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FOUNDATIONS OF OPEN ACCESS: SCIENTIFIC DISSEMINATION, RIGHTS RETENTION AND NEW COPYRIGHT LAW

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ABSTRACT

More than 2.5 billion open access licensed scientific articles are available on the internet to date – an indication of the sentiment among an increasingly global scientific community when it comes to knowledge transfer and scientific dissemination. These shifts are indicative of the current state of academic publishing, dominated by commercial publishers that appear to disproportionately profit from scholars' intellectual creations to the detriment of not-for profit university presses and in spite of publication costs having drastically decreased as digitalisation of literary works continues to grow. While alternatives to traditional publication models continue to be explored, scientific authors have increasingly shown a preference for the deployment of so-called Rights Retention strategies to reproduce scientific works: the ability to share copyright-protected works by means of publicly available licenses, such as Creative Commons licenses, even in the presence of a copyright transfer agreement with commercial publishers. Open access dissemination of scientific findings has revealed a number of contentious, namely, how to maintain the integrity of author's moral rights to their work, preventing plagiarism and facilitating the indirect commercialisation of works readily available in the open access ecosystem. We consider these issues by exploring the legal-philosophical foundations of open access, grounding our analysis in Kantian ideas of public and private use of reason. Through this lens, we argue that, for all its potential pitfalls, open access has the ability to delicately balance the interests of all involved stakeholders – including those of commercial publishers. We suggest that open access, in its variety of forms, including the use of Creative Commons licences and Rights Retention, allows for reciprocal, bifurcated copyright arrangements that display the ability of authors to honour contractual obligations with commercial publishers on the one hand, while openly disseminating their scientific findings to the public at large on the other hand, thus adding nuance and complexity to an emerging new copyright law – one that embraces principles of equity and inclusion, while being fit for purpose in light of rapid technological advances.

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I. FINDING OPEN ACCESS

Many readers will be familiar with the philosophy of Ubuntu. This philosophy has its origin in Africa and is best described in the words of Nelson Mandela. He said *ubuntu* is "…the profound sense that we are human only through the humanity of others; that if we are to accomplish anything in this world it will in equal measure be due to the work and achievement of others."[1] Thus, it emphasises that humans are interdependent, and thrive best when they work in cooperation with others, sharing the fruits of their work with the larger community that is the human race. This is all the more relevant for scientific enquiry. In a way, the obligation to share must be seen as a social responsibility.[2]

The open access movement builds on this culture of sharing knowledge. The origins of the movement can be traced back to the Budapest Open Access Initiative in 2002 where the words *open access* was coined and a *Declaration* was signed by the participants on 14 February 2002.[3] The *Declaration* recognised that the tradition of sharing the fruits of research combined with the power of internet can potentially lead to unprecedented public good if barriers to access such literature are removed. It called upon interested institutions and scholars to encourage open access by making such literature freely available over the internet and providing access rights to the users including the right to *'read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose…'.*[4] The only requirement was that the authors of the work must be properly acknowledged, and the integrity of their work is maintained.[5]

Much aligned with international copyright law provisions under the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),[6] the Bethesda Statement on Open Access Publishing (Bethesda Statement) was adopted on 11 April 2003, as a result of a meeting held at the Howard Hughes Medical Institute in Chevy Chase, Maryland, in the United States ["**US**"]. The *Bethesda Statement* called upon the author(s) and copyright holder(s) to grant all users

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[1] *See generally*, R. Stengel, *Mandela's Way*, Penguin Random House 2018.
[2] K. Ola, *Theories of Open Access*, 6, J. OPEN ACCESS L., 10-12 (Sept. 26, 2018); K. Ola, *Fundamentals of Open Access*, 36 EUROPEAN INTELLECTUAL PROPERTY REVIEW, 2, 112-123 (January 2014).
[3] BUDAPEST OPEN ACCESS INITIATIVE [*hereinafter* **"BOAI"**], available at: https://www.budapestopenaccessinitiative.org. *see also* M. Demeter, a. Jele and Z.B. Major, *The International Development of Open Access Publishing: A Comparative Empirical Analysis Over Seven World Regions and Nine Academic Disciplines*., PUB RES Q 37, 364–383 (2021). https://doi.org/10.1007/s12109-021-09814-9.
[4] BOAI, *supra* Note 3.
[5] *Id.*
[6] Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886 (as amended on 28 September 1979), 828 U.N.T.S. 221[*hereinafter* "**Berne Convention of 1889**"].

a "*free, irrevocable, worldwide, perpetual right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship*…".[7] Again, in October 2003, the *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities*[8] was adopted and published, re-emphasising the position previously stated in the *Bethesda Statement*. These instruments show how, at the turn of the century, there was an impeding need for redress in view of new challenges posed to scientific dissemination by emerging technologies like the internet.

