AN EU LEGISLATIVE AND REGULATORY FRAMEWORK FIT FOR RESEARCH AND THE SECONDARY PUBLICATION RIGHT

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Abstract

According to the European Commission's „European Research Area Policy Agenda - Overview of actions for the period 2022-2024", one of the actions foreseen within the Priority Area of „Deepening a truly functioning internal market for knowledge", is the development of a legislative and regulatory framework fit for research, that would enable, among other things: access and reuse of publicly funded R&I results, including open access; access and reuse of publications and data for research purposes and; the seamless flow of research knowledge and data across the EU based on Article 179 TFEU and academic freedom. This paper examines the notions of Open Science (OS) and Open Access (OA), as well as the legal mechanism of the so-called Secondary Publication Right (SPR). It furthermore presents an overview of the measures undertaken by the Directorate-General for Research and Innovation in advancing access to knowledge and reflects on the fitness of the SPR mechanism to address the issues with existing barriers and challenges to the objectives set by the Commission.

Keywords: EU internal market for knowledge; open access; academic publishing; copyright; secondary publication right (SPR)

Introduction

An important aspect of EU digital policies is the steadfast promotion of the enhancement of the availability and accessibility of publicly funded knowledge and resources. As various open access strategies and soft law incentives at the EU level have not been sufficiently effective in making the outputs of publicly funded research widely accessible to the public, some Member States are taking the matter into their own hands by introducing a legislative 'hack' to the

considerably dysfunctional models of commercial scholarly publishing that might boost Open Access in its 'Green' form – the so-called Secondary Publication Right (SPR).[1] The term encompasses various special legal regimes that empower or oblige authors of academic literature to retain certain usage rights over their publicly funded works, thereby facilitating open access to scientific literature in relation to scientific publishers. This contribution explores how a harmonised EU SPR regime could align with the European Research Area Policy Agenda for the upcoming legislative cycle.

Accessing Publicly Funded Publications – The Inadequacies of the Current Paradigm

In the realm of scholarly publications, authors are often funded through ongoing contracts with universities or research institutes, or through project-specific funding, including from the EU. At the same time, academics' behaviour as they choose to which journals and conferences, they submit their papers to is conditioned, to a very high degree, by the academic reward system.[2] As part of the so-called 'publish or perish' culture, there is increasing pressure on individual scholars to publish in high quality, well-ranked journals[3] as a central aspect of academic life and career progression. Typically, while the publishers of such journals do not pay to authors any pecuniary remuneration, they require the latter to assign or exclusively license their rights, thereby placing the publication behind a paywall. This may result in private entities 'appropriating' copyright in scientific publications, which is particularly problematic for publicly funded research.[4] It raises significant concerns, because, on the one hand, knowledge sharing and reuse are fundamental to the scientific method.[5] On the other hand, while it is true that academic authors

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[1] In its report on SPR for the Knowledge Rights 21 programme, LIBER uses the term 'publishing' instead of 'publication', 'as the latter might be confused with byproducts of an original publication, such as translations. Therefore, the former term seems to better convey the act of publishing a work at a secondary stage.' See Tsakonas, G., Zoutsou, K., & Perivolari, M. (2023). Secondary Publishing Rights in Europe: status, challenges & opportunities. Zenodo <https://doi.org/10.5281/zenodo.8428315>.

[2] Björk, B. C. (2004). Open access to scientific publications - an analysis of the barriers to change? <https://informationr.net/ir/9-2/paper170.html>.

[3] Barros, A., Prasad, A. and Śliwa, M., 2023. Generative artificial intelligence and academia: Implication for research, teaching and service. *Management Learning*, *54*(5), pp.597-604.

[4] European Commission, Directorate-General for Research and Innovation, Angelopoulos, C. (2022). Study on EU copyright and related rights and access to and reuse of scientific publications, including open access. DOI: 10.2777/891665.

[5] For a detailed analysis of the specificities of the author's interest in the context of scientific publishing, see Moscon, V. (2014). Academic freedom, copyright, and access to scholarly works: a comparative perspective. In Balancing Copyright Law in the Digital Age: Comparative Perspectives (pp. 99-135). Berlin, Heidelberg: Springer Berlin Heidelberg.

primarily seek reputational benefits from publishing in journals,[6] traditional commercial scientific publishing often forces them to compromise the visibility of their work. Thirdly, research performing and funding organisations cannot access the research they funded unless they pay again for access–either through license fees to access the research via academic libraries or through fees to make the work available to the public via open access - both expenses payable to commercial publishers and database vendors.

