

Secondary Publishing Rights and Open Access

Canada is falling behind Europe and the United States in providing no-charge access to publicly funded research. Governments around the world are recognizing that publicly funded research is a public good: not only do the national and European funding agencies make their funding conditional on open access publishing, but several countries have legislation that supports this policy. Public access to research promotes better science and innovation and fosters an informed public. However, despite most academic research being financed through public money (mainly through Tri-Agency funding), Canada lags behind in providing full open access to this research. Most of the Canadian academic output is still trapped behind paywalls, making access and reuse difficult if not impossible.¹

CFLA calls upon the Canadian government to introduce an amendment to the Copyright Act recognizing the academic authors' Secondary Publishing Rights in support of immediate access to publicly funded research published in research periodicals. This legislative amendment would bring Canada in line with several leading countries in Europe.²

In addition, in the United States the US Office of Science and Technology Policy has issued a memorandum ordering Federal public agencies to change their policies regarding federally funded research.³ By December 31, 2025, all publicly funded research is to be available to the public immediately without an embargo. Immediate open access and Secondary Publishing Rights are also encouraged by the Council of the European Union.⁴

The main obstacle towards open access publishing is the obligation put on academic authors to transfer all rights in their articles to the publisher, while the writing, peer reviewing, and often even editorial services provided by academics are provided for free to publishers. In principle such a full transfer of rights to publishers prevents the deposit of a published article in an institutional repository without the prior permission of the publisher. Some publishers allow the sharing of some form of the final version of an article after an embargo period, but many do not contractually allow these works to be shared at all. Secondary Publishing Rights legislation seeks to redress the bargaining imbalance in academic publication, as well as to provide for the public good of open access without increasing costs to national funders.⁵

One of the innovative ways European countries are addressing this problem is through the implementation of a statutory provision laying down Secondary Publishing Rights for academic authors.

¹ <https://www.erudit.org/en/journals/cjils/1900-v1-n1-cjils07118/1090599ar/>

² https://www.knowledgerights21.org/statement/secondary-publishing-rights-new-position-statement-from-knowledge-rights-21/#_ftn2

³ <https://www.whitehouse.gov/wp-content/uploads/2022/08/08-2022-OSTP-Public-Access-Memo.pdf>

⁴ <https://www.consilium.europa.eu/en/press/press-releases/2023/05/23/council-calls-for-transparent-equitable-and-open-access-to-scholarly-publications/>

⁵ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3981756

The first legislative provision in this sense was proposed by Dutch MP Taverne in 2012. The proposal became law in Article 25fa of the Dutch Copyright Act, now known as the Taverne Amendment.⁶ The provision states that *“The maker of a short scientific work, the research for which has been paid for in whole or in part by Dutch public funds, shall be entitled to make that work available to the public for no consideration following a reasonable period of time after the work was first published, provided that clear reference is made to the source of the first publication of the work.”* The French⁷, Belgian⁸, German⁹, Italian¹⁰, and Austrian¹¹ copyright acts all provide for a Secondary Publishing Right.

During the 2019 Government Consultation on the Statutory Review of the Copyright Act, some submissions did propose the introduction of a provision in the Copyright Act to allow the secondary publication of scientific or scholarly articles in institutional repositories¹². As in Europe, most Canadian universities operate open access repositories. If the Canadian Copyright Act included a provision allowing for academic Secondary Publishing Rights, Canadian universities could make sure that publicly

⁶ See Auteurswet, art 25fa, https://wetten.overheid.nl/BWBR0001886/2022-10-01/#Hoofdstukla_Artikel25fa ; <https://www.researchprofessionalnews.com/rr-news-europe-regulation-2022-10-groups-call-for-european-laws-to-enable-open-access/> ; see: <https://www.openaccess.nl/en/events/amendment-to-copyright-act>

⁷ See Research Code, Art. L-533-4 introduced through Art. 30 of the LOI n° 2016-1321 du 7 octobre 2016 pour une République numérique, https://www.legifrance.gouv.fr/jorf/article_jo/JORFARTI000033202841

⁸ See Economic Code, Art. XI.196 2 § 2/1. L'auteur d'un article scientifique issu d'une recherche financée pour au moins la moitié par des fonds publics conserve, même si, conformément à l'article XI.167, il a cédé ses droits à un éditeur d'un périodique ou les a placés sous une licence simple ou exclusive, le droit de mettre le manuscrit gratuitement à la disposition du public en libre accès après un délai de douze mois pour les sciences humaines et sociales et six mois pour les autres sciences, après la première publication, dans un périodique, moyennant mention de la source de la première publication.

