

Copyright Keeps Open Archives and Digital Preservation Separate

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I have read that if I publish with a "green" publisher or use one of the author's addenda, my articles can be preserved in an open access digital repository. Is this true?

The short answer: probably not.

There has been growing interest in the development of open access repositories for scientific literature during the past decade. Open access literature – defined by [Peter Suber](#), one of its primary proponents, as "digital, online, free of charge, and free of most copyright and licensing restrictions" – holds out the promise of fostering the communication and exchange of ideas that lies at the heart of the scientific endeavor. Open access repositories are primarily built through what is called [self-archiving](#): the authors of papers deposit in a repository either a version of the paper prior to refereeing (a "pre-print") and/or the version that includes the changes made in the refereeing process (the "post-print"). A publisher that will allow pre-print and post-print archiving by authors has been designated as "green" by the [Sherpa RoMEO project](#) on publishers' copyright and self-archiving policies.

Open access and self-archiving are important tools in enhancing access to current research – enough so that some funding agencies and institutions are now requiring that publications from all funded research be made freely available after a brief period of time. In the U.K., the Wellcome Trust and the Medical Research Council (MRC) have ordered that the final copies of all research they fund be made freely available no later than six months after the journal publisher's official date of final publication, and the Biotechnology & Biological Sciences Research Council (BBSRC) [has mandated](#) that publications from research it funds after 1 October 2006 be deposited in "an appropriate e-print repository." Research Councils U.K. (RCUK) [has encouraged](#) the other United Kingdom Research Councils to consider deposit of funded research in an open access repository. In the U.S., two efforts in 2006 attempted to mandate open access for some government-funded research. The proposed appropriations bill for NIH was modified in committee to mandate the deposit of copies of all NIH-funded research in an open access repository [within twelve months of publication](#). In addition, Senators John Cornyn (R-TX) and Joe Lieberman (I-CT) introduced the Federal Research Public Access Act of 2006 (FRPAA), which would have required that peer-reviewed research funded by the largest federal research agencies be deposited and made openly accessible in digital repositories within six months of publication. One can anticipate that both of these initiatives will be reintroduced in 2007; a petition urging the reintroduction of FRPAA is available [here](#).

Given that it would appear that more and more funded research is going to find its way into open access digital repositories, an obvious question is whether libraries can rely on those repositories to preserve that information. Unfortunately, they cannot, for at least two reasons.

First, as has [long been recognized](#), open "archives" are primarily concerned with providing open access to current information – and not the long-term preservation of the contents. Most lack the [technical, organizational, and financial support](#) required for a true digital preservation program. In its draft position statement on access to research outputs, Research Councils UK noted the distinction:

[RCUK](#) recognises the distinction between (a) making published material quickly and easily available, free of charge to users at the point of use (which is the main purpose of open access repositories), and (b) long-term preservation and curation, which need not necessarily be in such repositories.... [I]t should not be presumed that every e-print repository through which published material is made available in the short or medium term should also take upon itself the responsibility for long-term preservation.

Similarly, the Cronyn/Lieberman bill did not assume that institutional or subject-based repositories would be able to preserve research articles. Instead, it required that long-term preservation of the research articles be done either in a "stable digital repository maintained by a Federal agency" or in a 3rd-party repository that meets agency requirements for "free public access, interoperability, and long-term preservation" (with the implicit recognition that not all 3rd party repositories would meet the requirements for long-term preservation).

Second, and more troubling, is that the agreements that make it possible for authors to deposit articles in an open access repository do not necessarily also convey the rights needed by the repository to preserve and make available digital information over time.

Digital preservation, by its very nature, must impinge upon the rights of the copyright owner.[1] In order to be kept alive and usable, digital files need to be copied and recopied; this potentially infringes on the copyright owner's exclusive right of reproduction. In addition, as software and hardware changes, files will have to be migrated into new formats or new versions; this may infringe on the copyright owner's exclusive right to make derivative versions of the original work.[2] As most *RLG DigiNews* readers know, there is no general preservation exemption in US copyright law. Preservation copying and reformatting activities undertaken without the explicit permission of the copyright owner can only be done in very limited situations.



The model [DSpace distribution license](#) signed by authors recognizes that permission of the copyright owner is needed to preserve material over time. It stipulates the following:

1. You agree that MIT may, without changing the content, translate the submission to any medium or format for the purpose of preservation.
2. You also agree that MIT may keep more than one copy of this submission for purposes of security, back-up, and preservation.
3. You represent that the submission is your original work, and *that you have the right to grant the rights contained in this license* (emphasis added).


Depending on the precise terms in the agreement, an author granting the rights required by deposit in DSpace may actually be a violation of the copyright transfer agreement with the publisher and consequently put the author of the article at risk of a suit for contract infringement.