Twenty years later, those who support open access range from authors, researchers, universities, libraries, and the various users who make use of the knowledge in a variety of ways. The common goal shared by these stakeholders may be the same, yet their rationale varies, including social, economic, political and legal considerations. For some, there might be a social basis – as exemplified by the philosophy of *ubuntu* described above – the one that drives support for open access.[9] However, this social basis, which is arguably reflected in legal expressions of 'public interest' has also been found lacking at times of crisis.[10] For others, the reason may be purely economical, given the astronomically high subscription charges demanded by online journal publishers.[11] At times, the support for open access may even be politically induced, with some scholars suggesting a 'political capture' by corporations and states in the Global North, thus perpetuating neo-colonialist approaches to scientific dissemination.[12] Finally, there is the legal rationale which situates current copyright frameworks, with origins in laws that are over 300 years old,[13] as no longer suitable for contemporary lived experiences and practices, where downloading and sharing of files over the internet has become commonplace.[14] Seen in this light, copyright law appears to have been highjacked by a selected number of interest groups to serve their commercial interests, rather than operating for a higher purpose: the common good.

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[7] *See, among others,* BETHESDA STATEMENT ON OPEN ACCESS PUBLISHING, Harvard Dash, available at: https://dash.harvard.edu/bitstream/handle/1/4725199/Suber_bethesda.htm. See also: N. Chakravorty, C. Shekhar Sharma, K. Molla and J. Kumar Pattanaik, Open Science: Challenges, Possible Solutions and the Way Forward, PROC.INDIAN NATL. SCI. ACAD. 88, 456–471 (2022). https://doi.org/10.1007/s43538-022-00104-2.

[8] Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, OPEN ACCESS INITIATIVES OF THE MAX PLANCK SOCIETY, available at: https://openaccess.mpg.de/Berlin-Declaration.

[9] N. Koutras, The Public Policy Basis for Open Access Publishing: A Scientific Approach. PUB RES Q 36, 538–552 (2020). https://doi.org/10.1007/s12109-020-09772-8.

[10] K. Walsh, A. Wallace, A., Pavis, M. et al. Intellectual Property Rights and Access in Crisis. IIC 52, 379–416 (2021). https://doi.org/10.1007/s40319-021-01041-1.

[11] J. Willinsky, The Stratified Economics of Open Access, 39 ECONOMIC ANALYSIS AND POLICY, 1, 53-70 (2009). https://doi.org/10.1016/S0313-5926(09)50043-4; also: Ola, *supra* note 2, at 15.

[12] *See, e.g.*, K. Meagher, Introduction: The Politics of Open Access — Decolonizing Research or Corporate Capture? 52 DEVELOPMENT AND CHANGE, 2, 340-358, (January 2021). https://doi.org/10.1111/dech.12630.

[13] (United Kingdom) Copyright Act, 1710, 8 Ann. c. 19; Berne Convention of 1889, *supra* note 6.

[14] Ola, *supra* note 2, at 22-23.

Open access movements seek to galvanise and elevate these seemingly divergent motivations to bridge the gap between old copyright law and new technologies. As such, this article is concerned with the use of open access as explored through a legal-philosophical lens based upon Kant's idea of *public* and *private use of reason*. Beginning with a brief note on the historical development of copyright law, Section II will study Kant's idea of *public use of reason* and apply it to the free exchange of knowledge as understood under current open access systems. Using Kant's distinction between the book as a physical object and the ideas conveyed in the book, we argue that, upon signing of a publishing agreement, the inherent rights in the work continue to subsist with the author irrespective of certain elements of copyright protection being transferred to the publisher through contractual obligations. In Section III, we will carry forward this analysis by discussing the limitations placed on the Kantian *public use of reason.* The premise here is that people must obey the law in lieu of maintaining social cohesion – the *private use of reason*. This restriction on freedom of the citizens is a contractual exchange with the sovereign who in turn recognises their right to employ the *public use of reason* outside of the call of duty. In the context of copyright protection, the idea of Rights Retention and the use of public licenses (such as Creative Commons) resembles a similar trade-off between the author and the publisher on one hand, and the author and the public on the other. In Section IV, we will discuss selected arising out of current open access systems' usage, namely the challenge of protecting author's moral rights and safeguarding against plagiarism. The final section will briefly conclude.

II. IN DEFENCE OF OPEN ACCESS

The justifiability of the open access movement would depend upon what is perceived to be the underlying rationale of a given copyright protection regime. If the core purpose is to award proprietary rights to the author which motivates them to produce more, then increasing the scope of copyright protection will seem fair, and the open access movement erroneous. However, if the purpose of copyright is regulatory or distributive *i.e.,* serving the public interest by providing reasonable access to copyrighted works, then this purpose can only be fulfilled by encouraging the distribution of works to the wider public, which is in turn well served by open access systems.

A. Revisiting Copyright History

The ponderation is far from binary. In our view, however, the distributive purpose of copyright protection should be accorded primacy over the proprietary goals. One only has to briefly look at the history of copyrights to appreciate why. Without claiming to be exhaustive,[15] the idea of

[15] See *e.g.* I. Alexander and H. T. Gómez-Arostegui, RESEARCH HANDBOOK ON THE HISTORY OF COPYRIGHT LAW, Edward Elgar Publishing 2018; B. Atkinson and B. Fitzgerald, A SHORT HISTORY OF COPYRIGHT, Springer 2014; I.

copyright originated in England in the late 15th century, once large-scale printing became possible due to the invention of the printing press. At this time, the English Stationers' Guild, seeking to preserve the profitability from the book trade for its members, established a registry system wherein members of the Guild could enter the name of the book over which they claimed publishing rights. Other members were expected to refrain from publishing the same book to ensure harmony in the ranks was maintained. This system also protected against the publishing of heretical and seditious material, as the English kings and queens willingly granted substantial control over publication of books to the Guild, in exchange for their promise to refrain from publishing such material.[16] Through this historical lens, we can see how copyright, as a normative system, came into existence primarily to encourage *distribution* of works over *creation* of works – although the distribution of work benefitted the publishers more than the authors or the public.

