What's Mine Is Yours: A Brief Introduction To Open Access In The European Union

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Abstract

Over 300 years ago, Sir Isaac Newton astutely observed that if he had seen further than most, it was "by standing on the shoulders of giants." In one way or another, all scientific research builds on former work. Certainly on a scientific level therefore, sharing is caring. In the digital age, disseminating and exchanging content online has become child's play. In practice however, freely sharing academic papers is not as easy as one might think, as publication in a scientific journal more often than not entails a transfer of the copyright. As a result, the publisher obtains the right to exclude… and the scholar loses the right to share. Still, this is not the end of the story, at least not for the "open access" movement. Open access aims to provide users with free online access to scientific information and thereby facilitate further research. In this Scoop, we discuss the rise of open access and the relevant state of play in the European Union.

Open Access—Definition and Origins

The term "open access" was first coined at the beginning of this century (2002), when the Budapest Open Access Initiative (BOAI) launched a worldwide campaign for open access to all new peer-reviewed research. This ambitious plan was accompanied by the following broad definition of open access, which has been widely accepted ever since: *"By "open access" to [peer-reviewed] literature, we mean its free availability on the public internet, permitting any users 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, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself."*[1]

After the *Budapest Declaration*,[2] two other "B" open access declarations soon followed, with the *Bethesda Statement on Open Access Publishing*[3] of the Howard Hughes Medical Institute[4] and the *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities*[5] of the Max Planck Institute[6] in 2003. Since then, the Berlin Declaration has been signed by over 600 renowned universities and research institutes[7] worldwide and a significant number of other notable open access initiatives have been established.[8] In 2012, ten years after the initial launch of the open access campaign, the BOAI reaffirmed its aspirations, enouncing ten recommendations for further action.[9]

The mission of all open access proponents is the same: to disseminate knowledge to the highest extent possible, through the further promotion of the open access paradigm.[10]

Open Access vs. Copyright?

The traction gained by the open access paradigm in the last 15 years can be explained by the advent of the digital age. The internet offers unlimited opportunities in terms of distribution of scientific knowledge and cultural heritage, a veritable goldmine for researchers.

The problem is that, more often than not, the researcher transfers the copyright in their publication to the publisher, who has an economic interest in raising expensive access barriers to secure their revenue stream. These access barriers prevent scientific content from being freely accessible. In some cases, researchers even have to pay to obtain access to their own published work. This does not sit well with the

1. See *http://www.budapestopenaccessinitiative.org/read.*

2. To date, the Budapest Open Access Initiative has acquired over 7000 signatures, see *http://www.budapestopenaccessinitiative.org/list_signatures?indorg=org.*

3. See *http://legacy.earlham.edu/~peters/fos/bethesda.htm.*

4. With headquarters in Chevy Chase, Maryland, United States of America.

5. See *https://openaccess.mpg.de/Berlin-Declaration.*

6. With headquarters in Munich, Germany.

7. See list of signatories at *https://openaccess.mpg.de/319790/Signatories.*

8. See *e.g. http://www.budapestopenaccessinitiative.org/initiatives.*

9. See *http://budapestopenaccessinitiative.org/boai-10-recommendations.*

10. See *e.g.* G.F. FROSIO, "Open Access Publishing: A Literature Overview," 2014, p. 44-49. *http://www.create.ac.uk/wp-content/uploads/2014/01/CREATe-Working-Paper-2014-01.pdf* and P. SUBER, "Open Access Overview," available online at *https://legacy.earlham.edu/~peters/fos/overview.htm.*

fact that scholars often publish in scientific journals and/or conduct peer review without any (expectation of) financial compensation.[11] Scholars are paid a salary by 'their' university and/or research institute. As a result, scholars are usually more concerned with making a name for themselves and publishing their work in renowned scientific journals in order to advance their academic career.[12]

All of this begs the question: How is it possible that the researchers do all the work and are then forced to give it away, even losing the right to access the results of their own research in the process?

Since the access barriers put in place by intermediaries, combined with an ever-increasing subscription cost, impede the free movement of knowledge and innovation, it has been argued that copyright law should be amended to make room for open access.[13] This becomes all the more pressing due to the fact that the greater part of scholarly research is publicly financed. It follows that taxpayers have a legitimate interest in ensuring that research funds *"are not used to subsidise excessive profit margins of some commercial publishers, whose business models are based on the commodification of scientific information or knowledge,"*[14] in other words, that taxpayers have a legitimate interest in open access.

Below, we will examine whether legislators in the European Union have heeded this call.

