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Academic Copyright, Open Access and the "Moral" Second Publication Right

Roberto Caso, Giulia Dore| December/2021

ABSTRACT

The Green route to Open Access (OA), meaning the re-publication in OA venues of previously published works, can essentially be executed by contract and by copyright law. In theory, rights retention and contracts may allow authors to re-publish and communicate their works to the public, by means of license to publish agreements or specific addenda to copyright transfer agreements. But as a matter of fact, because authors lack bargaining power, they usually transfer all economic copyrights to publishers. Legislation, which overcomes the constraints of a contractual scheme where authors usually have less bargaining power, may deliver a (digital) second publication or communication right, which this paper discusses in the context of research publications. Outlining the historical and philosophical roots of the secondary publication right, the paper provocatively suggests that it has a "moral" nature that even makes it a shield for academic freedom as well as a major step forward in the overall development of OA.

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KEYWORDS

Scientific publications - Open Access - Copyright – Moral rights – Second publication right

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Academic Copyright, Open Access and the "Moral" Second Publication Right[1]

Roberto Caso, Giulia Dore

1. *Introduction*

The implementation of Open Access (OA) to scientific publications follows two roads: Gold or Green[2]. The Gold Road to OA consists in publishing *ab initio* with open licenses (such as Creative Commons licenses) on OA publishing venues (e.g., OA journals). The Green Road consists in re-publishing (and communicating to the public via the Internet) in OA venues (e.g., self-archiving OA repositories) works previously published in non-OA or closed venues. The Green OA route is made possible through two legal strategies: the first is contractual, whereas the second is legislative.

The contractual retention of the rights of re-publication and communication to the public allows authors to negotiate with the publisher to retain the right to re-publish and communicate to the public an OA version of the work, through transfer agreements (e.g., license to publish), or additional contractual amendments to standard publishing contracts (*addenda*).[3] With reference to research texts, this could be the first draft (pre-

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All findings, interpretations, and conclusions herein represent the views of the authors. All errors are their own.
2 This partition was first made by S. Harnad et al., "The green and the gold roads to Open Access" (2004), Nature Web Focus, https://eprints.soton.ac.uk/259940/.
3 Cf. M.W. Carroll, "Complying with the NIH Public Access Policy—Copyright Considerations and Options" (2008), http://www.arl.org/sparc/bm%7Edoc/NIH_Copyright_v1.pdf; A. Priest, "Copyright and the Harvard Open Access Mandate" (August 1, 2012) 10 Northwestern Journal of Technology and Intellectual Property, 377, https://ssrn.com/abstract=1890467.

print), the modified version following peer review (post-print or Author Accepted Manuscript) or, in some limited cases, the final edited version published by the publisher (publisher's version or Version of Record).[4] This negotiation strategy is difficult if conducted autonomously by the author, as their negotiating power vis-à-vis the publisher is generally very limited. Indeed, this approach works only to a limited extent since publishers often have more bargaining power and rarely grant unconstrained secondary publication rights.[5] The publisher's greater bargaining power depends on the current reward system within academia, which binds the rating of scientific publications to specific publishing venues, for example, high Impact Factor (IF) or Class A journals,[6] and attracts the same publishers to join the lucrative "evaluation game".[7]

The legislative strategy tackles this problem, with some legal systems providing a digital second publication right.[8] The first country to implement the strategy was Germany in 2013.[9] Its legislative model later circu-

4 The author of a research work (e.g., an article submitted to a journal), may decide to use an open licence to allow the public access for free and with rights of use for publication. Creative Commons licences fall into this category. These are non-exclusive, irrevocable, universal, and perpetual licences. Furthermore, they are also modular, allowing for combination. These modules are: (1) attribution, which requires acknowledgement of attribution, but grants extensive rights of use, including the processing of the work; (2) share-alike, which requires those who license new works based on the licensed work to grant the exact same rights granted by the licensor on the original work; (3) no-derivatives, which prevents the creation of derivative works from the licensed work; (4) non-commercial, which prevents the licensed work from being used for commercial purposes. https://creativecommons.org/about/cclicenses/.

5 Data on publisher and journal open access policies, including the conditions often imposed on self-archiving, are provided by the long-established online resource SHERPA/RoMEO (Search—Publisher copyright policies & self-archiving), https://v2.sherpa.ac.uk/romeo/; and by the Information on Journal Database (Zurich Open Repository and Archive), https://www.jdb.uzh.ch/.

6 The evaluation policy promoted by the Italian administrative evaluation system based in a government agency is exemplary of this approach: https://www.anvur.it/en/activities/rating-of-scientific-journals/.

7 See in particular J.C. Guédon, "In Oldenburg's Long Shadow: Librarians, Research Scientists, Publishers, and the Control of Scientific Publishing" in Creating the Digital Future: Proceedings of the 138th Annual Meeting, Toronto, Ontario May 23-25, 2001 (Washington, DC, Association of Research Libraries, 2001), pp. 60-66. http://www.arl.org/arl/proceedings/138/guedon.html, who describes the main dynamics of this game.

8 For an earlier exploration of the topic see R. Caso, "La libertà accademica e il diritto di messa a disposizione del pubblico in Open Access", in Opinio Juris in Comparatione, n. 1/2019, p.45.

9 Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes, aus Nr. 59 vom 08.10.2013, Seite 3728,

lated in the Netherlands,[10] Austria,[11] France,[12] and Belgium.[13] Rooted in the Kantian philosophy of the "public use of reason"[14] and brought together by the common goal to provide authors with the opportunity to republish scientific works with the aim of disseminating them to the widest possible audience, the right in question has also found some tentative application in Italy, where however it still strives to become law.[15] The importance of second publication right, which would have an even greater impact if harmonised at the EU level, is being gradually acknowledged by other countries,[16] but also by mindful stakeholders advocating for a uniform regulation concerning secondary publishing rights.[17]

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http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl113s3728.pdf.

10 Wet van 30 juni 2015 tot wijziging van de Auteurswet en de Wet op de naburige rechten in verband met de versterking van de positie van de auteur en de uitvoerende kunstenaar bij overeenkomsten betreffende het auteursrecht en het naburig recht (Wet auteurscontractenrecht), Staatsblad 2015, 257, https://zoek.officielebekendmakingen.nl/stb-2015-257.

11 Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz), StF: BGBl. Nr. 111/1936, zuletzt geändert durch BGBl. I Nr. 99/2015, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001848.

12 Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique, JORF n° 0235 du 8 octobre 2016, Article 30 [amending] Code de la recherche, Article L533-4,
https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000033205794/.

13 Wet houdende diverse bepalingen inzake Economie, Belgisch StaatsBlad, 30 Juli 2018, Artikle 29 [amending] Wetboek van economisch recht, 28 Februari 2013, Artikle XI.196, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2013022819&table_name=wet.