Over time, as discontent over the monopolistic character of the Guild system grew stronger,[17] the English Parliament passed the Statute of Anne in 1710, redirecting the purpose of copyright away from censorship and towards freedom of expression.[18] After the passing of the new law, rights were granted directly to authors instead of the publishers, in order to induce learned (wo)men to write and publish books. To promote future scholarship, the duration of copyright was limited only to fourteen years, with a further extension of fourteen years if the author was still alive at the expiration of the first period. These rights conferred were of limited character as the reprinting of copyrighted material was largely prohibited although the use of the work was not. In fact, publishers were required to deposit a copy of the work in designated libraries.[19] Thus, there is consensus among scholars[20] that the new law was a tool to serve the public interests, rather than serving the commercial interests of the Guild members, which is reflective of the distributive aspect of copyright.

Alexander, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY, Bloomsbury Publishing 2010.

[16] P. Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319, 323 (2003); For a detailed history of the stationer's copyright, *See* L. RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (Vanderbilt Univ. Press 1968).

[17] M. Rose, Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain, Law & Contemp. Probs. 66 (2003): 75; P. Samuelson, Copyright and Freedom of Expression in Historical Perspective, J. INTELL. PROP. L. 10 (2002): 319.

[18] C. Seville, The Statute of Anne: Rhetoric and reception in the nineteenth century, Hous. L. Rev. 47 (2010): 819.

[19] Statute of Anne, 1710; for a critique of Statute of Anne, 1710, *see*, L. Ray Patterson, *The Statute of Anne: Copyright Misconstrued*, 3 HARV. J. ON LEGIS. 223, 235-236 (1965).

[20] L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 8 (1987); H. T. Gómez-Arostegui, The untold story of the first copyright suit under the Statute of Anne in 1710, BERKELEY TECH. LJ 25 (2010): 1247.

B. Distributive Copyright Law

Arguably, a distributive approach to copyright can also be justified on the basis that an author, during the process of creation, draws upon the ideas available to them in the public domain. Therefore, it is only fair that their work, on completion, should be made available to other users once adequate rewards have been secured for the author. These rewards can be in the nature of profits accruing from the sale or licensing of the work. Because such profits cannot accrue to the author without distribution of the work, the proprietary interests of the copyright holder – be it the author or the publisher- are inconsequential without first securing the distributive aspects. Further, giving primacy to the distributive goals of copyright can also contribute to an individual's sense of self. Engagement with the works of others can contribute to the process of self-actualization of a subsequent user.[21] Kant in his *Critique of Judgment* stated that humans can experience the "feeling of life" when they are able to engage in a "state of free play" unfettered by any restraints. In other words, a person is said to be in a state of free play when he actively engages with a work by making judgments about it, in contrast to mere passive contemplation of the work. According to Kant, people can engage in such free play only when they are unconstrained by any rules.[22] Open access facilitates such free play by making available the fruits of research to everyone who chooses to receive it.

Further justifications for permitting open access to copyrighted material can be based upon Kant's ideas of *enlightenment* and the *public use of reason*. In his essay, *An answer to the Question: What is Enlightenment?* published in the year 1784, Kant describes *enlightenment* as achievement of maturity through the use of *reason*. According to him, to *reason* is to employ the ability to think for oneself, without being prejudiced by existing authorities and traditions. He says that every human has the innate capacity for independent thinking. However, most humans are content with existing in a state of self-imposed immaturity and lack the courage to act without the guidance of another. The primary concern for Kant is the *enlightenment* of the society as opposed to the individual. However, this *enlightenment* can be achieved only when each individual comprising the society has the freedom to exercise *public use of reason.*[23] An individual is free to make *public use of reason* when he has the freedom to think in "community with others" *i.e.*, he is permitted to communicate his views '*as a scholar* before the entire public of the *world of readers.*' Thus, this inextricable link between autonomous thinking by an individual and his ability to engage with others through a public

[21] C. Yoo, *Rethinking Copyright and Personhood*, 3 U. ILL. L. REV. 1039, 1041 (2019); A.-T. Kornman, *Is Poetry Undemocratic*, 16 GA. ST. U. L. REV. 311, 318-326 (1999).
[22] *Id.* at 1055-1057.
[23] A. Barron, *Kant, Copyright and Communicative Freedom*, L. & PHIL. 1, 16 (2011); K. DELIGIORGI, KANT AND THE CULTURE OF ENLIGHTENMENT 59-60 (SUNY Press 2005).

engagement of diverging views, forms the foundation for progressing towards an *enlightened* society.[24]