As the emphasized text above notes, the self-archiver must have the right to authorize DSpace (or other repositories) to make copies and reformat submissions. Prior to submission to a journal, an author would have that right. When copyright is transferred to a publisher, the publisher must then authorize the author/self-archiver to grant those rights. Yet in the typical copyright transfer agreement of even a "green" publisher, the explicit right to license preservation activities to DSpace is sorely lacking. Elsevier, for example, will allow you to keep a copy of a preprint on an institutional server "indefinitely," but is silent on whether that version can be modified. In general, an author in the [Elsevier agreement](#) does not have the ability to grant third parties the right to copy or modify the work. The American Institute of Physics [allows the author](#) the right to "post and update the Article on free-access e-print servers," but there is nothing in the agreement with the author that suggests he or she can grant the right to update an article as formats become obsolete to a third party (such as an organization managing the e-print server). Depending on the precise terms in the agreement, an author granting the rights required by deposit in DSpace may actually be a violation of the copyright transfer agreement with the publisher and consequently put the author of the article at risk of a suit for contract infringement.

In sum, most if not all of the "green" publishers only authorize the primary purpose of self-archiving: current and immediate access to article literature. None of the agreements I have examined explicitly authorize the rights necessary to ensure long-term continued access to the deposited literature. Authors can license those rights prior to copyright transfer to publishers, but they must ensure that previous grants of rights are not in conflict with the transfer agreement and that they are

explicitly authorized to grant needed rights for post-prints.

Are authors who attach an author's addendum to their copyright transfer agreement any better able to grant the needed permissions to the repository?[3] In some cases, the answer is yes. For example, in both the [SPARC Author's Addendum](#) and in the [Scholar's Copyright OpenAccess-CreativeCommons 1.0 Addendum](#) the author retains the right to authorize third parties (such as an open-access repository) to make limited non-commercial use of the article. Both agreements guarantee that the author will have the necessary authority to grant the rights required in the DSpace agreement. The Scholar's Copyright addendum has the added benefit of protecting authors against any publishing clauses that restrict or forbid previous grants of rights (such as when a pre-print is posted, prior to a copyright transfer agreement).

Authors who use either the SPARC or Scholar's Copyright addendum are likely to be able to grant to the open access repository the rights it needs in order to be able to preserve the digital files over time. (Whether the repository will technically, organizationally, or financially be able to do so is another matter.) Authors who submit material based on self-archiving provisions in publisher contracts are unlikely to be able to grant the rights needed. Self-archiving for other than immediate access


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may actually place the author and the open access repository at legal risk. How much risk is involved is difficult to say. Recently, [it was revealed](#) that the American Association of Publishers (AAP) has hired a very aggressive public relations firm to lead a campaign against open access. Furthermore, the AAP has [left open the possibility](#) of legal action against a university library on a different matter. It is not inconceivable that a legal attack upon long-term preservation in self-archives may be part of future anti-open access campaigns.

Open access archives can be a valuable tool in making information immediately available. With time, the license terms that permit self-archiving may mature to

journal literature.

explicitly permit digital preservation of the files as well as third party use of the archived material (the other great lacuna in the current agreements).[4] For now, however, libraries will need to rely on the published journal literature for the long-term preservation of scholarly information. And, as library directors concluded in our recent report, *E-Journal Archiving Metes and Bounds: A Survey of the Landscape*, only journals that are part of formal third party journal archiving programs can be said to be effectively preserved. In sum, libraries cannot yet rely upon open archives for long-term access to the journal literature.

Notes

[1] On copyright issues in digital preservation, see Peter Hirtle, "[Digital Preservation and Copyright](#)", Catherine Ayre and Adrienne Muir, "[The Right to Preserve: The Rights Issues of Digital Preservation](#)," *D-Lib Magazine* 10:3 (March 2004), and Adrienne Muir, "Digital Preservation: Awareness, Responsibility and Rights Issues," *Journal of Information Science*, 30:1 (2004): 73-92.

[2] In theory, displaying the files or performing audiovisual files could also be infringements, but it seems likely that these actions would be covered by the implicit license to self-archive.

[3] An author's addendum is a standardized legal instrument that modifies the publisher's agreement and allows the author to keep key rights. For more on the available addenda, see Peter Hirtle, "[Author Addenda: An Examination of Five Alternatives](#)," *D-Lib Magazine* 12:11 (November 2006).

[4] Except for the Scholars Copyright addendum, which explicitly gives authors the right to grant a Creative Commons license to use the material, the self-archiving agreements are silent on third party use. In the absence of explicit user permissions, it could be argued that a faculty member would not legally be able to include a link in a course syllabus to a published article in an open access repository. Such linking could be seen to be systematic, and systematic copying is normally not allowed under fair use. The issue of expressing user permissions in open access archives is discussed in Elizabeth Gadd, Charles Oppenheim, and Steve Proberts, "[The Intellectual Property Rights Issues Facing Self-archiving: Key Findings of the RoMEO Project](#)," *D-Lib Magazine* 9:9 (Sept., 2003).