Open Access in Practice: *Gold vs. Green*

Two basic models are used to achieve open access to scientific papers:[15]

- First, there is the so-called **gold** option of open access publishing, whereby papers are published in dedicated open access journals.[16] Such journals are not funded through paid subscriptions. Instead, the costs of publishing are covered by other sources, such as the authors themselves, the funding bodies supporting them and/or university libraries. There are also "hybrid" journals, which are subscription-based, but allow authors the option to pay for their article to be freely available to interested parties. Research articles published via this gold option are immediately freely available.

It could be argued that gold open access creates inequalities at a different level. Highly ranked universities with more financial resources may have a bigger budget to spend on open access publishing, leaving scholars at smaller institutes with less opportunities to present their work to an open access audience. Another concern could be that the peer review in open access journals is of a lower quality, although this is vehemently denied by open access proponents.[17]

- Not gold, but **green** is the model whereby authors deposit the manuscripts of their articles in open access repositories.[18] This option is referred to as 'self-archiving.' The deposited papers are often not immediately available; in many cases, there is an embargo period put in place to allow commercial publishers to recoup their investment. This way, the publisher is granted a period of exclusivity during which they can sell subscriptions and charge pay-per-download/view fees.

Open Access at the EU Level

A decade ago, the European Commission rallied behind the idea of open access, stating unequivocally that *"making research results more accessible to all societal actors contributes to better and more efficient science, and to innovation in the public and private sectors."*[19]

In the context of the Seventh Research Framework Programme (FP7), which was the EU's research programme for 2007-2013, the Commission conducted a pilot initiative whereby the participating researchers had to provide open access to peer-reviewed articles resulting from research funded through FP7 within a specified time period. The pilot project covered specific research areas such as health, energy and environ-

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11. See in this regard *e.g. http://budapestopenaccessinitiative.org/boai-10-recommendations.*

12. See in this regard *e.g.* R.M. Hilty, S. Krujatz, B. Bajon, A. Fruh, A. Kur, J. Drexl, C. Geiger and N. Klass, "European Commission: Green Paper: Copyright in the knowledge economy—comments by the Max Planck Institute for Intellectual Property, Competition and Tax Law," Max Planck for Intellectual Property, Competition & Tax Law Research Paper Series No. 08-05, p. 4, available online at *http://ssrn.com/abstract=1317730.*

13. See. *e.g.* T. Eger, M. Scheufen and D. Meierrieks, "Copyright Law and Open Access in Academia: International Survey Results—First Preliminary Draft," available online at *http://www.aslea.org/program2016/5D_Eger.pdf*; R.M. Hilty *et al.*, p. 3, available online at *http://ssrn.com/abstract=1317730* and F. Müller-Langer and M. Scheufen, "Academic Publishing and Open Access," 2012, p. 3-4, available online at *https://mpra.ub.uni-muenchen.de/61807/.*

14. See. *e.g.* R.M. Hilty *et al.,* p. 4-5 and 7, available online at *http://ssrn.com/abstract=1317730.*

15. This distinction was first set out in S. Harnad, T. Brody, F. Vallieres, L. Carr, S. Hitchcock, Y. Gingras, C. Oppenheim, H. Stamerjohanns and E. R. Hilf, "The Access/Impact Problem and the Green and Gold Roads to Open Access," Serials Review 2004, 310-314.

16. An online directory of such open access journals (Directory of Open Access Journals or DOAJ) is available at *https://doaj.org/.*

17. See *e.g.* P. SUBER, "Open Access Overview," available online at *https://legacy.earlham.edu/~peters/fos/overview.htm.*

18. An online directory of such open access repositories is available at *http://www.opendoar.org.* Open access repositories may furthermore be registered at http://roar.eprints.org.

19. See *http://ec.europa.eu/research/openscience/index.cfm?pg=openaccess.*

ment, amounting to approximately 20 percent of the total FP7 budget.[20] Both the green and the gold models were open to researchers, with the Commission pledging to reimburse full open access publishing costs during the duration of FP7 research projects.[21]

When Horizon 2020,[22] the current research EU research programme for 2014-2020, was launched, the Commission's stance on open access became even more pronounced.[23] The pilot project was eventually extended to all research areas. Since the start of the 2017 work programme, all Horizon 2020 beneficiaries must ensure open access to all peer-reviewed scientific publications that relate to their research results.[24] Again, researchers can choose between green and gold open access. The European Union is also financing a platform aimed solely at the promotion of open access in FP7/Horizon2020 project outputs, known under the name OpenAIRE.[25] A number of exceptions apply to the default open access rule, such as in the event that making the data at issue freely accessible would be inadvisable for security reasons or data protection reasons, or if this would mean that the project's main aim might not be achieved.[26] In short, data obtained with Horizon2020 funding should be "as open as possible, as closed as necessary."[27]