Clearly, such an exchange of views is possible only when existing works are available to future authors. Only when users have access to such works, will they be in a position to engage in free play with the ideas contained in them and form judgments about them – a process which is a prerequisite for further development of knowledge. Open access provides a medium for unrestricted dissemination of knowledge. Further, speaking on copyright in his essay, *On the Wrongfulness of Unauthorized Publication of Books* published in the year 1785, Kant distinguishes a book as a physical object from the thoughts of the author that are conveyed to the reader through it. For Kant, anyone who purchases a book acquires property rights in it and can use it as he likes, even to the extent of making copies of it. However, the thoughts present in the books are an intellectual creation of the authors innate capacities and an extension of his personality, and therefore there cannot be any proprietary rights in them. The author has inherent rights in them.[25] Speaking on the role of the publishers, Kant says that their role is limited to transmitting the work of the author in its original and undistorted form to the public, and nothing more. There is therefore, '*a tripartite operation where the author conceives the speech, the publisher disseminates it, and the public receives it'*.[26] Thus, the publisher is acting only as a medium through which the work of the author reaches the wider public. At this point, it is important to make it clear that Kant was not against the publishing trade. In fact, in his 1785 essay, he proposes that the author should not contract with more than one publisher so that the profitability of the trade for the publisher is maintained. However, his aim is to show that the trade can be rightfully organized which will serve the dual purpose of satisfying the economic pursuit of the publisher and at the same time allows the author to exercise his civil liberties of disseminating his ideas to the public.[27]

In this context, it may also be useful to touch upon the distinction between the work that is copyrighted and the copyright itself. Copyright is a series of rights – right to print, reprint, publish, etc. available to the person who holds the copyright.[28] So far as the work in which copyright exists, it is the creation of the author and by that virtue obtains certain inherent rights over it. Bearing

[24] *Id.* at 18-20.
[25] M.C. Pievatolo, PUBLICNESS AND PRIVATE INTELLECTUAL PROPERTY IN KANT'S POLITICAL THOUGHT (10th INTERNATIONAL KANT CONGRESS 2005) 5; *See*, A. RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 14-15 (HARVARD UNIV. PRESS 2009).
[26] C. Yoo, *supra* note 21, at 1048.
[27] Barron, *supra* note 23, at 25.
[28] Patterson, *supra* note 20, at 11.

this distinction in mind, anyone who, in an unauthorized manner, makes use of any right out of the set of rights forming the totality of copyrights, commits an infringement against the copyright holder, but anyone who merely makes use of the work without exercising a right reserved to the copyright holder, does not, as the rights outside the fold of copyrights are flowing directly from the author. This distinction can also be traced back to the Statute of Anne in England under which printing an author's work without his permission was an infringement of copyright, however if a user makes an abridgment, digest, or translates the work (thereby making use of the work) and prints such abridgement, digest, or translation, it was not deemed to be a copyright infringement.[29] The open access movement can similarly be justified on this basis. It must not be implied that the author has surrendered his inherent rights to the work only because he contracted with a publisher to distribute the work to the larger public. The inherent rights to the work accrue to the author by virtue of him having created that work. The mandate of future users who access works over open access database is ultimately derived from this inherent right of the author which includes the freedom to exert control over his work and to freely circulate it to the public. The work of the author is his communication/speech to the public which is further engaged with by future authors to exercise their own authorial freedom. The open access movement is therefore a culturally significant one where reasonable access to prior work is being provided to future authors, in the expectation that they would engage with the work in a manner which serves the wider cultural goal of facilitating critical reflection. This, in our opinion, cannot be termed as an infringement of the copyright available to the publisher.

The next section will discuss another aspect of Kant's theories: the *private use of reason*, which essentially places certain restrictions on the *public use of reason* by individuals occupying posts such as that of a clergyman, military official, tax payer, among others. Although these roles may not be a direct subject of discussion on copyright law, we will use the underlying rationale of *private use of reason* to show how rights' retention by the author in their work has the ability to protect the interests of all stakeholders, while at the same time achieve the distributive goals of copyright law.

III. PRIVATE USE OF REASON AND RIGHTS RETENTION BY THE AUTHOR

For Kant, the *private use of reason* "is that which person may make of it in a particular civil post or office with which he is entrusted."[30] This at once feels strange because someone who is occupying a 'civil post' is deemed to be carrying out functions of a public nature, and hence may reasonably

[29] Patterson, *supra* note 20, at 11-12.
[30] J.C. Laursen, *The Subversive Kant: The Vocabulary of "Public" and "Publicity"*, 14 POL. THEORY 584 (1986).

be held accountable to the public for the same.[31] However, for Kant, *private use of reason* represents a privation of an individual's *public use of reason* in the sense that the authority to *reason* in this case is arising from someone else. Thus, the *reason* is being used in a prescribed manner, in the name of someone else.[32] Kant uses the examples of a military officer, a clergyman and a taxpayer to elucidate his distinction between the *private* and *public use of reason.* Through this lens, while a "private" military officer must follow orders, a "private" clergyman must preach what his church requires, and a "private" citizen, must pay his taxes. However, outside the domain of authority, they must be free to make use of their *public use of reason* and voice their opinions to the world at large.[33] A military officer outside of his employment must be free to publish his thoughts on the errors in the military service, a clergyman in his *public* domain must be free to challenge the teachings of the church and a taxpayer must have the freedom to publicly voice his criticism of the impropriety of the fiscal regime.[34]

