

# Kluwer Copyright Blog

## Rights Retention Strategy or How to End a Mexican Stand Off – Part Two

Eugen Stoica (University of Edinburgh) · Tuesday, August 20th, 2024

### Rights Retention Strategy

Plan S is innovative, ambitious and unsurprisingly complex. Rights retention represents just a part of Plan S. Rights retention was developed as a strategy for compliance with the funder's requirements by retaining some of the economic rights granted by copyright. It was not intended to be a strategy for simply retaining rights in works created by academic researchers.

Rights retention strategy will apply in all cases when a journal's copyright policy conflicts with a funder's open access requirements, leaving no alternative for the author than to pay an APC in order to be compliant. As we mentioned, navigating the ever-changing labyrinth created by the publishers' copyright policies and research funders' open access requirements is most of the time impossible and paying an APC is the only way out of the maze. Authors and universities cannot afford to pay and research funders would rather not use their funds this way. Some publishers may accept making such works available open access without an APC being paid, in which case an embargo will usually be required. Embargoes are usually 12-24 months long and will benefit the publisher, as in the meantime they will have exclusivity in distributing the work. Nowadays, open access essentially means 'free to read' and it can be considered a unilateral act, a liberality of the publisher who in most cases will own the copyright. Publishing under a CC licence means



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that the author will retain copyright and will decide which of the [six licences](#) will be used to share the work.

The Rights Retention Strategy as intended by Plan S entails that research funders will require their grant beneficiaries to assert when submitting new work for publication that they have applied a CC BY license to any AAM that may result from the submission and to deposit that AAM (or VoR if possible) into their institutional (or a subject) repository, with a CC BY (or a similar suitable open) license, available immediately (no embargo).

This solution will allow authors to publish in the journal of their choice without having to pay an APC, even though this journal's copyright policy conflicts with their research funder's OA requirements. By applying a CC BY license to the AAM and depositing it in a repository without an embargo, they will meet funder's requirements while allowing the journal to further use the work for commercial gains.

### **How Rights Retention works in practice**

To work properly, a rights retention strategy should include three major elements.

The first one requires academics and university management to agree on a compromise regarding who owns the copyright in the scholarly outputs created during employment. Winning a research grant creates obligations for both parties but considering the old issue of copyright ownership in academia, it would be better if a convenient solution could be found. Usually this implies adopting a university copyright policy that recognises authors/employees the right to own the copyright in the research outputs created during employment in exchange for a non-exclusive, irrevocable, world-wide license granted to the university in these works which will be made publicly available under a CC BY licence. This will be “the agreement to the contrary” – the exception stipulated in CDPA 1988. Despite the usually clumsy wording, the intention of the parties is beyond any doubt. The advantage of such policy is that authors can use the entire bureaucratic apparatus of the university for advice and support. Obviously, these university policies have an opt out route for authors who, for one reason or another, do not want to use the RRS.

The second requirement is to apply a Creative Commons Attribution license (CC BY), to the author accepted manuscript (AAM). Creative Commons licenses are [irrevocable but non-exclusive](#) and apply throughout the world. In practice, this is done by adding the following copyright statement (or something to similar effect) to all works submitted for publication:

*‘For the purposes of open access, the author has applied a Creative Commons Attribution (CC BY) licence to any Accepted Author Manuscript version arising from this submission.’*

By applying a CC BY license to the submitted version or to the AAM, the authors will retain copyright allowing them to make the AAMs publicly available by uploading them to their institutional repository or a subject repository at the moment of publication (no embargo), thus meeting the research funder's requirements. Users are allowed to distribute, remix, adapt, and build upon the work in any medium or format, so long as attribution is given to the author. All CC licenses are irrevocable but non-exclusive and this particular license permits commercial use, allowing authors / right-holders to enter into additional licensing agreements with publishers that

can potentially contradict the terms of the original CC license. Clearly, these additional agreements cannot be under another CC licence; they must be under general copyright legislation.