Le contrat d'édition peut prévoir un délai plus court que celui fixé à l'alinéa 1er.

Le Roi peut prolonger le délai fixé à l'alinéa 1er.

Il ne peut être renoncé au droit prévu à l'alinéa 1er. Ce droit est impératif et est d'application nonobstant le droit choisi par les parties dès lors qu'un point de rattachement est localisé en Belgique. Il s'applique également aux oeuvres créées avant l'entrée en vigueur de ce paragraphe et non tombées dans le domaine public à ce moment.”<http://www.ejustice.just.fgov.be/eli/loi/2013/02/28/2013A11134/justel#Art.XI.197>

⁹ Law of October 1, 2013 (BGBl. I S. 3714) Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes): “38(4) The author of a scientific contribution which results from research activities at least half of which were financed by public funds and which was reprinted in a collection which is published periodically at least twice per year also has the right, if he or she has granted the publisher or editor an exclusive right of use, to make the contribution available to the public upon expiry of 12 months after first publication in the accepted manuscript version, unless this serves a commercial purpose. The source of the first publication must be cited. Any deviating agreement to the detriment of the author is ineffective.”

https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html

¹⁰ Law of October 7, 2013, n. 112, G.U. n. 236, 8.10.2013, see Articolo 4:

<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2013:112>

¹¹ Urheberrechtsgesetz (StF: BGBl. Nr. 111/1936 (StR: 39/Gu. BT: 64/Ge S. 19§) as last modified by BGBl. Nr. 206/1949, 37a. : “Der Urheber eines wissenschaftlichen Beitrags, der von diesem als Angehörigem des wissenschaftlichen Personals einer mindestens zur Hälfte mit öffentlichen Mitteln finanzierten Forschungseinrichtung geschaffen wurde und in einer periodisch mindestens zweimal jährlich erscheinenden Sammlung erschienen ist, hat auch dann, wenn er dem Verleger oder Herausgeber ein Werknutzungsrecht eingeräumt hat, das Recht, den Beitrag nach Ablauf von zwölf Monaten seit der Erstveröffentlichung in der akzeptierten Manuskriptversion öffentlich zugänglich zu machen, soweit dies keinem gewerblichen Zweck dient. Die Quelle der Erstveröffentlichung ist anzugeben. Eine zum Nachteil des Urhebers abweichende Vereinbarung ist unwirksam.”

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001848>

¹² See

<https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9887146/br-external/CreativeCommons-e.pdf>

and <https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10278308/br-external/BannermanSara02-e.pdf>

funded research is available to the public via repositories in all cases, instead of at the dispensation of publishers.

In 2021, LIBER (Ligue des Bibliothèques Européennes de Recherche – Association of European Research Libraries) prepared a [Model Law](#)¹³ for Secondary Publishing Rights, which seeks to allow immediate distribution by authors of their own research when the research has been funded by public funds:

The author of an article in a research periodical, their employer or research funder shall be entitled to make the work in any of its forms available to the public via any open access repository immediately after its acceptance, including any third party content such as images, tables, etc., contained therein necessary for the understanding of the article, on the condition that:

- a. the research to which the article relates has been paid in whole or in part by public or research charity funds; and
- b. it is accompanied by a sufficient acknowledgement of both the author and the source of first publication.

Upon being made available to the public in any of its forms in line with this provision the specific version being made available shall be identifiable, and clear terms of use shall be appended. No contractual or other restrictions on its reuse shall be enforceable regarding an article whose author has been majority funded by public or research charity funds.

Implementing thoughtful Secondary Publishing Rights, in consultation with universities, libraries, and other research organizations in Canada, would allow us to keep pace with key EU countries and the US in making sure that our publicly funded research is available to everyone to learn and build from, especially the Canadian public.

¹³https://libereurope.eu/wp-content/uploads/2021/03/LIBER_SecondaryPublisherRight_LIBERBoard-version-February-2021.pdf