This issue is further compounded by the highly commercialised nature of the scientific publishing market. In 2004, Björk stated the lack of competition in the academic publishing sector resulting in a concentration of journal titles among a few major entities,[7] thereby allowing pricing strategies to be dictated more by individual customers' willingness and ability to pay rather than production costs. Consequently, access to knowledge over the Internet remained more or less as expensive for academic libraries and individual subscribers as before in paper format.[8] The issue was exacerbated by concerns of potential consolidation through mergers among the largest publishers, as well as strategies like bundling and differential pricing. Even though at present, the OA publishing market has become more competitive, it seems that it has been entered and dominated in large part by traditional publishers.[9]

In addition, commercial scholarly publishing is intricately linked with indexing services and the academic reward system.[10] For instance, the Amsterdam-based academic mega-publisher *Elsevier* owns, amongst others, one of the two most popular and widely used databases for academic research and publication – *Scopus*, as well as the leading full-text scientific database *ScienceDirect*. The English-American company *Clarivate Plc*, known for being the company which

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[6] According to Björk, 'authors do not give away their product for free. Instead, they trade their papers without specific payment in exchange for the services that the publisher renders them (peer review, quality labelling, marketing, and dissemination)' (Björk, n 2). Angelopoulos also states that, 'inter alia as a result of the ex-ante remuneration and tenure [academics] enjoy in the name of academic freedom - researchers tend to be motivated primarily by reputational gains, with peer esteem understood to translate indirectly into professional advancement.' (Angelopoulos, n 4)

[7] In 2015 scholars from the Montreal University found that in both natural and medical sciences and social sciences and humanities, Reed-Elsevier, Wiley-Blackwell, Springer, and Taylor & Francis increased their share of the published output, especially since the advent of the digital era (mid-1990s). Combined, the top five most prolific publishers account for more than 50% of all papers published in 2013. See Larivière, V., Haustein, S. and Mongeon, P. (2015). The oligopoly of academic publishers in the digital era. PloS one, 10(6), p.e0127502.

[8] Frazier, K. (2001). The librarians' dilemma - contemplating the costs of the 'Big Deal'. D-Lib Magazine 7(3) <http://dx.doi.org/10.1045/march2001-frazier>.

[9] Shu, F. and Larivière, V., (2024). The oligopoly of open access publishing. Scientometrics, 129(1), pp.519-536.

[10] For a more detailed explanation of commercial scientific publishers' market power, linked to bibliometric evaluation, which translates into bargaining power for publishers vis-à-vis academic authors, see Dore, G., & Caso, R. (2021). Academic Copyright, Open Access and the „Moral" Second Publication Right. <https://zenodo.org/records/5764841#.YidpCXrP13g>.

calculates the impact factor and the owner of, amongst others, *Web of Science* and *Publons*, in 2021 acquired the collection of cross-searchable databases *ProQuest*. These circumstances raise concerns of vertical integration between publishers, aggregators and companies performing bibliometrics and scientometrics and also of big publishers acting as gatekeepers to academic growth.

Open Science and Open Access in Scientific Publications

One of the main tools available at the EU level to tackle all these issues is the framework of open science (OS) and open access (OA). Although not central for the present contribution, the terms 'open' in general, as well as 'open science' and 'open access' in particular, need to be clarified in order to delineate the scope of practices and policies that fall under them, which in turn can help the consistent implementation of the relevant EU policies. It should be acknowledged, that the usage of the term 'open' varies slightly across different contexts and sectors. Prominent open movements encompass open-source software, open data, open culture, open content, open GLAM etc. Notwithstanding existing nuances in terminology, when talking about 'open', one typically envisages information and tools that are both broadly *accessible* to the public, as well as *reusable*. For example, open licences are such copyright licenses that authorise all types of reuses of the licensed content, including further dissemination and adaptation, as well as use for commercial purposes.[11]

'Open science' in terms of EU policies refers to a framework and set of principles aimed at making scientific research accessible to all levels of an inquiring society, amateur or professional. It includes initiatives and policies designed to promote transparency, accessibility, and collaboration in scientific research across Europe. In this, the European Union employs mostly soft law instruments. The legal framework for open science at the EU level is complex and with limited application, mainly since applicable instruments were not specifically designed for academic purposes and are only tangentially relevant to research results.[12] One of the key elements of open science is open access.

The term 'open access' (OA) holds a particular meaning distinct from other uses of 'open'. Although initially defined by the Budapest Declaration of 2002 as the 'free availability on the public internet, allowing any users to

[11] For a very detailed explanation of the various aspects and meanings of 'open', see Europeana Copyright Community Steering Group (2024). FAQs on digital cultural heritage and the concept of openness. <https://europeana.atlassian.net/wiki/spaces/EF/pages/2647490571/FAQs+on+digital+cultural+heritage+and+the+concept+of+openness>.

[12] van Eechoud, M. (2022). Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research. <https://pure.uva.nl/ws/files/99127433/study_on_the_open_data_directive_data_ governance_and_KI0822204ENN.pdf>.

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, without financial, legal, or technical barriers other than those inseparable from accessing the internet itself,'[13] therefore, originally including free reuse, in the realm of EU open data and open science policies, the term 'open access' lacks a formal definition and does not always imply the possibility of reuse. On the one hand, the Commission Recommendation (EU) 2018/790[14] defines 'open access' as 'the possibility to access and re-use digital research outputs with as few restrictions as possible.' Similarly, the Open Data Directive (EU) 2019/1024[15] defines it as 'the practice of providing online access to research outputs free of charge for the end user and without restrictions on use and re-use beyond the possibility to require acknowledgment of authorship.' On the other hand, however, 'open access' is widely perceived by the academic community as a tool solely ensuring the *free availability* of research results, without specifying reuse conditions. This view is reinforced by legal definitions of 'open access' in other EU documents. The Regulation (EU) 2021/695 establishing Horizon Europe[16] and the Horizon Europe General Model Grant Agreement[17] describe 'open access' as 'free of charge, online access for any user,' while the subsequent use of research results, such as scientific publications or data, is termed 'reuse'.