14 I. Kant, What Is Enlightenment? (1784), translated by M.C. Smith, http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html. On the Kantian perspective on copyright see M.C. Pievatolo, "Freedom, ownership and copyright: why does Kant reject the concept of intellectual property?" (January 21, 2010), https://doi.org/10.5281/zenodo.51525; A. Barron, "Kant, Copyright and Communicative Freedom" (2012) Law and Philosophy, 31 (1), 1- 48. DOI: 10.1007/s10982-011-9114-1.

15 See infra §6.

16 One example is Estonia, where the need to introduce a second right of publication (Teistkordne avaldamise õigus) is thought to be worth exploring regardless of a future intervention of the EU legislator in the matter. On this, see Kelli, A., Mets, T., Vider, K., Kull, I., Avatud teadus Eestis ja Euroopas: õiguslikja majanduslik lähenemine (Tartu: Tartu Ülikool, 2017), p. 25, https://www.etag.ee/wp-content/uploads/2018/02/Avatud-teadus-Eestis-ja-Euroopas_T%C3%9C.pdf

17 A Pan-European Model Law for the Use of Publicly Funded Scientific Publications is proposed and endorsed by LIBER (Ligue des Bibliothèques Européennes de Recherche—Association of European Research Libraries), https://libereurope.eu/draft-law-for-the-use-of-publicly-funded-scholarly-publications/

This paper is structured around eight main sections. After a concise illustration of the virtuous dynamics of the ideal academic copyright scenario, which serves as a basis to discuss opportunities to rebalance the ecosystem of scientific communication through OA,[18] the discussion is promptly directed towards the current distorted setting of commodified academic copyright.[19] The discussion then revolves around the contractual and the legislative approaches to OA that allow authors of scientific publications to retain or regain their rights to the works they publish. The emphasis is placed on the legislative dimension, as this appears to be more practicable and sustainable. It is ultimately suggested, in some ways provocatively, that a second publication right has a unique nature, related but distinct from the author's moral right of disclosure (or the right to make the work public), which confirms the importance of its further legislative dissemination at the EU level. The paper emphasises that this right may be considered a strong ethical concern for public-funded research.

2. *Virtuous academic copyright: publicity, freedom and responsibility*

Modern science was born as a public science, as opposed to previous secretive practices. The aim of making the results of scientific research public was aided using movable type printing, which guaranteed the widest dissemination of ideas.[20] A good example of this is the famous incipit of Galileo Galilei's letter to Belisario Vinta of 1610, in which the great Pisan explains the choice to publish his book, entitled *Sidereus nuncius*:

> Parmi necessario, per aumentare il grido di questi scoprimenti, il fare che con l'effetto stesso sia veduta et riconosciuta la verità da più persone che sia possibile[21]

18 Green Open Access is only a piece of a complex puzzle involving other fundamental issues such as the control of Open Science infrastructures. On this, see B. Brembs, K. Förstner, M. Goedicke, U. Konrad, K. Wannemacher, & J. Kett., "Plan I—Towards a sustainable research information infrastructure" (21 January 2021), Zenodo. http://doi.org/10.5281/zenodo.4454640.

19 As argued in R. Caso, "The academic copyright in the age of commodification of scientific research" (October 2020), SCIRES-IT—SCIentific RESearch and Information Technology, http://www.sciresit.it/article/view/13342.

20 On this see P. Rossi, *The Birth of Modern Science*. Trans. Cynthia De Nardi Ipsen. (Oxford: Blackwell Publishing, 2001), pp.24-25.

21 To increase the cry of these discoveries, it seems to me necessary to ensure that by the same effect the truth is seen and acknowledged by as many people as

Shortly after, in 1655, the first modern scientific journal was born: *The Philosophical Transactions*, commissioned by Lord Oldenburg, secretary of the Royal Society. Oldenburg decided to print the letters that scientists (then called natural philosophers) exchanged to describe the results of their experiments and formalise their findings.[22] Subsequently, the letters became articles in printed journals. From then on, the scientific journal represented a public record of original contributions to knowledge.[23]

Ever since, scientific authors have published not so much to receive compensation from the sale of copies, but to certify the importance of their discovery,[24] ensuring that their thoughts receive the widest dissemination possible, along with collecting comments and criticisms. In that sense, the construction of new knowledge constituted an ontologically collective enterprise. Publicity was functional to review by readers, and readers reacted by publishing their works to endorse or to criticise the thinking of those who had previously published (public peer review). This important historical passage took place according to the informal norms of the scientific community of the time and precedes modern laws on copyright. Only later, with the appearance of the first modern copyright laws, did scientific publications become intellectual works protected by formal legal norms.

In this framework, academic copyright ideally evolved as a system aimed at sharing ideas and developing organised scepticism, in other words, the broad-based control over the new acquisitions of science.[25] This system is based on the virtuous circle between the informal rules of the scientific community, communication technology (the printing press) and formal copyright law, as Figure 1 illustrates:

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possible (Translation our own). Galileo Galilei to Belisario Vinta, 19 March 1610, *https://opac.museogalileo.it/imss/resource?uri=0000018291*

[22] A. Johns, "Piracy" in *The Intellectual Property Wars from Gutenberg to Google* (Chicago and London: University of Chicago Press, 2009), pp.59-61.

[23] Guédon, "In Oldenburg's Long Shadow", p. 5.

[24] M. Biagioli, "Rights or Rewards? Changing Frameworks of Scientific Authorship", in M. Biagioli, P. Galison (eds.), *Scientific Authorship. Credit and Intellectual Property in Science* (London-New York: Routledge, 2013), p.253.

[25] R.K. Merton, "Science and Technology in a Democratic Order" (1942) *Journal of Legal and Political Sociology* 1, 115-126.

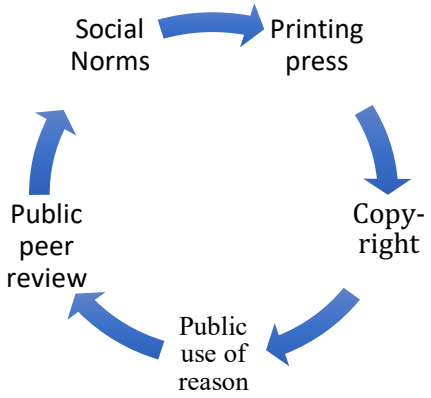

Figure 1: the virtuous circle of traditional academic copyright

One principle that links the informal rules of science to copyright is encapsulated in the distinction between unprotected ideas and their protected expression, known as the idea/expression dichotomy. Indeed, copyright only protects the expressive form, and does not protect ideas, theories, facts, and underlying data that are therefore in the public domain. For instance, anyone can use and apply the theory of relativity, but Einstein's authorship is widely acknowledged. Another connection between informal rules and formal law is the one that recognises the author's rights to the scientific publication, regardless of the author's employment by a public or private organisation (e.g., a university).[26] Scientific authors speak in the name of science and for themselves, not in the name of the institution or organisation to which they are affiliated.

