

**Workshop of the International Mathematical Union
'Perspectives on Electronic Information and
Communication in Mathematical Sciences'
Simons Foundation, New-York
*12-13 September 2024***

**Working Group 2 :
Which legal framework for publishing
research articles in open access ?**

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Electronic publishing is a technological revolution that makes it possible to publish and distribute research articles at virtually zero marginal cost, which is not the case with print publishing. When publishers were printers, they took care of many tasks, from text layout and proofreading to editing, printing and worldwide distribution by post; today, thanks to electronic means, in some fields publishers ask researchers to take care of the layout and submit their articles to journals camera-ready. Since the middle of the 20th century some commercial publishers operating on a global scale have bought numerous commercial and academic publishers, so that today they own many journals that researchers need in order to share their results. They publish them using electronic technology but still register them under *Copyright Law (Statute of Anne, Queen of England /1/)*, designed in 1710 to protect the commercial interests of printers. Today, *Copyright Law* makes it advantageous for publishers to require researchers to assign them copyright free of charge, with only the signature of one co-author engaging all of them. Then as copyright holders publishers have the exclusive possession of each article they publish (typically the text, figures and any additional elements attached to the article, *e.g.*, data or software), and this for over a century, more precisely from the date of publication until seventy years after the death of the last surviving co-author (*Copyright Term Extension Act of 1998 /2/*). The *Copyright Law* is a privilege acquired three centuries ago by the printing press, which enables publishers to sell research articles at any price they wish. Moreover, unlike for consumer goods, the market for research publications is not competitive, and prices are 'inelastic' /3/, as researchers cannot replace the articles they need with cheaper ones.

Although the current legal framework for publishing research articles is still dominated by the *Copyright Law*, it is important to take note that the intellectual property laws vary from one country to another :

- in Continental Europe, Latin America, Japan and Korea they protect the authors' rights,

- in Commonwealth Countries and the United States they protect the publishers' rights,
- until recently, China, India and the former Soviet Union countries had no laws to enforce these rights, and therefore authorized anyone to reproduce and distribute articles already published (this is why *Alexandra Elbakyan*, a researcher from Kazakhstan, is able to provide us free access to millions of research articles on her platform *Sci-Hub*). But today those rights depend on the rules of the *World Trade Organization*, of which these countries are now members, and on various bilateral treaties whose content is unknown, and for which there is not yet sufficient case law to judge what the situation is really in these countries.

Lawyers employed by universities and research institutes are familiar with patent laws, as they are a source of income for these institutions. This is not the case with copyrights, as they belong exclusively to researchers and do not generate any income. It is thanks to this exclusivity that publishers can require authors to sign a contract with them to have their article published, provided that it has been accepted by the journal's editorial board.

The working group will look for the universal legal framework that would be better suited to electronic publishing, and able to protect the interests of both researchers and of the academic institutions that support them, not forgetting the taxpayers (citizens and companies) who fund public research independently of their original country. We will also propose that the exclusive transfer of copyright to the publisher should become non-exclusive, to take into account the contractual asymmetry between publishers and researchers (publishers require authors to submit their articles electronically in camera-ready layout and, when they are accepted after peer-review, to transfer their copyrights to them for free).

The last twenty years have seen the advent of the open access movement, thanks to a combination of several factors: the new electronic publishing techniques, the creation of the *Internet* and the *Web*, the actions of a few visionary researchers and research institutions /4, 5, 6, 7/, and the invention of *Creative Commons* licenses by *Larry Lessig* (professor of law at *Harvard University*) /8/. In this workshop, "open access" means unrestricted online access to peer-reviewed research articles and other related data needed to reproduce results presented. One of the aim of the open access movement is to improve the quality of peer review and the reproducibility of published results, while maximizing their dissemination.

Several research institutions have already modified their policies and some countries have adapted their legislation to guarantee open access to research articles and data, *e.g.*:

- since 2008, the *National Institute of Health* requires that all the research which it funds be published in open access (with an embargo period of at most 12 months after publication) /9/,
- since 2013, the White House *Office of Science and Technology Policy (OSTP)* asks federal agencies to require that all sponsored research be published in open access (without any

embargo after publication) /10/,

- in 2016, the French parliament passed the *'Loi pour une République Numérique'* whose article 30 allows authors, whose research is financed by at least 50% public funds, to deposit in open access the final author version of their article (with an embargo period, of six months after publication for exact sciences, and of twelve months for humanities and social sciences) /11/,

- since 2021, the *CoalitionS* /12/, a consortium of European funding agencies and research institutions, demands that researchers whose research is publicly funded no longer assign their copyrights to publishers, and publish their author-accepted manuscript in open access without any embargo period.

Unfortunately, publishers' lawyers have already found a way around these new public policies. For example, some publishers now replace the assignment of copyrights by requiring one of the authors to sign a license agreement giving them the exclusive and perpetual right to publish their article.

The working group will look for ways of providing legal advice to researchers before they sign the publishers' contracts, as well as ways to defend themselves if a publisher refuses to publish their article accepted by the editors. We will also examine the licenses currently used to publish research articles, analyse the recommendations published in 2024 by the *IMU Committee on Permissions* /13/, and consider advice that could be given to mathematicians wishing to publish in open access.

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