A. Limits to the Free Use of Reason and Rights' Retention

The reason for Kant to place limitations on the free use of *reason* in certain situations is because he believes that such restrictions are conducive for the attainment of *enlightenment.* For Kant, *private* and *public use of reason* are not contradictory, but complimentary in the pursuit of *enlightenment.*[35] Being attentive to the political consequences of allowing free *public use of reason*, Kant believed that cooperation of political authority is necessary for the achievement of *enlightenment*, positing that human beings should be free to make use of their *reason*, but only within the context of humanly instituted and enforced laws.[36] Arguably, *private use of reason* is grounded in the contractual relations between the individuals and a higher authority in which the individuals have agreed to surrender some of their rights in favour of advancing common goals.[37] And so, the military officer and the clergyman are bound by the terms of their engagement by the military and the church respectively. The citizen-taxpayer's duty to pay tax arises from the privilege granted to it by the sovereign to undertake that trade. Furthermore, for Kant the surrender of *reason* by individuals is based on a *quid pro quo* with the sovereign in the sense that while individuals must obey when required, the sovereign in exchange should grant them the freedom to criticise outside the scope of their duties. This is beneficial for the sovereign too, because without such public criticism, it would be

[31] C. Cronin, *Kant's Politics of Enlightenment*, 41 J. HIST. OF PHIL. 51, 55 (2003).
[32] K. Koukouzelis, *Rawls and Kant on the Public Use of Reason*, 35 PHIL. & SOC. CRITICISM 841, 850 (2009).
[33] Laursen, *supra* note 30, at 588.
[34] Cronin, *supra* note 31, at 55.
[35] M. Clarke, *Kant's Rhetoric of Enlightenment*, REV. OF POL. 53, 60-61 (2009).
[36] *Id.* at 60-61.
[37] Cronin, *supra* note 31, at 56.

challenging to become aware of what ails the society and what reforms must be introduced to rectify it.[38] These illustrative aspects of Kant's private use of reason lend themselves well to apply legal theory to the increasingly relevant copyright phenomenon of rights' retention.

Transporting Kant's idea of *private use of reason* to copyright law, we have seen that the relationship between an author and a publisher is contractual and limited. For a publisher to publish, an author must first bring a work into existence by creating it. As the inherent rights in the work always remain with the author and what is transferred to the publisher is only a bundle of rights associated with the work, these rights can operate subject to the interests of other stakeholders *i.e.,* the authors themselves and the wider public. Rights retention by the author provides such a mechanism to rectify the asymmetry currently existing between the author and the publisher.

B. Creative Commons and Rights' Retention

Rights' retention facilitates open access publishing through the application of CC-BY licenses. As per the data available in the *State of Commons Report, 2022* it is estimated that over 2.5 billion CC-licensed open works are available online.[39] This is a substantial increase from 1.4 billion reported in the 2017 Report.[40] This popularity can be ascribed to the ethos of open access which denounces the increased commercialization of knowledge and shrinking of the public domain as a result of the unbridled expansion of the scope of copyright. At the same time, it is important to note that CC-BY does not seek to abolish the copyright regime.[41] In fact, it relies on the traditional principles of copyright law for its enforcement.[42]

At this point, and before analysing their purpose and implications, it is important to introduce key concepts in the operationalisation of rights' retention, namely 'Author Accepted Manuscript' ["**AAM**"], 'Version of Record' ["**VOR**"], and Creative Commons licenses ["**CC-BY**"]. An AAM is basically the final version of the work after considering all the comments and suggestions made during the review process. This is the version belonging to the author as accepted by the journal. Thereafter, the publisher turns this manuscript into the final article by carrying out suitable typesetting and formatting. This version is known as the VOR, which may take anywhere between

[38] Laursen, *supra* note 27, at 590.
[39] *State of the Commons, 2022*, CREATIVE COMMONS, https://creativecommons.org/state-of-the-commons-2022/#cc-licenses-and-legal-tools.
[40] *State of the Commons, 2017*, CREATIVE COMMONS, https://stateof.creativecommons.org/index.html#data.
[41] S. Dusollier, *The Master's Tools v. The Master's House: Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 271, 278 (2006).
[42] A. Giannopoulou, *The Creative Commons Licenses Through Moral Rights Provisions in French Law*, 28 INT'L REV. L., COMPUTERS & TECH. 60, 63-64 (2013).

weeks to months to be produced.[43] Rights are usually retained over the AAM version of the work. Finally, CC-BY is a set of public licenses provided by Creative Commons (CC), an international non-profit organization focused on knowledge sharing. These licenses give a person or organization a free and standardized way to grant copyright permissions for their work. There are six types of licenses which allows rights of distribution, copying, and making use of the work in various forms and simultaneously ensures proper attribution of the work to the original author.[44] In essence, rights retention is an option available to the author of a work, which allows them to retain their intellectual property rights over the AAM, and so use their work as they choose. In doing so, the author grants a license over the AAM as open access by self-archiving the work in a repository.[45] This is usually achieved by adding the following or similar 'magic sentence' to the cover page while submitting the AAM to the journal:

'A CC BY or equivalent licence is applied to the AAM arising from this submission.'[46]

The journal can either accept the manuscript with this condition or decline it. The advantages of rights retention are that it allows the author to retain a degree of control over his work and allows him to freely distribute his work to others by publishing the AAM in hybrid or open access journals. The publisher, on the other hand, is free to publish the VOR with all the additions it has made to the AAM, as per the journals' requirements.[47]

Once the rights in the work have been retained and to some extent insulated from a complete commercial takeover by the publisher, the author is free to distribute their work to the wider public. The AAM is deposited with a repository under a CC-BY license. Crucially, and although disputed by some publishers to date, rights' retention through the assignment of a CC-BY license takes precedence over any subsequent copyright transfer agreement that the author may sign with the publisher, because the author has asserted their rights not only by including a rights' retention clause, but also by making the work public.[48]

[43] S. Eglen, *Primer on the Rights Retention Strategy*, ZENODO (Apr 7, 2021), https://zenodo.org/record/4668132.
[44] *What We Do*, CREATIVE COMMONS, https://creativecommons.org/about/.
[45] S. Moore, *The Politics of Rights Retention*, 11 PUBLICATIONS 28 (2023), https://doi.org/10.3390/publications11020028.
[46] Eglen, *supra* note 43, at 2.
[47] *Id.*
[48] Moore, *supra* note 45, at 4.

As stated above, a CC-BY license allows various rights to end users; however different types of CC-BY licenses place different restrictions on end users. For example, the generic CC-BY allows users to distribute, remix, adapt, and build upon the work in any medium or format, so long as attribution is given to the creator. It also allows for commercial use. CC-BY licenses provide a range of forms, with different levels of restrictiveness. The following four forms are the most relevant for rights' retention:

1. **CC BY-SA** allows for all of the above, but the modified material must also be licensed under identical terms.
2. **CC BY-NC** is granted only for non-commercial purposes. CC BY-NC-SA is a combination of the above *i.e.*, it is granted only for non-commercial purposes and the modified material must be licensed under identical terms.
3. **CC BY-ND** allows commercial use with all rights as above; however, no adaptations of the work are permitted. Finally,
4. **CC BY-NC-ND** is the CC BY-ND minus commercial use of the work.[49] Thus, the author can retain control over his work by choosing the scope of activities permissible to the subsequent users.

C. Private Use of Reason and Copyright Licenses under Creative Commons

Coming back to our theoretical framework, recall that Kant had supported compliance with the laws laid down by a higher authority on the basis of reciprocal contractual obligations to achieve the greater common good, in lieu of allowing individual freedom of expression beyond this contract. In other words, the sovereign can legitimately expect obedience from citizens, in exchange for respecting their right to conscience and expression. In a similar exchange, under rights' retention, the author contracts with the publisher to grant it the right of publishing, subject to the author's right to exercise control over their work by exercising their inherent rights. By depositing the AAM with a repository, the author has granted the right of use to other users subject to securing their own interests through the application of one or the other form of CC-BY licenses. Seen in this light, the interests of all stakeholders – the author, the publisher and the public- are taken into account and thus protected. *Public use of reason* is exercised through dissemination of knowledge, while warranting *private use of reason* because the publisher is free to publish and monetize their version of the author's work, and free to pursue claims against any perceived infringement of their copyright over the same.

[49] *About CC Licenses*, CREATIVE COMMONS, https://creativecommons.org/about/cclicenses/.

Some publishers may differ with our analysis, although robust evidence on a systematic rejection of manuscripts containing the 'magic sentence' is lacking. This could be explained for the reason that most large publishers have a portfolio of both hybrid and fully open access publishing options, allowing them to accommodate the works in which rights have been retained into their database. Even for subscription-based journals, it may be possible for publishers to negotiate in the author agreement that authors may retain the rights but delay the deposition of the AAM with a repository for a certain time period (so-called embargo).[50] Lastly, like any system, rights' retention strategies are not short of vulnerabilities. The '*magic sentence*' or two added to the cover letter of the submission may not be legally sufficient to circumvent the prohibitions mandated under certain copyright provisions. The lack of clarity can expose authors, institutions as well as readers to legal risks. This is so because authors and institutions could potentially be distributing the work in contravention of certain publishing agreements. The reader can also be potentially at risk because, should the applied CC-BY license itself be rendered invalid as a result of the publishing agreement, then a user making use of that work can also be deemed to have done so in an unauthorized manner.[51] In addition to these limitations, making scientific work open access through rights' retention presents other significant challenges, namely the violation of the moral rights of the author and plagiarism.

IV. CHALLENGES OF OPEN ACCESS PUBLISHING

The expansion in the open access domain and the increased use of CC-BY licenses has brought to the forefront challenges and potential vulnerabilities that must be addressed for the objectives of open access to be realised. We discuss below two of the most significant challenges: moral rights and plagiarism.