Academic freedom is a fundamental aspect of freedom of expression and thought.[27] Liberty and responsibility are two essential features of scientific publication. Making public one's scientific thought is an act of freedom, but also an act of responsibility: the contributions of others must be recognised correctly and the data on which scientific findings are based must be correctly reported. On the other hand, this act also exposes

[26] Cf. L. Guibault, "Owning the Right to Open Up Access to Scientific Publications" in L. Guibault and C. Angelopoulos (eds.), *Open Content Licensing: from Theory to Practice* (Amsterdam University Press, 2011), available at SSRN: *https://ssrn.com/abstract=1829889*

[27] V. Moscon, "Academic Freedom, Copyright, and Access to Scholarly Works: A Comparative Perspective", in R. Caso and F. Giovanella (eds.), *Balancing Copyright Law in the Digital Age. Comparative Perspectives* (Berlin: Springer Verlag, 2015), p.99.

the author to criticism. Choosing whether and where to publish a scientific work, or using the works of others while properly acknowledging their authorship, epitomise scientific authors' liberties and duties. Therefore, it becomes essential that scientific authors retain—or regain—such rights.

3. *A new vicious cycle: commodification, bibliometrics and research assessment*

For centuries, scientists have turned to professional publishers to spread their ideas, with publishing having remained an essentially artisanal enterprise up until recently. But after the Second World War, with the exponential growth of researchers and scientific publications, the need to identify some fundamental scientific journals emerged, as libraries could not afford to buy all the journals available on the market.[28] To identify these journals, Eugene Garfield created a citation index called the Impact Factor (IF) which measures how much the "average" article of a journal is quoted in the two years preceding the measurement. Garfield founded a commercial enterprise—the Institute for Scientific Information—which began selling citation measurements, or bibliometric services. This commercial invention aimed to accredit a scientifically improper and misleading idea, namely that only journals with a high impact factor are valuable journals. This idea seeped into the scientific community and the IF began to be used to determine the career of scientists and university professors. With the advent of the digital age, major journals have turned into very expensive databases, and scientific publishers have become data analytics companies that sell evaluation services (e.g., the calculation of bibliometric indices such as IF) and practice surveillance capitalism.[29]

Furthermore, the market for scientific journals and evaluation services has become oligopolistic. If the journal is considered essential

[28] Guédon, "In Oldenburg's Long Shadow".

[29] For a long time, the phenomenon concerned only the so-called hard sciences, but it now also regards any fields of knowledge, including the humanities and social sciences. Cf., e.g., SPARC, *Landscape Analysis*, report (29 March 2019), *https://infrastructure.sparcopen.org/landscape-analysis*; R. Siems, "When your journal reads you", *Elephant in the Law*, 14 April 2021, doi:*10.5281/zenodo.4683778*, J. Pooley, "Surveillance Publishing", *SocArXiv*, November 18, 2021, doi: *10.31235/osf.io/j6ung*.

because it has a high impact factor, it does not have a perfect substitute on the market. A new journal that wants to enter the market encounters barriers that are difficult to overcome because the acquisition of reputation in terms of citations takes time. Aggravating the scenario is the commercial strategy of the big oligopolists, who offer online access licences to packages of journals and books.[30] They practice bundling, that is the package deal with journals that in many cases would be not subscribed alone, on a multi-year contracts basis. This strategy further engulfs the market, causing an exponential increase in the prices of access to scientific databases.

From the perspective of the author of a scientific publication, this market power, linked to bibliometric evaluation, translates into bargaining power for publishers. The author who aspires to publish in a scientific review with a high IF is willing to sign standard contracts which have as a central clause the exclusive, total, and definitive transfer of all economic copyrights. For instance, the clause of the contract for the transfer of economic copyrights on a scientific article could be formulated in the following terms: the author fully and definitively transfers to the publisher all economic copyrights on the scientific article.[31] When the author accepts the contract, which usually takes place in writing, the publisher has exclusive control of the circulation of the text.[32] If the author of the scientific publication is a university teacher, they cannot distribute the same publication to their students without the publisher's authorisation. Alternatively, they must ask students to buy the publication, or rather to purchase a licence for the use of the digital content. This constitutes an obvious paradox. While authors have the most powerful technology (i.e., the Internet) to engage with the public, the dissemination of scientific publications becomes artificially limited to benefit the commercial interests of a few oligopolists. The growing tendency to replace the peer review pro-

[30] Cf. C. Reichman, R. Okediji, "When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale" (2012) 96 *Minnesota Law Review*, 1362, Minnesota Legal Studies Research Paper 12-54. SSRN: *http://ssrn.com/abstract=2149218.*

[31] These rights include, by way of example, the right to publish in the press, the right to communicate to the public, the right to reproduce, the right to distribute and the right to create derivative works.

[32] Cf. S. Rouah, R.D. Bourdon, "Access to Scientific Works. Exclusive Rights and Free Science", in *Revue International du Droit d'Auteur (RIDA)* (2019), 29.

cess based on the evaluation of the content of scientific publications with a mere calculation of citations is despicable. In addition, a cultural climate that fuels competition instead of favouring cooperation between scientists leads to the degeneration of the peer review procedures and has induced a distortion of academic copyright. From an instrument of freedom and responsibility, it has been transformed into an instrument for commodifying scientific knowledge that is held by a few. Economic rights do not serve to disseminate the work, but, on the contrary, to restrict its circulation on the Internet.[33] Even the right of attribution does not serve to recognise the contribution of the individual to the collective enterprise, but rather serves as a prerequisite for the measurement of citations.

This ecosystem induces two distortions: digital piracy of scientific publications,[34] and academic plagiarism,[35] The new scenario can be summarised in Figure 2:

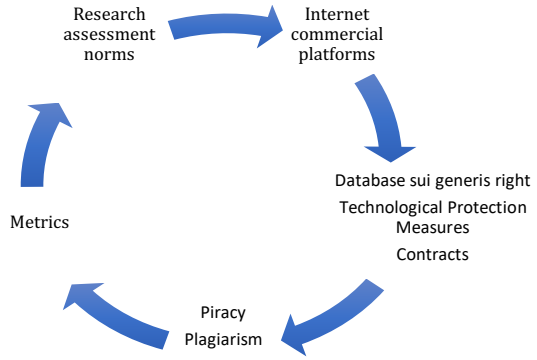

Figure 2: the vicious circle of commodified academic copyright

[33] Cf. S. Shavell, "Should Copyright of Academic Works be Abolished?" (2014) *The Journal of Legal Analysis*; Harvard Law and Economics Discussion Paper No. 655; Harvard Public Law Working Paper No. 10-10. Available at SSRN: *https://ssrn.com/abstract=1525667*.