In scientific publishing, the various types of open access, like 'Green', 'Gold', 'Platinum', and 'Hybrid OA', refer only to the way content is made publicly accessible and to who bears the cost for making these publications freely available.[18]

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[13] See the Budapest Open Access Initiative (2002) <www.budapestopenaccessinitiative.org/read/>. According to this document, the only constraints on reproduction and distribution [in Open Access], and the sole role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited. This substantive scope is maintained by the Berlin and Bethesda Declarations of 2003.

[14] European Commission Recommendation (EU) 2018/790 on access to and preservation of scientific information of 25 April 2018.

[15] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, PE/28/2019/REV/1, OJ L 172, 26.6.2019.

[16] Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe - the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, and repealing Regulations (EU) No 1290/2013 and (EU) No 1291/2013, PE/12/2021/INIT, OJ L 170, 12.5.2021.

[17] Horizon Europe, General Model Grant Agreement, n16. / EIC Accelerator Contract, Version 1.2 of 01.04.2024. <https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/common/agr-contr/general-mga_horizon-euratom_en.pdf>.

[18] Even though the main advantage of open access publications is that OA removes the price barriers and permission-related restrictions for users, open access publications are not created for free - instead, the cost is not paid by the users. See Georgieva, K. and Marinov, E., (2015). Open Access - Definitions, Legal Framework, Advantages. <https://adis.org/ERIS_conference/2015/sbornik-ERIS.2015.pdf>.

Is 'Open' the Solution? Challenges to the OA Model

Notwithstanding the variety in terminology, the main routes an open access publication might take are two. One is through the so-called 'primary' OA outlets, such as peer-reviewed journals for primary open access publishing (Gold OA). The other main OA channel is the so-called 'self-archiving' (Green OA). This is the practice of authors depositing a copy of their published or pre-publication works for secondary parallel publishing in an OA repository. Both routes, however, come with their own obstacles and inefficiencies. Bjork classified the barriers to open access into six different categories: legal framework, information technology infrastructure, business models, indexing services and standards, academic reward system, and marketing and critical mass.[19] In this respect, it should be acknowledged that the two main types of OA channels face different challenges. These challenges make it so that OA publishing is not as popular as one might expect and does not necessarily decrease the overall cost of publication for academic institutions.[20]

Firstly, in terms of 'primary' OA outlets, OA policies can further go in two main avenues – publishing in publicly funded OA journals, or publicly funded publishing in commercial journals. OA journals may be typically funded by universities and research organizations, or they may follow collaborative OA publishing models.[21] However, according to a recent study, although the low market entry threshold has allowed many competitors to appear in the OA publishing market, traditional commercial publishing houses have used their advantageous publishing resources to regain a dominant position in the market.[22] As open access expands and accelerates the application and commercialization of research results, publishing in OA journals is beneficial in the way it increases the return on public and private investment in the field. However, the cost of knowledge dissemination is transferred from readers to authors, prevent academics from developing countries from publishing their research in OA journals, which builds a new paywall in scholarly communication.[23]

Furthermore, independent OA journals encounter challenges with entering the reputational value market. On the one hand, a significant challenge facing open access journals is their limited inclusion in mainstream commercial indexing services, which are crucial for locating high-quality scholarly publications. Although partially stemming from the perception of indexing services as aligned with traditional establishments,[24] this exclusion is mostly associated

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[19] See Björk, n 2.

[20] Shu et al, n 9.

[21] Naim, K., Brundy, C. and Samberg, R.G. (2021). Collaborative transition to open access publishing by scholarly societies. Molecular Biology of the Cell, 32(4), pp.311-313.

[22] Shu et al., n 9.

[23] Ibid.

[24] Björk n 2.

with indexing services typically prioritising established journals with a proven track record thus posing entry barriers to relatively young and experimental journals. According to Communia's Policy Paper on Access to publicly funded research, notwithstanding the emergence of new open access journals, the scientific publications market has been unable to self-correct.[25] One probable reason for the market not self-correcting is the fact that big scientific publishers have made themselves indispensable concerning both indexing and the academic reward system. Apart from the challenges emerging journals face in terms of attracting quality submissions and establishing academic credibility, there is also a persistent concern regarding the connection between big publishers and scientometrics services and the potential conflict of interest associated with it. Thus, the problem of hindering access to the results of publicly funded research, where 'primary' OA outlets are concerned, has a very pronounced competition law component. This is also true in terms of the academic reward system.