A. Open Access and the Moral Rights of the Author

Moral rights originate from the personhood theory of copyright according to which work is an extension of the personality of its creator as projected into the world.[52] They seek to protect the non-commercial interests of the author which typically includes the right of attribution – to be named as the author of the work, and the right to integrity of the work *i.e.,* the right to object to

[50] L.- J. Hinchliffe, *Explaining the Rights Retention* Strategy, THE SCHOLARLY KITCHEN (Feb. 17, 2021), https://scholarlykitchen.sspnet.org/2021/02/17/rights-retention-strategy/.
[51] S. Yon-Seng Khoo, *The Plan S Rights Retention Strategy is an Administrative and Legal Burden, not a Sustainable Open Access Solution*, 34 INSIGHTS 1, 5 (2021).
[52] C.-H. Settlemyer III, *Between Thought and Possession: Artists' "Moral Rights" and Public Access to Creative Works*, 81 GEO. L. J. 2291, 2303 (1993).

mutilations or distortions of the work.[53] Under international copyright law, [54] Article 6*bis* of the Berne Convention grants the author a right to be recognized as the author and to object to any distortion, mutilation, or other derogatory action in relation to his work, which would be prejudicial to his honour or reputation.

The right to attribution is recognized under section 3 of the CC-BY 4.0 license agreement, in cases where the licensed work or its modified form is shared with the public. According to the terms of the section, the licensee is required to identify the licensor in any reasonable manner.[55] Attribution has largely remained uncontroversial, although there may be cases where compounded sharing of the work may become so complex -with multiple modifications, contributions, etc.- that the necessary distinction between the original version and the subsequent versions may become blurry. In such cases, attribution of all contributions and modifications may not be a straightforward matter,[56] likely exposing the users to potentially unmitigated risks.

Integrity rights present a bigger challenge. While section 2(b)(1) of the CC-BY 4.0 license agreement expressly states that moral rights such as the right of integrity or other personality rights are not licensed under it, there is a caveat included. This section further states that the licensor waives and agrees not to assert such rights, to the extent it is necessary for a user to exercise their rights granted under the terms of the license. This carve-out is problematic, in that it is far from clear which element in the agreement would take precedence – rights to the integrity of the work, or right to use the work. In addition, section 3(1)(b) establishes that the licensee must 'indicate' the modifications, if any, that they made to the original work in case they share the modified version with the public. As stated above, it can be challenging to attribute modifications to the work in cases of compounded sharing. What is to be noted here is that the licensee is merely required to *indicate* that changes have been made to the original text, and is not *required* to show what those changes are. Absent this requirement, there is a latent risk for a distorted version of the work attributed in the name of the original author to be shared with the public, leading to potential reputational damages for the original author. As such, the authorization to make use of

[53] M.-T. Sundara Rajan, *Creative Commons: America's Moral Rights*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 905, 909 (2011).
[54] Berne Convention for the Protection of Literary and Artistic Works, July. 24, 1971 (Paris), WIPO, 828 U.N.T.S. 221.
[55] Attribution 4.0 International, CREATIVE COMMONS, https://creativecommons.org/licenses/by/4.0/legalcode.
[56] A. Giannopoulou, '*Sharing is Caring': Creative Commons, Transformative Culture, and Moral Rights Protection*, AMSTERDAM LAW SCHOOL LEGAL STUDIES RESEARCH PAPER NO. 2022-42, (University of Amsterdam 2022).

and to modify the work must not be perceived to have been granted at the expense of the right of integrity of the original work.

An additional challenge is posed by the difficulty in maintaining a balance between freedom of creation and respect for the integrity of the original work through the use of CC-BY licenses. For example, in 2007, the French *Cour de cassation* – one of the four courts of last resort in France, while deciding a case involving *Les Misérables* by Victor Hugo- denied the claim of one of his descendants who was keen in preventing the publication of a sequel to the novel. The claim was ultimately denied on the basis that a work available in the public domain is open for adaptation, and any harm to the integrity of the work must be proven to justify suppressing the freedom of creation of other users.[57] Thus, while considering a claim alleging violation of the integrity of a work, it is essential to stay close to the main rationale of the CC-BY licenses: that of promoting the free dissemination of work.

B. Open Access and Plagiarism

Plagiarism is not only illegal but is also considered unethical. In a sense, plagiarism has always been dependent on the current state of technology, in that plagiarism is possible only to the extent the technology of the day makes it possible. In earlier times, access to printed work was accessible only to those who could travel to the libraries and repositories which physically held the work. Detecting plagiarism was difficult and would usually only be established in cases where a person familiar with both texts could scrutinize the documents together to establish their originality[58] (or lack thereof). Today, there are billions of open access works available online, increasing the risk of the ease with which these can be used by third parties without giving proper attribution to their original authors.