[34] B. Bodó, "Pirates in the Library—An Inquiry into the Guerilla Open Access Movement" (6 July 2016). Paper prepared for the 8th Annual Workshop of the International Society for the History and Theory of Intellectual Property, CREATe, University of Glasgow, UK, July 6-8, 2016, *https://ssrn.com/abstract=2816925.*

[35] M. Biagioli, "Watch out for cheats in citation game" (2016) 535(201) *Nature*, *https://doi.org/10.1038/535201a.*

4. *Against commodification of academic copyright: legislative strategies for Green OA*

There is an alternative to the current, and poisoned, ecosystem of scientific communication. Thanks to the Internet, the community of scientists has the possibility of regaining, at least in part, control over their publications, while academic copyright can restart a virtuous circle based on positive and fair dynamics. This possibility has a name: Open Access (OA). Open access literature is digital, online, free, and exempt from the main restrictions imposed by copyright and contractual licences.[36] This definition makes it explicit that OA in the strict sense means free access associated with rights of use (e.g., reproduction, processing, communication to the public). OA is undeniably an opportunity not only for research in the broadest sense but also for society as a whole,[37] as was recently firmly acknowledged at the international level,[38] but it still encounters many barriers.[39]

Focusing expressly on the legislative ground, the Green route operates with the inclusion in the copyright law of a re-publication right (and communication to the public) in OA. In 2013, Germany was the first European country to amend its copyright law to establish a digital second

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[36] P. Suber, *Open Access* (Cambridge (Mass.): The MIT Press, 2012), 4. Cf. S. Harnad et al., "The Access/Impact Problem and the Green and Gold Roads to Open Access: An Update" (2008) 34(1) *Serials Review*, 36-40, *https://doi.org/10.1016/j.serrev.2007.12.005*; D.W. Hook, I. Calvert, M. Hahnel, "The Ascent of Open Access: An Analysis of the Open Access Landscape since the Turn of the Millennium" (2019) *Digital Science*: *https://doi.org/10.6084/m9.figshare.7618751.*

[37] For a detailed analysis of the impact of OA, see J.P. Tennant, et al. "The academic, economic and societal impacts of Open Access: an evidence-based review" (11 April 2016) 5(632) *F1000Research*, *doi:10.12688/f1000research.8460.3*

[38] We refer to the UNESCO Recommendation on Open Science, envisioned as an international standard-setting instrument on Open Science that should influence the development of national laws and be adopted by 2021, following the 2017 Recommendations on Science and Scientific Research and the UNESCO Strategy on Open Access to Scientific Information and Research. Cf. Committee on Economic, Social and Cultural Rights, *General comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights)*, 30 April 2020, E/C.12/GC/25, https://undocs.org/E/C.12/GC/25.

[39] For a concise analysis of the many obstacles to hindering the proliferation of OA, which are not only legal but also linked to IT infrastructure, business models and academic evaluation systems, see B.-C. Björk, "Open access to scientific publications—an analysis of the barriers to change?" (January 2004) 9(2) *Informationresearch*, *http://informationr.net/ir/9-2/paper170.html.*

publication right (*Zweitveröffentlichungsrecht*) to re-publish and make available scientific publications. Such right is inserted in the German Copyright Act (*Urheberrechtsgesetz—UrhG*) in a provision dedicated to works that are contributions to collective works (§ 38 *Beiträge zu Sammlungen*), whose authors have the right to reproduce, distribute and make available the work to the public, unless otherwise agreed with the editor or publisher. According to § 38 (4), the author of a scientific contribution, that is produced in the context of a research activity that is at least half a per cent publicly funded and appeared in a collection that is published periodically at least twice a year, shall have the right to make the contribution publicly available in the accepted manuscript version twelve months after the first publication, for non-commercial purpose, regardless of whether they had granted the publisher or editor any exclusive rights of use. Such provision also mandates the indication of the source of the first publication and specifies that any contrary agreements to the detriment of the author shall be invalid.[40]

This pioneering German standard has indeed a limited field of application, since it requires the adherence to some stringent prerequisites (i.e., with minimum percentage of funding, at certain periodical recurrence, for only author accepted manuscript (AAM) version, with a one-year embargo, and for non-commercial purposes only), but it offered a model which began to circulate in other European countries, such as the Netherlands, Austria, France, and Belgium.[41]

The Netherlands amended its copyright law (*Auteurswet*) within the section dedicated to the general provisions on licensing agreements (*exploitatieovereenkomst*),[42] to add Article 25fa, known also as the "Tav-

[40] Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes, cit.

[41] These national applications were first discussed, among others, by L. Guibault, "Back on the Green Road: How Imperative are Imperative Rules?" (19 April 2015), *Kluwer Copyright Blog*, *http://copyrightblog.kluweriplaw.com/2015/04/19/back-on-the-green-road-how-imperative-are-imperative-rules/*; D. Visser, "The Open Access Provision in Dutch Copyright Contract Law", (2015) 1 *Journal of Intellectual Property Law & Practice*; Cf. L. Maurel, "Quelles perspectives pour l'Open Access en sciences juridiques après la loi 'République numérique'?", (2017) 5(1) *JOAL—Journal of Open Access to Law*, *https://ojs.law.cornell.edu/index.php/joal/article/view/60*.

[42] *Wet auteurscontractenrecht*, Article 25fa, cit.

ern amendment".[43] Under Article 25fa, the author of a short scientific publication, for which the research has been financed entirely or partly with Dutch public funds, shall have the right to make that work freely available to the public following a reasonable period after its first publication, only providing that the place of first publication is clearly indicated. The Dutch standard, compared to the German model, is broader: it indicates a short work, without specifying the type of publication, mostly just excluding monographs; it implies that public funding can be also partial and thus even minimal; it does not mention a specific version of the work as permitted, thus allowing the final and published version (version of record, or VOR); it does not require specific uses and thus does not exclude commercial purposes; it does not impose a clear embargo, meaning that the reference to a reasonable period can be interpreted; it nevertheless requires a clear mention of the first publication venue. Followed by a successful national pilot in 2019 to help researchers share their publications,[44] the copyright amendment seems to properly function as an effective legal strategy to enhance green open access.