Next, publications can also be made 'primarily' available under open access in traditional, paywalled journals. In this case, the government or a university would pay to the commercial publisher a compensation fee for 'opening' the publication to the public. The so-called Hybrid OA, which consists in public bodies paying traditional subscription-based journals to publish specific academic works under open access in an otherwise paywalled editions. In other words, this publishing model allows for a mix of open access and subscription-based content within the same journal. Hybrid OA (as well as Gold OA controlled by traditional publishers) is in the heart of the so-called *transformative agreements*[26] and seem to be the preferred route to open access on a national policy level. However, this open access policy approach also leads to what is known as 'double-dipping', wherein publishers exploit the exclusive rights over publicly funded research results without compensating the academic authors or reviewers, while also receiving payment from the public to make the work accessible. It turns out that, somewhat counterintuitively, the combination of both subscription and publishing costs for public interest users increases the global cost of OA publishing.[27]

The other main OA route - Green OA, also called 'self-archiving', typically involves secondary publishing in not-for-profit repositories. These can include institutional repositories (managed by universities or research institutions) or subject-specific repositories, which mainly function as secondary outlets complementing the mainstream channels of journals and conference pro-

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[25] Communia (2024). Policy Paper n 17 on Access to publicly funded research, notwithstanding the emergence of new open access journals, the scientific publications market has been unable to self-correct <https://communia-association.org/policy-paper/policy-paper-17-on-access-to-publicly-funded-research>.

[26] See the recent Agreement between Bulgaria and Elsevier <https://www.elsevier.com/open-access/agreements/ bulgaria>.

[27] Shu et al., n 9.

ceedings.[28] This type of open access is operating independently of the academic reward system, the latter having both positive and negative effect on individual academics' carriers. On the one hand, Green OA has the benefit of independence of big publishers, typically leading to increased visibility and citations, which in turn can indirectly enhance authors' academic standing and incentivise further uploads. On the other, repositories seldom feature significant publications alone. Usually, authors use these repositories to expedite the dissemination of their manuscripts, which are often concurrently submitted elsewhere. Alternatively, academics deposit versions of publications that might have already been published in a high impact factor journal. The biggest downside of this 'Green OA' route is the possible legal – mostly contractual – barriers for republication. Given the very limited bargaining power that researchers have vis-à-vis big commercial publishers, they usually are not able to retain much of their copyright over their own work, so they could republish it elsewhere without breaching their publishing contract or getting themselves blacklisted by high impact factor outlets. Even in cases where publishers allow for self-archiving, it is conditioned upon publishing a previous, non-reviewed version of the publication, and after the expiration of a specified period, called an 'embargo period'.

The Secondary Publications 'Hack'

In this context, in the past decade numerous EU countries introduced a legally guaranteed self-archiving opportunity called a secondary publication right (SPR). The term 'SPR' may cover a variety of special legal regimes empowering – or obliging – authors of academic literature to retain some of the usage rights over their publicly funded works vis-à-vis scholarly publishers to facilitate open access to scientific literature. The Knowledge Rights 21 programme has issued a statement[29] containing an overview of the existing national SPR regimes as of the beginning of 2023, covering Spain,[30] Italy,[31] Germany,[32] Austria,[33] France,[34] the Netherlands[35] and Belgium.[36] However, this list presents

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[28] See Björk, n 2.

[29] Knowledge Rights 21 (2023). A Position Statement from Knowledge Rights 21 on Secondary Publishing Rights <https://www.knowledgerights21.org/wp-content/uploads/2022/10/KR21-Secondary-Publishing-Rights-Position-paper-v1.1.pdf>.

[30] Art 37, para 2 of the Spanish Law 17/2022 on Science. Technology and Innovation.

[31] Art 4, para 2 of the Italian Law of October 7, 2013, n. 112, G.U. n. 236. In Italy, there is also an attempt to introduce SPR - the so-called Legge Gallo - pending since 2018. See DDL n. 1146, '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.senato.it/leg/18/BGT/Schede/Ddliter/51466.htm>.

[32] Section 38, para 4 of the German Copyright Act (*UrhG*).

[33] Art 37a of the Austrian Federal Law on Copyright in Literary and Artistic Works and Related Rights.

[34] Art L533-4 of the French Research Code.

[35] Art 25fa of the Dutch Copyright Act.

[36] Art XI.196 § 2/1 of the Belgian Economic Law Code.

a mix of both 'secondary publication right' (SPR) and so-called 'secondary publication obligation' (SPO) solutions. It also does not include the most recent developments in this field in Slovenia[37] and Bulgaria.[38] A recent study of the European Commission has identified SPR regimes proper in six member states - Germany, the Netherlands, Austria, France, Belgium and Bulgaria.[39]

In the meantime, significant efforts have been made to conceptualise SPR. The mechanism has been defined as an author's right, as well as an exception and/or limitation to copyright. Most popular takes on the nature of SPR as a right include categorising it as an incarnation of the author's moral right to disclosure,[40] or as a 'secondary' usage right.[41] Notwithstanding doctrinal approach, however, all the SPR regimes existing on the national level are, in their essence, imperative contract adjustment mechanisms, uniformly positioned within copyright contract law to balance power dynamics between authors and publishers. In all cases identified by the Commission study of May 2024,[42] the author is the holder/beneficiary of SPR as a copyright tool. The object of the right varies across Member States but usually pertains to short scientific contributions in periodicals. A crucial condition for SPR to apply is for the publication to be the outcome of publicly funded research. The effect of existing national provision constitutes, without exception, in *preventing the alienation of specific usage rights* and thus imposing, in certain circumstances, statutory rights retention in a specific scope. In this, SPR has a twofold purpose. On the one hand, it serves as a safeguard of authors' rights within the heavily commercialised ecosystem of scientific publishing. Through SPR, the academic researcher, as a primary rightsholder, avoids being coerced into a 'buyout' scenario, wherein negotiation for retaining certain rights from a publisher, who holds significantly stronger bargaining power, becomes unnecessary. Thus, the individual author can actively facilitate a secondary dissemination of the publication, securing its higher visibility and citability.