It is interesting to note that the source of most copyright violations in scholarly work today can be traced back to the internet, which indicates that the open access availability of work does facilitate ease of plagiarism.[59] As illustration, a survey carried out with academics of a research-intensive university in Malaysia revealed, in 2009, that for 73.8% of the respondents, concerns of potential plagiarism was the top deterrent against self-archiving their work,[60] a telling indication of

[57] *Id.*, at 70.
[58] D. Ocholla and L. Ocholla, *Does Open Access Prevent Plagiarism in Higher Education*, 26 AFR. J. LIBR., ARCHIVES & INFO. SCI. 187, 192 (2016).
[59] J. Brandt et al., *Plagiarism Detection in Open Access Publications*, in Proc. of the 4th Int. Plagiarism Conference (2010).
[60] A. Abrizah, *The Cautious Faculty: Their Awareness and Attitude Towards Institutional Repositories*, 14 MALAYSIAN J. LIBR. & INFO. SCI. 17, 30 (2009).

the interplay between the importance of self-archiving and a perceived lack of copyright protection when CC-BY licenses are in use. Conversely, it is also widely accepted that the use of the internet, coupled with the proliferation of open access systems, has led to much easier and greater detection of plagiarism. For example, the unrestricted availability of work over open access makes them particularly suitable for plagiarism detection software like Turnitin and Docoloc.[61] In fact, it may also be the case that, as a result of open access publishing, authors are being even more attentive when publishing their research -as a charge of plagiarism has the potential to cause major embarrassment and reputational loss.[62]

As a result, when it comes to plagiarism, open access is a double-edge sword in that it can facilitate as well as detect plagiarism.[63]

On a concluding note, the use of most CC-BY licenses, barring few, allow for commercial use of derivative works. This is important to emphasise because, even though attribution is one of the requirements, we have seen above that, attribution may become progressively difficult in cases of compounded modifications, or when the changes made to the original work are merely indicated but not substantially defined, resulting in the subsequent user potentially, even if inadvertently, come into the enjoyment of commercial fruits of scientific works to the detriment of the original author. This is one key situation which the terms of the licenses fail to address at present, and for which new copyright law will need to provide an alternative avenue of redress.

V. CONCLUSION

The rapid expansion in the scope of copyright protection appears to have diminish the public domain of knowledge and scientific dissemination. Corporate capture of publishing industries must not only be seen as a private loss to the author, but as a loss for all. If left unattended, imposing undue restrictions on the accessibility to generated knowledge will stifle the ability of future generations to engage in independent thinking, with wider implications for the development and progress of global societies.

In this paper, we have engaged with the legal-philosophical foundations of open access by grounding our analysis in Kantian ideas of public and private use of reason. Through this lens, we argued that, for all its potential pitfalls, open access has the ability to delicately balance the interests

[61] Ocholla, *supra* note 58, at 5.
[62] *Id.*
[63] J. Purdy, *Calling Off the Hounds: Technology and the Visibility of Plagiarism*, 5 PEDAGOGY 275, 276 (2005).

of all involved stakeholders - including those of commercial publishers. We suggested that open access, in its variety of forms, allows for reciprocal, bifurcated copyright arrangements that display the ability of authors to honour contractual obligations with commercial publishers on the one hand, while openly disseminating their scientific findings to the public at large on the other hand, thus adding nuance and complexity to an emerging new copyright law – one that embraces principles of equity and inclusion, while being fit for purpose in light of rapid technological advances.

When Kant discusses the idea of *enlightenment*, he makes it clear that any obligation which has the effect of keeping humans away from the pursuit of *enlightenment* is absolutely null and void,[64] in a sense equating the will of the sovereign with the will of the people. Kant's view on public and private use of reason reminds us that this value alignment is necessary and continues to be relevant today. The open access movement optimises access and maximises the impact of scientific research. A work which is freely accessible is read more widely and is cited more often, thus contribution to a virtuous cycle of knowledge generation. Moreover, the use of CC-BY licenses is a carefully balanced act in deference to foundational principles of copyright law and the freedom to contract, seeking to give back control to the original creators of the work: the author. Also, given that a significant portion of academic research is publicly funded, there is a strong argument[65] in favour of making it freely available to the public.

One way of shifting towards a more responsible culture of commercial academic publishing is to see the advancement of scientific knowledge as a social responsibility, so enabling commercial publisher to act as social partners in this process. This could be done by partnering with academic institutions such as universities, libraries, research centres, etc. to device mutually beneficial collaborations,[66] while simultaneously promoting -and indeed operationalising- the social objectives of publicly funded scientific works. In turn, publishers (as the "gatekeepers" of standards in the publishing business)[67] could provide invaluable experience in addressing the challenges posed by distortions of original works and concerns of plagiarism, both significant concerns for open access systems, as we have seen. In this way, commercial publishers would

[64] Cronin, *supra* note 31, at 57.
[65] P. Suber, *Open access overview: Focusing on open access to peer-reviewed research articles and their preprints*, OPENSOURCE.COM (Nov. 15, 2010), https://opensource.com/education/10/10/open-access-overview-focusing-open-access-peer-reviewed-research-articles-and-their-
[66] N. Koutras, *The Evolving Role of Commercial Publishers and the Future of Open Access Repositories: The Potential of Corporate Social Responsibility*, 35 PUB. RES. Q. 391, 409-410 (2019).
[67] *Id.* at 409.

continue to play a key role as "gatekeepers" of academic publishing standards in a more open, inclusive and equitable knowledge dissemination environment. Engaging in such initiatives would shift the narrative engulfing commercial publication of scientific works towards a realigned reality where partnerships, not profits, are at the core of knowledge dissemination.