Austria implemented the right of second publication, characterising it as a secondary exploitation right of authors of scientific contributions (*Zweitverwertungsrecht von Urhebern wissenschaftlicher Beiträge*), under § 37a of its copyright law. Under such provision, the author of a scientific publication that is created as a member of staff of a research institution, at least half financed by public funds and appearing in a collection published periodically at least twice a year, regardless of having granted the publisher or editor the right to exploit the work, shall have the right to re-publish the work twelve months after the first publication by making the accepted manuscript version publicly available, for non-commercial purposes only, and while indicating the source of the initial publication. The provision clarifies that any contrary agreements to the

[43] Named after the Dutch member of parliament Joost Taverne, who sponsored the amendment.

[44] The Dutch pilot "You Share, We Take Care!", aimed at testing the implementation of article 25fa, is reported and analysed in Sondervan, J., Schalken, A., Jan de Boer, & Saskia Woutersen-Windhouwer, "Sharing published short academic works in institutional repositories after six months: The implementation of the article 25fa (Taverne Amendment) in the Dutch Copyright Act" (2021) 31(1) *LIBER Quarterly: The Journal of the Association of European Research Libraries*, 1–17. *https://doi.org/10.53377/lq.10915*

detriment of the author shall be void.[45] The Austrian provision mirrors the German model, replicating the same constraint and also adding a further limitation, that the scientific work must be created by the author in their capacity as a member of staff at a research institution.

France amended its *Code de la recherche* to add the new Article L. 533-4 to implement a second publication right,[46] which resembles the German model but adds a few more specifications. It replicates the requirement that the work must stem from a research activity that is at least half publicly funded, but may be published in a periodical that is issued at least once (not twice, as in Germany and Austria) per year; it specifies that the work (document) may be made available in an open format and with the agreement of any co-author; it is limited to the AAM; it tolerates an embargo of six to twelve months depending on the discipline[47]; and it opposes any commercial purpose. The French provision defines its nature as being of public order and that any contrary clause shall be deemed unwritten. A separate specification complements the right to reuse research data made public in the context of the publication, unless other limitations (in terms of other specific rights or regulations) apply.

Lastly, Belgium more recently introduced the secondary publication right by amending its Code of Economic Law (*Wetboek van economisch recht*) to revise Article XI.196, which establishes the right of the author of a scientific publication (article) that stems from research that is at least half financed by public funds, regardless of any existing copyright assignment or transfer, to make the work publicly available in OA from twelve months for humanities and social sciences and six months for other disciplines, after the first publication in a journal. Acknowledgement of the first publication venue is required. Compared to the laws discussed above, the Belgian model further specifies that the work subject to this provision is an article published in a journal (but no specification regarding the number of issues is given). It also adds that a shorter period of embargo may be agreed with the publisher, or a longer period demanded by royal authority. It finally concludes that the law is mandatory, retroac-

[45] *Urheberrechtsgesetz (UrhG)*, §37a, cit.
[46] *Code de la recherche*, Article L533, cit.
[47] Respectively, six months for science, technology, engineering, and mathematics (STEM), 12 months for humanities and social sciences (SHS).

tive (it applies to works created before the entry into force of the provision) and that the right in question cannot be waived.[48]

All regulatory provisions of the legislative models considered here are mandatory in nature, that is, they aim to neutralise the clause by which the author assigns economic rights to the publisher. In all cases, such right is personal, notwithstanding the economic rights and licensing agreements that may be stipulated by the publishers or editors. It is a right of the author, not an obligation of the publisher, an exception to copyright law or an adjustment to a publishing agreement. Given the author's right is either non-transferable, inalienable or not waivable, thus sharing some features of the author's moral rights, there seem therefore to be all the conditions necessary to consider secondary publication rights having a true personal nature, which serves as an additional argument for its relevance and further circulation.

5. *Other coping strategies: rights retention, revocation, and termination rights*

At the outset of discussing the contractual strategy for the Green OA route, it is worth mentioning the Rights Retention Strategy (RRS) by Plan S,[49] which aims to solve this problem by providing an alternative solution to retain the author's rights. This strategy assumes that the body that funds the research requires scientific authors to give the funder a non-exclusive licence for publication in OA, which does not allow them the economic rights to be assigned exclusively to the publisher. Despite best intentions, this has inadvertently done more harm than good by limiting the scientific author's freedom of choice. In the current evaluation system, scientific authors are encouraged to publish, as previously stated, in editorial venues that have a bibliometric advantage. If the academic career of

[48] *Wet houdende diverse bepalingen inzake Economie*, Article XI.196, cit.

[49] Plan S is a valuable initiative for OA launched in 2018 by a consortium of European research agencies and funders (cOAlition S), which, as a key principle, requires researchers whose research is publicly funded, to publish their scientific publications in open repositories or in OA journals or platforms without embargo by 2021 (a deadline which is not set for other type of works, such as monographs). Plan S principles include the need for authors to retain copyright on publications, which must be published under an open licence, and that publication fees shall be either covered or waived by their affiliated institution. *https://www.coalition-s.org/rights-retention-strategy/.*

the scientist depends on publication in high-ranking venues, they are unlikely to have the courage to start and eventually break a negotiation with a publisher on whom their scientific reputation depends, even indirectly.[50]

The Rights Retention Strategy, which is the second avenue for complying with Plan S,[51] is perhaps the most complex feature of this entire policy: authors comply with Plan S by depositing the AAM or the VOR in the OA repository to distribute the work, with no embargo. In doing so, authors retain the copyright entitlements that have an economic or moral nature. In some cases, moral rights would not be transferable or even waivable in any case, so the possibility of retaining economic rights is a crucial aspect of such a retention strategy. This specific contractual route encounters some significant problems, which can be attributed to the inability of authors to choose their site of dissemination—thus restricting their scientific freedom that, as we have seen, is a fundamental aspect of their action—and to the limited application that RRS may have, which is in part heightened by the adverse reaction of publishers towards this specific scheme. Therefore, a legislative approach may better address these issues.

At the legislative level, further to the statutory provisions on secondary publication rights described above, specific coping strategies to balance the traditionally unstable contractual position of authors, including the perilous commodification of academic copyright, have led to the recognition of revocation and termination rights. The right of revocation, recently harmonised by the EU Directive 2019/790 on Copyright and Related Rights in the Digital Single Market (DSM) under Article 22, provides authors and performers with the right to revoke in whole or in part the licence or the transfer of rights in a work or other protected subject matter on an exclusive basis, should that work not be exploited after a reasonable time following the conclusion of the licence or the transfer of the

[50] This is of particular importance for those who work in institutions, as publishing in high impact venues can influence career progression.
[51] The three main lanes revolve around some form of rights retention by the author: (a) publication in fully OA journals or platforms; (b) deposit of Versions of Record (VoR) or Author Accepted Manuscript (AAM) in OA repositories without embargo and licensed with open licenses (e.g., CC-BY 4.0); (c) publication in hybrid journals but under transformative agreements.

rights.[52] Such provision, which is mandatory and cannot be overridden by contracts unless required by a collective bargaining agreement, gives national legislators sufficient discretion with respect to its concrete implementation, e.g. in terms of sector-specific variations or multiple contributions, but its aims should not be frustrated, or its execution made too complicated.[53] The right in question, often referred to as "use-it-or-lose-it", which was identified as "an historic opportunity to achieve better copyright outcomes for creators",[54] also elicits the termination right by referring to the option for authors or performers to terminate the exclusivity of the contract, as opposed to revoking the licence or transfer of the rights.