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[37] Decree No. 00704-212/2023 of 25 May 2023 on the implementation of scientific research work in accordance with the principles of open science, as per the Slovenian Scientific Research and Innovation Activities Act.

[38] Article 60, para 2 and seq. of the Bulgarian Copyright and Neighbouring Rights Act. For an overview of the introduction of a non-overridable zero-embargo SPR in the Bulgarian Copyright and Neighbouring Rights Act in December 2023, see Lazarova, A. (2024). Introducing a zero-embargo Secondary Publication Right in Bulgaria Kluwer Copyright Blog <https://copyrightblog.kluweriplaw.com/2024/02/09/introducing-a-zero-embargo-secondary-publication-right-in-bulgaria/>.

[39] European Commission, Directorate-General for Research and Innovation, 2024. Improving access to and reuse of research results, publications and data for scientific purposes - Study to evaluate the effects of the EU copyright framework on research and the effects of potential interventions and to identify and present relevant provisions for research in EU data and digital legislation, with a focus on rights and obligations. Publications Office of the European Union. <https://data.europa.eu/doi/10.2777/633395>.

[40] Dore & Caso, n 10.

[41] Tsakonas et al., n 1.

[42] In the Dutch case - it is 'the creator (maker)' of a short academic work.

On the other hand, the main strategic goal associated with SPR is the wide dissemination of scientific research. Some authors describe the role of SPR in this respect as a 'Green Open Access *backstop*'[43] that ensures availability of publicly funded research where Gold and Hybrid OA fail.

Considering the above, it is important to note that all currently available national SPR regimes cover open access in the 'making the publication accessible to the public' variety of the term.[44] Commentators are divided regarding the possibility of expanding the scope of this particular tool to also include reuse. The LIBER model SPR clause - a template developed by the Association of European Research Libraries to advocate for the retention of authors' rights when publishing their research - states that no contractual or other restrictions on the reuse of the scholarly work should be enforceable regarding a scholarly work whose author has been majority funded by public funds.[45] Others believe that the insistence on the use of open licenses and public domain dedication tools, like CC-BY and CC 0, which are the Creative Commons tools most commonly imposed by OA journals and funders, while preventing academic publishers from controlling copyright, does not effectively restore meaningful control to authors.[46] In my view, SPR as a copyright mechanism could not sustainably cover free reuse of a publication on top of free access to it, since such a major restriction to the contractual autonomy of both authors and publishers might not withstand a proportionality assessment.

Furthermore, what is referred to as SPR in some countries is in fact an obligation to re-publish publicly funded research, referred to as Secondary Publication Obligation (SPO), or a statutory clause promoting open science. This is the case in Spain, Germany,[47] Italy, Slovenia, and recently - Bulgaria,[48] making the latter the first EU state to adopt a comprehensive legislative approach

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[43] Zeinstra, M. (2024). Secondary Publishing Rights in the Netherlands. Right2Pub: Balancing Publication Rights. <www.knowledgerights21.org/wp-content/uploads/KR21-Maarten-Zeinstra.-April-2024.-SPRs-in-the-Netherlands.pdf>.

[44] For a comprehensive break-down of existing national SPR provisions, see European Commission, n 39.

[45] LIBER Draft Law for the Use of Publicly Funded Scholarly Publications <https://libereurope.eu/draft-law-for-the-use-of-publicly-funded-scholarly-publications/>.

[46] van Eechoud, M. (2023). FAIR, FRAND and open-the institutionalization of research data sharing under the EU data strategy. In Improving intellectual property (pp. 319-329). Edward Elgar Publishing.

[47] Germany is the first country to combine, albeit partially, SPR and SPO. While SPR is regulated under federal copyright law, SPO is mandated in the Baden-Württemberg's State Higher Education Act, requiring universities to ensure researchers exercise secondary publication rights. The latter legislative solution faced legal scrutiny, with University of Konstanz law professors challenging it on grounds of academic freedom. The case now rests with the Federal Constitutional Court, addressing the constitutional competence over university obligations rather than the core of the SPO itself. See Fischer, G. (2023). Zweitveröffentlichungsrecht und Causa Konstanz: Bundesverfassungsgericht vor Entscheidung <https://irights.info/artikel/zweitveroeffentlichungsrecht-bundesverfassungsgericht-konstanz/31878>.

[48] See the new Bulgarian law on the Promotion of Scholarly Research and Innovation, promulgated in issue 39 of the State Gazette of 1 May 2024 <https://dv.parliament.bg/DVWeb/showMaterialDV.jsp?idMat=214107>.

to secondary publications, incorporating both a right and an obligation to republish at the national level.[49] SPOs can complement existing SPRs and vice versa, highlighting the need for a comprehensive EU approach to secondary publications, integrating legislative measures from copyright, open data, and open science domains.

