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# Copyright: Retaining and Sharing Rights to Your Scholarship

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# Copyright: Retaining and Sharing Rights to your Scholarship

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*a presentation for Open Access Week  
October 20, 2009*

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OPEN  ACCESS WEEK

[openaccessweek.org](http://openaccessweek.org)

*co sponsored by the University  
of Toronto Libraries, the  
Graduate Student Union and  
the School of Graduate Studies*

“Librarians must develop strategies favoring the outcomes best corresponding to the deepest values of their profession, in particular the desire to keep the knowledge commons open. From that perspective, it is clear that they must throw all of their weight—and it is considerable—behind the Open Archive Initiative.”

Jean-Claude Guédon

“In Oldenburg’s Long Shadow: Librarians, Research Scientists, Publishers, and the Control of Scientific Publishing.”  
<<http://www.arl.org/resources/pubs/mmproceedings/138guedon.shtml>>

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# Goals of presentation

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- To review the general background surrounding the serials crisis and the need to develop new models of scholarly communications;
  - to assist faculty, librarians and students in retaining copyright ownership in the articles they publish in journals;
  - to provide some basic background about the nature of copyright in works;
  - to explain the general rules of how the “first owner” of a copyright in a work is determined and how these interests may be transferred / assigned
  - to situate these rules in the context of the publication and dissemination of academic and scholarly research;
  - to consider the implications open access issues for the scholarly autonomy and academic freedom.
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# The general context. . .

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In recent years there have been significant shifts in the practices of dissemination of scholarly research.

- unprecedented levels of concentration in the publishing industry along with skyrocketing costs of publications have resulted in a well-documented serials crises
- advances in information technology have enabled new models of scholarly publishing to emerge, and electronic journals, self-archiving projects, and other innovations have proliferated.
- an emerging theme in the literature of scholarly communication is that the electronic environment provides libraries and other institutions with new opportunities to assert more control over scholarly output.

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Yet . . .

# The general context. . .

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Yet . . .

- for all of the discussion of alternatives outside of the mainstream, this vision has gone unrecognized, and the progress has been particularly uneven across different disciplines
  - It would be useful to consider what some of the barriers are to the more widespread adoption of open access methods of scholarly communication and dissemination
  - In many respects, the promise of open digital access has gone unmet. Fee-based subscription publications have been able to penetrate the new digital markets through password protected online databases available only through subscription or other licensing arrangements. . .
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## To Publish and Perish

(1998- special Pew Higher Education Roundtable, AAU, ARL Policy Report)

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research universities have the ability to transform scholarly communication into *"a system of electronically mediated publications that will provide enhanced access to scholarly information and relief from the escalating prices of commercial publishers."*

draws lessons from past mistakes, noting that

*"the ripest moment for creating a system of scholarly discourse in printed form that might serve institutions and their faculty in a fair and cost-effective manner occurred some 30 years ago. At that time universities might have exercised a stronger hand in shaping the publication system and the disposition of rights to intellectual property created on their own campuses."*

Events such as **Open Access Week** help maintain focus on the need to continue pressing for Open Access solutions, over a decade into the the “digital revolution”

Unquestionably, one of the greatest impediments to realizing the goals of open access lies *not just* in the continued insistence by many publishers to demand copyright interests far in excess of what is needed to enable publication *but in also in the willingness of authors to go along with these arrangements.*

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SOME COPYRIGHT BASICS WILL BE PRESENTED FIRST. . .