Both termination and revocation rights essentially aim to strengthen the weaker bargaining position of authors and somehow address the lack of transparency that often features in the publishing industry,[55] and yet are fundamentally associated only with the economic facet of copyright. Their execution is therefore strictly dependent on the unsatisfactory exploitation of the work and the consequent remuneration of its creator, with no reference whatsoever to the personal or even ethical interest of creators in regaining their rights in the works, e.g., to make such works available to the public, nor to the freedom that has here been strongly advocated for, against the vicious escalation of commodified copyright.

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[52] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, E/51/2019/REV/1, OJ L 130, 17.5.2019, p. 92–125.

[53] For a detailed analysis of the right of termination, see the CREATe Rights Reversion Resource Page, https://www.create.ac.uk/reversion-rights-resource-page/, which maps pre-existing national provisions across Member States. Cf. U. Furgał, "Interpreting EU Reversion Rights: Why "Use-it-or-lose-it" Should Be the Guiding Principle" (2021) 43(5) *European Intellectual Property Review* 283; S. Dussolier, "EU Contractual Protection of Creators: Blind Spots and Shortcomings" (2018) 41(3) *The Columbia Journal of Law & The Arts* 435; P. Heald, "Copyright Reversion to Authors (and the Rosetta Effect): An Empirical Study of Reappearing Books" (8 December 2017), *https://ssrn.com/abstract=3084920*.

[54] See the *Open letter concerning the right of revocation* published by international academics on December 11, 2020, and initiated by CREATe (UK Copyright and Creative Economy Centre), University of Glasgow, *https://www.create.ac.uk/blog/2020/12/11/open-letter-revocation-how-authors-and-performers-can-reclaim-their-copyrights/*.

[55] This is most recently confirmed by E. Rosati, *Copyright in the Digital Single Market. Article-by-Article Commentary to the Provisions of Directive 2019/790* (Oxford University Press, 2021), pp.402-406.

6. *Daring a "moral" direction to balance contractual gaps*

The legislative route to Green OA opens the way to considering the opportunity for a formal change in the law, which would be especially needed in cases where the work has already been published in a non-OA-friendly venue, and economic rights have been assigned or transferred to the publisher. In this case, it appears more plausible for the law to intervene and make such retention mandatory, specifying that any contractual contrary clause will be void. To be more specific in this context, it would perhaps be more accurate to speak of a "retrieval" of rights, bringing into question the specific personal or moral dimension of the right, which is clearly an entitlement of the author. This legislative route would operate as a precious instrument to allow authors to regain the freedom and responsibility that should comprise the virtuous circle of academic copyright.

With these premises, it is here boldly suggested, expressly with respect to the Italian proposed model for the right of secondary publication, that such right may be a "moral" right. However, from theory to practice, there is always some slippage, and this is especially true when moral rights are concerned. In many respects, moral rights have been interpreted differently in civil and common law systems. The former (e.g., Italy or France) tend to protect moral rights in an absolute way and recognise their perpetuity, inalienability, and non-transferability. The latter, traditionally featured by a predominantly economic approach to copyright, protects moral rights in a mild or strictly limited manner (e.g., UK or USA). These divergences originate at the beginning of the history of copyright.

Notwithstanding the academic debate over the earliest foundation of the principle of copyright, based on the revolutionary invention of printing with movable type which opened the way to the system of book privileges from 1469, it is commonly held that the history of copyright formally began in eighteenth-century Britain with the Statute of Anne.[56]

[56] The Statute of 1710 is considered the first modern copyright law, later followed by, to mention but a few, the U.S. Constitution and the Copyright Act of 1790; the French Revolutionary Laws of 1791 and 1793; and the Italian laws of 1801 and of 1837, before Italy's unification. Cf. M. Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1995); M. Rose, "The Public Sphere and the Emergence of Copyright: Are-

Originally, the identification of copyright with the patrimonial rights of the use of intellectual works limited the scope of protection to commercial exploitation. Only later, with the recognition of a qualified relationship between author and work, were moral and economic rights sketched out—with different articulations in the monist and dualist theories.[57]Article 6-bis of the Berne Convention represents a turning point in the complex process towards international recognition of the moral right of the author, and in some contexts makes up for a lack of appropriate national legislation.[58] It makes an apparently clear distinction between patrimonial rights and those of a personal nature, expressly including two moral prerogatives of the author: the right of paternity and the right of integrity. No reference is made to other moral rights, such as the right of disclosure or the right to withdraw the work from the market, presumably because national laws on these were even more fragmented. The fragmentation and discretionary nature of the discipline at the international level is reflected in the European context, where moral rights are not yet harmonised. The most recent DSM Directive 2019/790 confirms the current intention of not achieving any harmonisation of moral rights, as previous directives have done, including Dir. 2001/29/EC. Only Directive 2001/84/EC on the harmonisation of the resale right (*droit de suite*) can be considered a timid first step towards a possible harmonisation of mor-

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opagitica, the Stationers' Company, and the Statute of Anne", in R. Deazley et al. (eds), *Privilege and Property: Essays on the History of Copyright*, 1st ed., (Cambridge: Open Book Publishers, 2010), pp. 67–88, JSTOR, *www.jstor.org/stable/j.ctt5vjt9v.7*; L. Moscati, *Diritti d'autore. Storia e comparazione nei sistemi di civil law e di common law* (Milano, 2020); U. Izzo, *Alle origini del copyright e del diritto d'autore. Tecnologia, interessi e cambiamento giuridico* (Roma, 2010).

[57] O. Von Gierke, *Deutsches Privatrecht* (Leipzig, 1895-1917); I, *Allgemeiner Teil und Personenrecht*, 748 ss.; M.C. Pievatolo, "La comunicazione del sapere. La questione del diritto d'autore", in *Bollettino Telematico di Filosofia Politica* (2007-08), *https://btfp.sp.unipi.it/dida/fpa/index.xhtml*; J. Kohler, *Das Autorrecht, eine zivilistische Abhandlung* (Jena, 1880).