A Truly Functioning Internal Market for Knowledge

At the EU level, policies on open science are framed in the context of the European Research Area (ERA) and rely on strategic documents, recommendations, programs and funder policies.[50] One of the main relevant documents is Recommendation (EU) 2018/790 of the European Commission on access to and preservation of scientific information of 25 April 2018, according to which Member States should define and implement clear policies for the dissemination of scientific publications resulting from publicly funded research and for open access to them. They should ensure that scientific organisations that receive public funding for their activities provide open access to scientific publications to their researchers. The other main avenue for promoting OA publications and open data at the EU level are research funding programmes, such as FP7, H2020 and Horizon Europe. Mirroring the Commission's approach, most countries rely on a mix of strategic and operative documents, funding programs and institutional policies to further the open science agenda.

The only comprehensive legislative framework concerning 'open' access and reuse currently available at the EU level is that on open data. However, 'open data' is not so much about scientific data, as it is about transparency in government and more precisely – open access and reuse of public sector information. At the EU level, the legal framework governing open data is delineated in the Public Sector Information/Open Data Directive (EU) 2019/1024.[51] This directive primarily addresses the unrestricted accessibility and reuse of data collected by public sector entities, such as state institutions. However, data managed by universities and research organizations that emerges from publicly funded research is regulated only partially by this legislation.

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[49] For a commentary on the open science provisions in the new Bulgarian Research law, see Lazarova, A. (2024). Unlocking Knowledge: Bulgaria Takes Next Steps in Open Science Legislation. <https://www.knowledgerights21.org/news-story/unlocking-knowledge-bulgaria-takes-next-steps-in-open-science-legislation/>.

[50] According to Horizon Europe's granting agreements, 'The beneficiaries must ensure open access to peer-reviewed scientific publications relating to their results.' See Horizon Europe, n 16.

[51] The Open Data Directive (EU) 2019/1024 (last revision of the Public Sector Information Directive 2003/98/EC, amended by Directive 2013/37/EU), which has the objective to maximise the reuse of public data to further stimulate digital innovation in products and services, has expanded its scope from traditional public sector information to cover certain instances of data resulting from publicly funded research. Bulgaria implemented Directive (EU) 2019/1024 in its Law on the Access to Public Information.

The adoption of national SPR and SPO regimes in many EU countries has led to SPR becoming a policy hot topic at the EU level as well. On 23 May 2023, the Council of the EU issued its Conclusions on high quality, transparent, open, trustworthy and equitable scholarly publishing,[52] welcoming the adoption of the Secondary Publication Right in a number of Member States and prompting the Commission to act towards the introduction of this mechanism at the EU level. Furthermore, according to the European Commission's 'European Research Area Policy Agenda – Overview of actions for the period 2022-2024', one of the actions foreseen within the Priority Area of 'Deepening a truly functioning internal market for knowledge', is the development of a legislative and regulatory framework fit for research, that would enable open access and reuse of publicly funded R&I results, access and reuse of publications and data for research purposes and the seamless flow of research knowledge and data across the EU based on Article 179 TFEU and academic freedom.[53] In addition, at a workshop organised in February 2024 by the European Commission Directorate-General for Research and Innovation (DG RTD), the Commission presented the preliminary results of a study carried out under ERA Policy Action 2. ERA Action 2 specifically targets data and copyright law interventions to ensure free access and reuse of publicly funded research, facilitating a seamless flow of scientific knowledge and data across the EU.

To support these goals, the EU Commission funded a study analysing the impact of current EU and national legislation on research access and reuse, aiming to advance reform proposals. The study, conducted between July 2023 and May 2024, consisted of three phases. The first phase mapped relevant regulatory texts and reviewed EU and national Open Science Plans, focusing on key Copyright Directives, legislative interventions in data and digital markets, and the EOSC system. This analysis identified strengths and weaknesses in the EU *acquis* and national implementations, categorising provisions as 'enablers' or 'disablers' of Open Science and assessing the harmonisation level of 'enablers' across the 27 Member States. The second phase involved extensive surveys and interviews with key stakeholders, gathering quantitative and qualitative data on the impact of copyright and data legislation on research. These insights informed the evaluation of various intervention options, considering social and economic variables. The third phase refined the original reform proposals, offering legislative and non-legislative options to align IP and data disciplines with ERA's Open Science objectives. The study's findings highlight the need for specific legislative reforms to support the full and effective implementation of Open Science across the EU. According to the resulting report, the possible

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[52] Council of the European Union (2023). Council conclusions on high-quality, transparent, open, trustworthy and equitable scholarly publishing. Brussels, 8827/23 <https://data.consilium.europa.eu/doc/document/ST-8827-2023-INIT/en/pdf>.

