submissions by dropping the demand, and (4) that authors should favor publishers who drop the demand for exclusive rights and adopt an open license like CC-BY.¹⁰

The argument might apply more broadly, even if I can't take it further here. It might apply to book publishers, even though books have significantly higher production costs than journal articles. Just as with journal publishers, some OA book publishers use CC-BY and do fine without exclusive rights. Those that would not do fine, or believe they would not, could use temporary exclusive rights that expire after x months, when the x is larger for books than for articles. Likewise, the argument might apply to print works as well as digital works, with or without OA, with or without peer review, with or without embargoes, with or without article processing charges (or the equivalent), and might also apply to non-academic publishers.

Acknowledgment

I thank Kyle K. Courtney for helpful discussions and comments on earlier drafts of this article.

10. I support other methods of author rights retention as well, such as rights-retention OA policies at funders and universities. See my recent piece, "Rights Retention and Open Access," *European Research Council Magazine*, October 28, 2021, <https://erc.europa.eu/news-events/magazine/rights-retention-and-open-access>.

We'll need these other methods until all or most publishers stop demanding exclusive rights. But if publishers did drop this demand, that would give us a faster and easier path to author rights retention than we have through university and funder policies.

Author Biography

Peter Suber is the Senior Advisor on Open Access, Harvard Library, and Director of the Harvard Open Access Project (in the Berkman Klein Center for Internet & Society). By training he's a philosopher and lawyer, and he stepped down from his position as a full professor of philosophy in 2003 to work full-time on open access. He was the principal drafter of the Budapest Open Access Initiative (2002), serves on the boards of many groups devoted to open access and scholarly communication, and has been active in fostering open access for many years through his research, speaking, and writing.