[58] The first international law to ensure systematic protection of the moral right of authors was the Berne Convention of 1886. In particular, the 1928 revision of the Rome Convention laid the basis for the formal recognition of moral rights, which were already recognised at a jurisprudential and doctrinal level by the old continent. Cf. E. Adeney, *The moral rights of authors and performers* (New York: Oxford University Press, 2006), 97; M.T. Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (Oxford: Oxford University Press, 2011) p.12; L. Moscati, "I diritti morali e la Conferenza di Roma del 1928 per la revisione della Convenzione di Berna" (2015) 44 *Quaderni fiorentini per la storia del pensiero giuridico moderno* , 465.

al rights. However, the lack of EU legislative intervention does not exclude *a priori* the possibility of harmonisation,[59] since a new approach to moral rights, as with economic rights, may be necessary in view of today's digital challenges.

In Italy, moral rights are explicitly referred to in Articles 2577 and 2582 of the Civil Code, Articles 20-24, 142 and 143 of the Copyright Law (no. 633/1941, hereinafter l.d.a.)[60] which comprise three main and typical moral rights: the right of paternity, the right of integrity, and the right to withdraw the work from the market. Except for the right of withdrawal, moral rights are recognised as perpetual, inalienable, non-transferable, and imprescriptible (art. 22 l.d.a.). It is disputed whether the right of disclosure (*inedito*), as the right to make the work public,[61] has a moral or economic nature.[62] If the two rights—moral and economic—that concern the act of publication are to be distinguished, the former is the personal right of the author to choose whether to publish their work when they so please, while the latter consists of the exclusive right to make their work public, thus exercising the first form of economic use (art. 12 l.d.a.).

The right to make the work public is undeniably the core element of the protection of moral right,[63] which should be regarded as the other side of the coin when speaking of the publication right. Its strong moral nature could also justify a withdrawal *ad nutum* from previous consent to publication,[64] unless as with the right to withdraw from the market (art.

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[59] M. Van Eechoud (ed.), *Harmonising European Copyright Law. The Challenges of Better Lawmaking* (Alphen aan den Rijn: Wolters Kluwer, 2009), p.68; C. Doutrelepont, *Le droit moral de l'auteur et le droit communautaire* (Bruylant, 1997).

[60] Legge 22 aprile 1941, n. 633, *Protezione del diritto d'autore e di altri diritti connessi al suo esercizio*, last amended on 24.07.2021, *https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1941-04-22;633!vig.*

[61] S. Strömholm, *Copyright—Comparison of Law*, Volume XIV: Copyright and Industrial Property. Chapter 3, in U. Drobnig et al. (eds.), *International Encyclopedia of Comparative Law* (Tübingen, Dordrecht, Boston, Lancaster, 1990), pp.58-59.

[62] The discussion on the moral or economic (like the primary right of publication) nature of the right of disclosure (right in unpublished works or right to make the work public), still animates scholars worldwide. With reference to the Italian scholarship, see, e.g., P. Auteri. *Diritto di autore*, in A.A. V.V. *Diritto industriale. Proprietà intellettuale e concorrenza*, (Torino, 2016), 565, 662. Cfr. infra, §7.

[63] See V. De Sanctis. *I soggetti di diritto d'autore*, Milano, 2005, 207.

[64] E.g., A. Vanzetti. *Il diritto di inedito*, in *Riv. dir. civ.* 1966, I, 387, 429. Of contrary view, e.g., G. Santini. *I diritti della personalità nel diritto industriale*, Padova, 1959, 12, 51,

142 l.d.a.), conditions of serious moral harm should apply.[65] The second publication right, as another facet of the act of publication, could have all the features of a moral right. It would embody the utmost liberty of the scientific author to decide when and where to publish and give it back to the public that first funded the work.

7. *The still-dreamed-of second publication right in Italy*

A bill featuring the German standard has attempted to make its entry in Italian law, thanks to proposal and petitioning from the Italian Association for the Promotion of Open Science (AISA).[66] Nevertheless, the bill has remained pending before the Senate since November 2019. Long ago approved by the Italian House of Representatives (*Camera*),[67] it was transferred to the Senate and is still awaiting discussion.[68]

In a single article, the draft bill provides an amendment to the Decree-Law No. 91/2013, which includes provisions on open access to scientific publications.[69] More specifically, at Paragraph 1 it amends the existing Article 4, dedicated to encouraging the development of libraries and archives, and the promotion of acting and reading,[70] while at Paragraph 2

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[65] Cf. T.M. Ubertazzi. *Il diritto alla privacy. Natura e funzioni giuridiche*, Padova, 2004, 162 ss.

[66] *https://aisa.sp.unipi.it/attivita/diritto-di-ripubblicazione-in-ambito-scientifico/novella/*

[67] Atto Camera n. 395, XVIII Legislatura. "Modifiche all'articolo 4 del decreto-legge 8 agosto 2013, n. 91, convertito, con modificazioni, dalla legge 7 ottobre 2013, n. 112, nonché introduzione dell'articolo 42-bis della legge 22 aprile 1941, n. 633, in materia di accesso aperto all'informazione scientifica", *https://www.camera.it/leg18/126?tab=1&leg=18&idDocumento=395&sede=&tipo=.*

[68] Atto Senato n. 1146, XVIII Legislatura, https://www.senato.it/leg/18/BGT/Schede/Ddliter/51466.htm.

[69] Decreto-Legge 8 agosto 2013, n. 91, *Disposizioni urgenti per la tutela, la valorizzazione e il rilancio dei beni e delle attività culturali e del turismo*, G.U. 9 agosto 2013 n.186, convertito con modificazioni dalla L. 7 ottobre 2013, n. 112 (G.U. 8 ottobre 2013, n. 236), *https://www.gazzettaufficiale.it/eli/id/2013/08/09/13G00135/sg*.

[70] Amendments concern the opportunity for public entities providing or managing funding for scientific research to adopt, in their autonomy and for non-commercial purposes: the necessary measures for the promotion of open access to research results and data financed at least half a per cent by public funds; the undertaking of national strategies and infrastructures for the dissemination and use of open access to scientific publications; and more broadly, the implementation of open access policies.

it introduces a new Article 42-bis to the Italian Copyright Act, which sets out as follows:

> "1. The author of a scientific work published in a periodical, which is the result of research financed to the extent of 50 per cent or more by public funds, shall have the right, provided that it is not for commercial purposes, to make it available free of charge to the public on the Internet, in institutional or disciplinary electronic archives, with open access, after it has been made available free of charge to the public by the publisher or in any case after no more than six months from the first publication in the case of works in the scientific, technical and medical subject areas, and after no more than one year in the case of works in the humanities and social sciences. In exercising this right, the author shall indicate the references of the first edition, specifying the name of the publisher.
> 2. The author shall remain the owner of the right referred to in paragraph 1 even if he/she has assigned exclusively the rights of exploitation of his/her work to the publisher or editor. Contract terms agreed in breach of the provisions of paragraph 1 shall be null and void."[71]

The proposed addition of Article 42-bis l.d.a., which grants the author an inalienable right to make available to the public in open access scientific works published in periodicals, is a rule that restores the freedom of the scientific author whose research is public financed, and who is typically the weaker party in the contract.