- works and other interests
  - requirements for copyright to subsist in a work
  - owners' exclusive economic rights
  - creators moral rights
  - infringement of copyright
  - fair-dealing and other limitations on infringement
  - initial allocation of ownership
  - subsequent transfer of interests
  - the importance of contracts!
-

## works and other interests

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- *Copyright applies to (subsists in) artistic, dramatic, musical and literary works, (including journal articles).*
  - *Copyright also subsists in performers' performances, sound recordings and broadcast signals*
  - *This presentation will focus on **works***
  - For copyright to subsist in a work, there must be originality and fixation
-

## owners' rights

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*Owners of copyright enjoy a bundle of economic rights, including the rights to reproduce, perform, publish, communicate, or exhibit a work. (section 3)*

*Creators of copyrighted works also have a series of moral rights including the rights to protect the integrity of a work, to be associated or not associated with a work, and to preserve their honour and reputation in relation to a work.*

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# infringement of copyright

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**Section 27.** (1) *It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.*

- This is a circular definition.
  - In the case of a work, refer back to sec 3 for the list of things that only the owner has the right to do.
  - Note the importance of *CONSENT*
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# fair-dealing and other limitations

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*Time does not allow an adequate discussion of fair-dealing. Suffice it to say that fair dealing is of increased importance since the [CCH v Law Society of Upper Canada](#) decision of 2004 where a unanimous Supreme Court said fair dealing is an important users-right which is an integral part of the act. Basically, fair-dealing provides an excuse to what would otherwise constitute infringement. It is important for authors because publishers may seek to remove portions of an article from a work because they would like fair-dealing to be narrow.*

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# initial allocation of ownership

General rule: **author** is first owner of copyright  
Canadian Copyright Act, section 13(1):

13. (1) Subject to this Act, the author of a work shall be the first owner of the copyright therein.

**Exception:** Sec. 13(3): **employer** is first owner for works made in course of employment

13.(3) Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright. . .

# initial allocation of ownership

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note 3 conditions for exception to apply:

1. the author of a work was in the employment of some other person under a contract of service or apprenticeship
  2. work must be made within the course of the employment
  3. absence of agreement to the contrary
-

## initial allocation of ownership (students)

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Note that the papers, thesis, etc. authored by students ARE NOT under the employment of the faculty or the university and therefore are owned by the student . . .

***YES! EVEN IF THE WORK IS REQUIRED FOR A CLASS OR PROGRAM OF STUDY***

But work a student undertakes as a research assistant, teaching assistant will be governed by an agreement. Absent an agreement, the initial rights may be claimed by the employer.

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## initial allocation of ownership (faculty)

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- While the copyrighted works of faculty would generally be under the work for hire exception, it has been the normal custom and usage in higher education for the faculty to retain ownership.
- Collective agreements, common law and tradition typically grant academic staff first ownership in the copyrighted works they create.
- This ownership provides control over the content and use of the work and is recognized as an integral part of academic freedom.
- owners of works, can sell, assign, license or waive all, some or none of the bundle of rights associated with copyright.

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**For purposes of our discussion about journals,  
we will assume the author is the first owner**

## subsequent transfers- sec 13(4)

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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 licence, 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

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- in order to publish an author's article, the journal must have the consent of the copyright owner (presumably here the author)
  - otherwise they would be doing something that only the owner has the right to do without the consent of the owner (that is engaging in infringement)
  - Instead of simply asking for consent, journals often ask for a full transfer of all copyright interests
  - remember the difference between plagiarism and infringement. While you don't plagiarize your own work, you might be infringing the *new owner's* exclusive rights if you do certain things with *your* article after you transfer full copyright ownership.
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## the importance of contracts

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*Both in respect to the initial allocation of ownership between the institution and the author, and later. . .*

*in respect to the dealings between the owner and a publisher, the applicable rights and obligations are going to be determined by an agreement.*

***Be conscious of your agreements.  
They are very important!***

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## Open Access 101, from SPARC

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**1. Open Access 101, from SPARC**  
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# dealing with journals

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- to secure publication of an article, journals typically present the author with a publication agreement.
  - these agreements are legally binding contracts that often require the author to transfer full copyright ownership to the journal.
  - such transfer of copyright is an intrinsic part of the traditional model of scholarly communication in which: individuals sign their work over to journals free of charge; and the academic community collectively purchases the work back from the publisher, often at great expense.
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# dealing with journals