Last but definitely not least, the university should notify all academic publishers, letting them know that a new copyright policy has been adopted and the university will retain a non-exclusive licence in the works created by their employees and license these works under a CC BY licence. Once the publishers are formally informed about this change, they cannot ask for or expect to get exclusive rights to these works or full copyright ownership, because the university and authors will retain certain rights.

Authors are free to sign the publishing contract with the academic publisher who has already been notified that they cannot get an exclusive license in the works that they would like to publish, in the usual way. Obviously, publishers will further customise their version of the work (the VoR) by copy-editing and adding specific typesetting (typographical arrangements), thus resulting in two very similar versions of the same work: the information will be the same, only the ‘look’ of the two versions will be different.

### **Publishers’ reaction to RRS**

In 2021, a group of sixty publishers issued a [statement](#) protesting against the Rights Retention Strategy as specified in Plan S. cOAlition S responded with a [statement](#) of their own, saying that RRS is beneficial for authors as it ‘restores long-standing academic freedoms’.

Undoubtedly, RRS has no influence over publishers’ policies in any way, it will not change them and it cannot force them to accept submitted manuscripts where the author has retained a non-exclusive license.

Harvard University was the first to implement an [early version](#) of the RRS in 2008 and their researchers have not struggled to have their papers accepted for publication in the journal of their choice.

University of Edinburgh was the first UK university to implement RRS as a [university policy](#) since 2022. It was developed with colleagues from Legal Services Department, who first sent a formal Notice of Grant of Licence to fifteen major publishers followed by a wave of 150 notifications to other publishers. All letters were signed by Head of Legal Services and they were sent by recorded delivery and also by email. Since then, [many UK universities](#) and from [around the world](#) adopted similar policies.

The response to the notifications sent was relatively quiet as we received responses from approximately 10% of the notified publishers. It is fair to say that these initial responses are rather polite acknowledgements of the new policy and not official replies as already a statement has been released and it is unlikely that decision-makers would have mobilised for a second time to provide an answer to a RRS notification from only one university.

In practice, we noticed that some publishers specified that their publishing agreements (signed with authors) will take precedence to any prior license granted. We were advised by our Legal Services

colleagues that if a publisher, after has been formally informed by the existence of the new university policy, persist in asking an author to sign an exclusive licence that contradicts an existing (non-exclusive) licence, will be seen as procuring a breach of contract and they are opening themselves up to a legal claim which they are unlikely to win.

The involvement of our colleagues from Legal Services in drafting and implementing the policy was crucial for its success as it provided reassurance for academics that in the unlikely eventuality of litigation, they will be supported by the university.

## **Conclusion**

Time will tell, but it seems that a rights retention policy represents the best mechanism for authors to successfully walk the tight rope between the funders' open access requirements and publishers' copyright policies.

It is very likely that adopting a rights retention strategy will ensure a more balanced round in the infinite game of academic publishing. Will the research funders and universities succeed in their quest for reducing the costs of publication and access to knowledge?! Academic publishers proved to be resourceful players, well capable of innovating the rules of the game when an opportunity arise. At the same time, cOAlition S Rights Retention Strategy draws its strength from the number of its members and influence they have around the EU institutions which may validate the rules of the game. At least for a little while.

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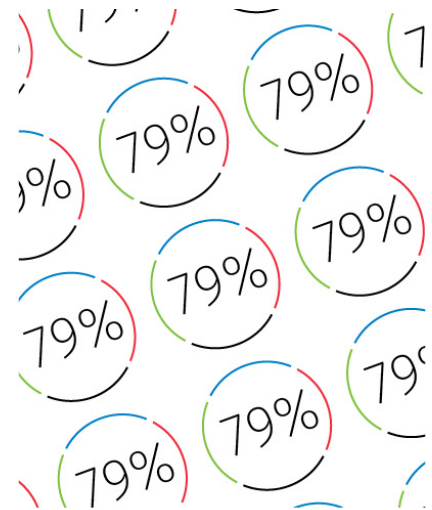
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