It is worth mentioning that the current formulation of the proposed Article 42-bis is different from that endorsed by its main sponsor. AISA's final proposal, consolidated after public consultation, provided the following adjustments: it listed monographs and chapters of books among the scientific works to be considered, thus expanding the scope of the provision; it broadened the rights that the author could have retained, i.e., reproduction, making available and distribution, thus also allowing in principle commercial use; it harmonised the embargo period for all disciplines to one year, while allowing a shorter reasonable period[72].It is well known that the scientific author often cedes their patrimonial rights to the publisher without receiving any compensation, either because they are not interested in earning money but in making ideas public, or because there is no room for negotiation with the publisher that cleverly

[71] Atto Senato n. 1146, XVIII Legislatura, cit.
[72] The legislator should listen to all parties' reasoning, but then choose with the public interest in mind. There is no doubt that public interest moves towards tighter embargo periods and greater freedom for the scientific author as a means of achieving the goal of wider open access to scientific information.

takes advantage of such established scheme. Indeed, if the author had bargaining power, there would be no need for a mandatory rule such as 42-bis. It would be the author who would insert a clause in the contract reserving them the right to republish in open access. They cannot do this, because the publisher has greater contractual power and can prevent OA republication or lengthen the embargo period. It should be noted that the proposed Article 42-bis l.d.a. would immediately follow Article 42 l.d.a., lasting since the earliest formulation of the Copyright Act and providing that the author of a work (as an article) reproduced in a collective work shall have the right to reproduce such work as an offprint, or to include it in a volume, on the condition that they mention the collective work from which it has been taken and the date of publication. The provision at paragraph 2 of the existing article further specifies that, in case of an article appearing in magazines or newspapers, the author shall also have the right, in the absence of a contrary agreement, to reproduce the work in other magazines or newspapers.[73] Although the provision in question has not been often controverted in case law,[74] a first reading reveals that there seems to already be all the conditions to admit a specific and indeed wider right of the author to republish a work already published in a collection unless, and only for articles appearing in magazines or newspapers, contrary agreements apply.[75]

To somehow close the circle on the right of second publication, it must be remembered that Article 42 is also strictly related to Article 12 l.d.a., which concerns the right of first publication. Ever since the initial parliamentary discussions and through the following early doctrinal debate, it has been made clear that such right was first and foremost an evident expression of the author's right of personality, even before being a right of exclusive property, hence the link with the moral right of the author to withdraw the published work from the market and with the right

[73] Legge 22 aprile 1941, n. 633, cit.

[74] Among the few decisions, Trib., sent. Milano, 17 luglio 2009, in *Annali it. dir. Autore*, 2010, 887, which confirms how, on publication of individual writings in a collective work, the author retains the right to use his work separately. Cf. Corte di cassazione civile, sez. I, 25 settembre 1999 n. 10612, in *Rep. Foro Italiano* 1999, *Diritti d'autore*, n. 123; Corte di cassazione civile, sez. Lavoro, 30 maggio 1989 n. 2601, in *Giust. civ.* 1989, I, 1807.

[75] In the opinion of the authors, paragraph 2 mentions "riviste o giornali", where "riviste" is presumably be understood as magazine and not journal as in scientific journal.

to remain unpublished (*inedito*) as the obvious flip side of the right of first publication.[76] Furthermore, identifying the right of first publication as the first communication to the public it can be emphasised that «the object of the publishing contract is not the transfer of the work, which, upon publication, belongs to the public, but the transfer of the limited rights to which the author is entitled in relation to the work, and not even all the rights, because the personal rights remain with the author»[77]. This strengthens the idea of the secondary publication right as a personal entitlement of the author but also a reflection of the scientific author's commitment to dedicate their works to the public. Moreover, it reinforces the argument that public and collective interests should prevail over the protection of individual rights[78].

8. *Conclusions*

Virtuous and ideal academic copyright is at present a distant vision, substituted by a strongly commodified setting where authors' rights appear extremely constrained by the market, and the freedom of scientific authors is equally restricted. In this distorted landscape, Open Access represents a possible countermeasure to this issue. It aims to rebalance the ecosystem of scientific communication. If a full OA system is still a dream, the Green route, with its dual approaches, contractual and legislative, may allow authors of scientific publications to retain or regain their rights regarding their works.

The contractual approach consists in the retention of rights of republication and communication to the public through contract agreements, where (a) authors negotiate with publishers to reserve the right to re-publish, or (b) it is the funder who creates a mechanism that impedes the assignment of such rights, as with RRS of Plan S. The first option ap-

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[76] L. Ferrara, *La nuova legge italiana sul diritto di autore*, *Riv. Dir. Comm.,* 1941, I, p. 6, 7-8.

[77] E. Piola Caselli, *Relazione*, in Ministero della cultura popolare, *Atti della Commissione per la riforma della legislazione in materia di diritto d'autore*, Roma, 1939, p. 20 (translation our own).

[78] L. Ferrara, *La nuova legge italiana sul diritto di autore*, cit., 4, who argued that recognition of private initiative should always be coordinated or even subordinated to the needs of the superior social interest. Cf. V. De Sanctis, *Diritto di autore e interessi della collettività*, *Il Diritto di autore*, 1933, 431.

pears balanced and merits consideration, but it is less practical as authors normally have less bargaining power as opposed to publishers. The second option, indeed, tries to overcome this specific issue, but lacks the necessary freedom of the author to determine where to publish their work and is undermined by the hesitancy of publishers to accept such a strategy.

The legislative approach, on the contrary, appears to better tackle the issue, as it represents a firm and binding solution that, on the one hand, shields the author's freedoms while on the other hand, it unburdens them from the responsibility to negotiate directly with the publisher. In this regard, it is the legislative approach to Green OA that benefits the personal liberty of the author.

Examining the current legislative examples of second publication rights in Germany, France, Austria, Belgium, and the Netherlands, the common features suggest the possibility of conceding a specific personal nature of such rights. Closer scrutiny of the "tentative" Italian right to make the work public has helped to illuminate the complexity of the issue, suggesting that nothing in the law prevents adding a "new" moral right of second publication that indeed, carefully integrated within the set of existing norms, would empower again research authors with their natural and vital commitment to publicly disseminate their knowledge.

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