[53] European Commission, (2021). European Research Policy Agenda - Overview of actions for the period 2022-2024, <https://commission.europa.eu/system/files/2021-11/ec_rtd_era-policy-agenda-2021.pdf>.

harmonisation of the mandatory Secondary Publication Right regime is one of the main prospective measures to be undertaken by the Directorate-General for Research and Innovation to reach these goals. These findings were detailed in an exhaustive study „to evaluate the effects of the EU copyright framework on research and the effects of potential interventions and to identify and present relevant provisions for research in EU data and digital legislation, with a focus on rights and obligations" published in May 2024.[54]

A Digital Knowledge Act for the EU

In the meantime, European civil society organizations have been calling for the introduction of a common legislative solution at the EU level that would ensure facilitated access to publicly funded research and public sector materials, removing barriers that prevent knowledge institutions from fulfilling their public mission in the digital environment. These initiatives have led to calls for a stand-alone horizontal regulation, which advocates are calling a 'Research and Education Act'[55] or an 'EU Digital Knowledge Act,'[56] to be adopted in the next legislative cycle. An EU-wide SPR regime would have a central role in such future legislation. A 'digital knowledge' regulation would also cover a harmonised obligation to republish publicly funded research outputs, immediately upon publication. The EU legislator could embrace a more holistic approach towards secondary publications, combining measures from the legislative field not only of copyright, but also of open data and open science.

To further strengthen the European open science ecosystem, policymakers could consider implementing horizontal legislation to harmonise additional legal mechanisms supporting these regimes. These could include an EU-wide 'works for hire' framework allowing Research Performing Organisations (RPOs) and Research Funding Organisations (RFOs) to disseminate works created under employment or assignment relationships through non-profit repositories; strengthening the existing research exceptions and introducing a 'user right' for public institutional users to openly republish publicly funded research results; limiting the institutional users' liability in case of copyright infringements that do not happen knowingly and arise in the context of a

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[54] European Commission, n 39.

[55] See, for example, KR21's Action Plan - Knowledge Rights 21 (2024). Knowledge for a Stronger Europe. <https://www.knowledgerights21.org/wp-content/uploads/KR21-EU-Action-Plan.pdf>.

[56] Communia (2023). A Digital Knowledge Act for Europe <https://communia-association.org/2023/12/12/a-digital-knowledge-act-for-europe/>; Open Future (2023). A Digital Knowledge Act for Europe. <https://openfuture.eu/policies-for-the-digital-commons/digital-knowledge-act/>; Creative Commons (2024). CC Supports a new Digital Knowledge Act for Europe - Creative Commons. <https://creativecommons.org/2024/02/12/cc-supports-a-new-digital-knowledge-act-for-europe/>; Wikimedia Europe (2024). We need a Digital Knowledge Act. <https://wikimedia.brussels/we-need-a-digital-knowledge-act/>.

good-faith pursuit of universities', research institutes', libraries' and archives' public service mission.[57]

Lastly, a future digital knowledge regulation should draw inspiration from the recently adopted complex digital legislation, such as the Digital Services Act (DSA)[58] and the Digital Markets Act (DMA),[59] by adopting an interdisciplinary approach to access to knowledge, research and innovation. Such regulation should foresee monitoring of gatekeepers and should address potential competition and conflict of interest issues inherent to the traditional scientific publishing business model. It should also promote independent infrastructures and indexing mechanisms, as well as modernise the academic reward system to encourage transparency and diversity in scholarly publishing.

Conclusion

The issue of access to the results of publicly funded research presented in this study, is clearly a complex one and cannot be tackled solely by public funding of open access publishing. It also seems that, at present, the EU level open science strategic and operational documents and programmes do not exercise sufficient pressure to achieve an effective and consistent system for open access and reuse of publicly funded research results in general and publications in particular. Nor do research funding organisations' requirements or research performing organisations' rights retention policies. All these considerations direct to the conclusion that a future legal solution to barriers to the dissemination of the results of publicly funded research should strive for an interdisciplinary approach, as is the current trend at the EU level, but also contain a straight-forward mechanism empowering academic authors to share research outputs irrespective of market realities.

Bibliography

- Angelopoulos, C., 2022. Study on EU copyright and related rights and access to and reuse of scientific publications, including open access. European Commission, Directorate-General for Research and Innovation. DOI: 10.2777/891665;

[57] See for instance Communia's proposal that knowledge institutions be sheltered from liability for copyright infringement, so long as they act in a responsible and prudent way, having reasonable grounds to believe that they have acted in accordance with copyright law. Communia (2024). Policy Paper n 18 on limitation of liability for knowledge institutions. <https://communia-association.org/policy-paper/policy-paper-18-limitation-of-liability-for-knowledge-institutions/>.

[58] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[59] Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act).