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- the publication agreement between the journal and the author is the key document in ensuring that authors can take full advantage of new forms of dissemination
  - the agreement can simply involve a statement of permission to publish, not a full transfer of copyright.
  - but the agreement may also involve the transfer of full copyright
  - these agreements are *always* negotiable, so it is critical that authors read them carefully and, if necessary, amend their terms to ensure that journals receive only the minimum rights that are actually required to publish the work.
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# don't be afraid to bargain

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- If you want to make changes, ask!
- Even if your attempt to bargain is not successful, there is nothing lost in trying.
- They are not going to reject your article because you have dared to bargain.
- In all likelihood, the reasonable publisher will be willing to make at least some change.
- In some cases, they will start out with a more onerous contract than what they will be willing to settle for.
- While the status of the authors is certainly a factor, junior scholars should nonetheless attempt to engage in this discussion

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OR. . .



or simply attach the SPARC Authors Addenda

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*The Canadian Association of Research Libraries (CARL) and SPARC (the Scholarly Publishing and Academic Resources Coalition) have created an Author Addendum that amends publishing agreements in such a way that authors retain key rights to the journal articles they publish.*

See <http://www.carl-abrc.ca/projects/author/author-e.html>

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## the terms of the SPARC Authors Addenda

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The parties agree that wherever there is any conflict between this **Addendum** and the **Publication Agreement**, the provisions of this Addendum are paramount and the Publication Agreement shall be construed accordingly. . .

(followed by 3 clauses)

## 1. Author's Retention of Rights

In addition to any rights under copyright retained by Author in the Publication Agreement, Author retains the right to

- (i) reproduce the Article in any material form for non-commercial purposes;
- (ii) to perform the Article in public for non-commercial purposes;
- (iii) to convert the Article by preparing derivative works;
- (iv) to make a sound recording, cinematographic film or other contrivance by means of which the Article may be mechanically reproduced or performed for non-commercial purposes;
- (v) to reproduce, adapt and publicly present the Article as a cinematographic film for non-commercial purposes;
- (vi) to communicate the work to the public by telecommunication for non-commercial purposes; and
- (vii) to authorize others to make any non-commercial use of the Article so long as Author receives credit as author and the journal in which the Article has been published is cited as the source of first publication of the Article. For example, Author may make and distribute copies in the course of teaching and research and may post the Article on personal or institutional Web sites and in other open access digital repositories.

## 2. Publisher's Additional Commitments.

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Publisher agrees to provide to Author within 14 days of first publication and at no charge an electronic copy of the published Article in Adobe Acrobat Portable Document Format (PDF).

The Security Settings for such copy should all be set to "No Security."

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### 3. **Publisher's Acceptance of this Addendum.**

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Author requests that Publisher demonstrate acceptance of this Addendum by signing a copy and returning it to the Author.

However, in the event that Publisher publishes the Article in the journal identified herein or in any other form without signing a copy of the Addendum, Publisher will be deemed to have assented to the terms of this Addendum.

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OR...

**consider publishing directly in an Open Access journal!**

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For a directory of open access journals, see

<http://www.doaj.org/>



DOAJ DIRECTORY OF  
OPEN ACCESS  
JOURNALS

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- <http://www.carl-abrc.ca/projects/author/EngBrochure.pdf>
- <http://openaccessweek.org>
- Directory of Open Access Journals  
<http://www.doaj.org/>
- CAUT, Retaining Copyright in Journal Articles  
<http://www.caut.ca/uploads/IP-Advisory1-en.pdf>
- CARL, Links to Canadian Institutional Repositories  
[http://www.carl-abrc.ca/projects/institutional\\_repositories/canadian\\_projects-e.html](http://www.carl-abrc.ca/projects/institutional_repositories/canadian_projects-e.html)
- CARL, Resources for Authors  
<http://www.carl-abrc.ca/projects/author/author-e.html>
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