- Barros, A., Prasad, A. and Śliwa, M., 2023. Generative artificial intelligence and academia: Implication for research, teaching and service. Management Learning, 54(5), pp.597-604.
- Björk, B. C., 2004. Open access to scientific publications - an analysis of the barriers to change? Available at: https://informationr.net/ir/9-2/paper170.html;
- Budapest Open Access Initiative (2002) 'Budapest Open Access Initiative'. Available at: www.budapestopenaccessinitiative.org/read/;
- Communia, 2023. A Digital Knowledge Act for Europe. Available at: https://communia-association.org/2023/12/12/a-digital-knowledge-act-for-europe/;
- Communia, 2024. Policy Paper n 17 on Access to publicly funded research, notwithstanding the emergence of new open access journals, the scientific publications market has been unable to self-correct. Available at: https://communia-association.org/policy-paper/policy-paper-17-on-access-to-publicly-funded-research/;
- Communia, 2024. Policy Paper n 18 on limitation of liability for knowledge institutions. Available at: https://communia-association.org/policy-paper/policy-paper-18-limitation-of-liability-for-knowledge-institutions/;
- Council of the European Union, 2023. Council conclusions on high-quality, transparent, open, trustworthy and equitable scholarly publishing. Brussels, 8827/23. Available at: https://data.consilium.europa.eu/doc/document/ST-8827-2023-INIT/en/pdf;
- Creative Commons, 2024. CC Supports a new Digital Knowledge Act for Europe - Creative Commons. Available at: https://creativecommons.org/2024/02/12/cc-supports-a-new-digital-knowledge-act-for-europe/;
- Dore, G. and Caso, R., 2021. Academic Copyright, Open Access and the „Moral" Second Publication Right. Available at: https://zenodo.org/records/5764841#.YidpCXrP13g;
- Europeana Copyright Community Steering Group, 2024. FAQs on digital cultural heritage and the concept of openness. Available at: https://europeana.atlassian.net/wiki/spaces/EF/pages/2647490571/FAQs+on+digital+cultural+heritage+and+the+concept+of+openness;
- Frazier, K., 2001. The librarians' dilemma - contemplating the costs of the 'Big Deal'. D-Lib Magazine, 7(3). Available at: http://dx.doi.org/10.1045/march2001-frazier;
- Fischer, G., 2023. Zweitveröffentlichungsrecht und Causa Konstanz: Bundesverfassungsgericht vor Entscheidung. Available at: https://irights.info/artikel/zweitveroeffentlichungsrecht-bundesverfassungsgericht-konstanz/31878;
- Georgieva, K. and Marinov, E., 2015. Open Access - Definitions, Legal Framework, Advantages. Available at: https://adis.org/ERIS_conference/2015/sbornik-ERIS.2015.pdf;
- Horizon Europe, 2024. General Model Grant Agreement / EIC Accelerator Contract, Version 1.2 of 01.04.2024. Available at: https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/common/agr-contr/general-mga_horizon-euratom_en.pdf;
- Knowledge Rights 21, 2023. A Position Statement from Knowledge Rights 21 on Secondary Publishing Rights. Available at: https://www.knowledgerights21.org/wp-content/uploads/2022/10/KR21-Secondary-Publishing-Rights-Position-paper-v1.1.pdf;

- Knowledge Rights 21, 2024. Knowledge for a Stronger Europe. Action Plan. Available at: https://www.knowledgerights21.org/wp-content/uploads/KR21-EU-Action-Plan.pdf;
- Larivière, V., Haustein, S. and Mongeon, P., 2015. The oligopoly of academic publishers in the digital era. PloS one, 10(6), p.e0127502;
- Lazarova, A., 2024. Introducing a zero-embargo Secondary Publication Right in Bulgaria, Kluwer Copyright Blog. Available at: https://copyrightblog.kluweriplaw.com/2024/02/09/introducing-a-zero-embargo-secondary-publication-right-in-bulgaria/;
- Lazarova, A., 2024. Unlocking Knowledge: Bulgaria Takes Next Steps in Open Science Legislation. Available at: https://www.knowledgerights21.org/news-story/unlocking-knowledge-bulgaria-takes-next-steps-in-open-science-legislation/;
- Moscon, V., 2014. Academic freedom, copyright, and access to scholarly works: a comparative perspective. In: Balancing Copyright Law in the Digital Age: Comparative Perspectives. Berlin, Heidelberg: Springer Berlin Heidelberg, pp. 99-135;
- Naim, K., Brundy, C. and Samberg, R.G., 2021. Collaborative transition to open access publishing by scholarly societies. Molecular Biology of the Cell, 32(4), pp.311-313;
- Open Future, 2023. A Digital Knowledge Act for Europe. Available at: https://openfuture.eu/policies-for-the-digital-commons/digital-knowledge-act/;
- Sganga, C., 2024. The Past, Present and Future of EU Copyright Flexibilities. IIC-International Review of Intellectual Property and Competition Law, pp.1-32;
- Shu, F. and Larivière, V., 2024. The oligopoly of open access publishing. *Scientometrics*, *129*(1), pp.519-536;
- Tsakonas, G., Zoutsou, K. and Perivolari, M., 2023. Secondary Publishing Rights in Europe: status, challenges & opportunities. Available at: https://doi.org/10.5281/zenodo.8428315;
- van Eechoud, M., 2022. Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research. Available at: https://pure.uva.nl/ws/files/99127433/study_on_the_open_data_directive_data_governance_and_KI0822204ENN.pdf;
- van Eechoud, M., 2023. FAIR, FRAND and open-the institutionalization of research data sharing under the EU data strategy, in Improving intellectual property. Edward Elgar Publishing;
- Wikimedia Europe, 2024. We need a Digital Knowledge Act. Available at: https://wikimedia.brussels/we-need-a-digital-knowledge-act/;
- Zeinstra, M., 2024. Secondary Publishing Rights in the Netherlands. Right2Pub: Balancing Publication Rights. Available at: www.knowledgerights21.org/wp-content/uploads/KR21-Maarten-Zeinstra.-April-2024.-SPRs-in-the-Netherlands.pdf.