Given the importance of EU funding for many research projects, the support of the European Commission has provided a significant boost for the open access paradigm. It is therefore unsurprising that several EU member states have followed suit by inserting a provision on open access in their national copyright legislation following a Commission Recommendation[28] to this effect.[29]

Open Access at the National Level

Several EU member states have already modified their national rules on copyright contracts, such as Germany,[30] the Netherlands[31] and France.[32] The specifics of these national legislations vary slightly, but their essence is the same: the author has the right to 'republish' for free all scientific publications that have been (partially) funded with public means after a certain embargo period (*i.e.* in Germany: 12 months after publication; in the Netherlands: after a 'reasonable term'; and in France: six or twelve months after publication, depending on the research field).

Strikingly, all of these legislative amendments let authors choose whether or not they want to allow open access to their works. It will be very interesting to see how scholars react[33] and how universities and/or research institutes will further shape their policies to foster the free dissemination of information published by 'their' scholars.[34]

Finally, the most recent open access news comes from Sweden, where the government, in 2017, set the

20. See *https://ec.europa.eu/research/science-society/document_library/pdf_06/open-access-pilot_en.pdf.*

21. See *https://ec.europa.eu/research/science-society/document_library/pdf_06/open-access-pilot_en.pdf.*

22. See *http://ec.europa.eu/programmes/horizon2020/.*

23. See *e.g. https://ec.europa.eu/programmes/horizon2020/sites/horizon2020/files/FactSheet_Open_Access.pdf.*

24. See Article 29.2 of the Model Grant Agreement, as well as Guidelines to the Rules on Open Access to Scientific Publications and Open Access to Research Data in Horizon 2020, Version 3.2, 21 March 2017, p. 5 jo. 9, *http://ec.europa.eu/research/participants/data/ref/h2020/grants_manual/hi/oa_pilot/h2020-hi-oa-pilot-guide_en.pdf.*

25. See *https://openaire.eu.*

26. See Guidelines to the Rules on Open Access to Scientific Publications and Open Access to Research Data in Horizon 2020, Version 3.2, 21 March 2017, p. 8.

27. See Guidelines to the Rules on Open Access to Scientific Publications and Open Access to Research Data in Horizon 2020, Version 3.2, 21 March 2017, p. 8.

28. See Commission Recommendation of 17 July 2012 on access to and preservation of scientific information, Pb. L 21 July 2012, n° 194, 39-43 and available online at *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012H0417&rid=1*. The Commission recently adopted a reviewed version of this Recommendation, see Commission Recommendation (EU) 2018/790 of 25 April 2018 on access to and preservation of scientific information, Pb. L 31 May 2018, n° 134, 12-18, available online at *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018H0790&from=EN.*

29. See also the Commission Communication "Towards better access to scientific information: Boosting the benefits of public investments in research," 17 July 2012, COM(2012) 401 final, available online at *http://ec.europa.eu/research/science-society/document_library/pdf_06/era-communication-towards-better-access-to-scientific-information_en.pdf.*

30. Section 38, paragraph 4 of the German Copyright Act, as amended in 2013 by the Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes, Bundesgesetzblatt I S. 3728 (Nr. 59).

31. Section 25fa of the Dutch Copyright Act, as inserted in 2015 by the Wet van 30 juni 2015 tot wijziging van de Auteurswet en de Wet op de naburige rechten in verband met de versterking van de positie van de auteur en de uitvoerende kunstenaar bij overeenkomsten betreffende het auteursrecht en het naburig recht (Wet auteurscontractenrecht), Stb. 1 July 2015, 257.

32. Section L 533-4 of the French Code de la recherche, as inserted in 2016 by the Loi du 7 octobre 2016 pour une République numérique, JORF 8 October 2016, nr. 0235.

33. See in this regard already the research conducted in Germany by T. Eger, M. Scheufen and D. Meierrieks, "The determinants of open access publishing: survey evidence from Germany," *Eur. J. Law Econ.* 2015, (475) 501.

34. See in this regard *e.g.* the current policy of the University of Cambridge (UK) at *https://www.cam.ac.uk/research/research-at-cambridge/open-access and of the KULeuven (BE) at https://www.kuleuven.be/english/research/scholcomm/openaccess/policy/policy.*

goal of providing immediate open access to all scientific publications by 2026.[35] The Bibsam Consortium, the entity charged with negotiating copyright licence agreements on behalf of all Swedish universities, governmental agencies and research institutes, therefore presented the scientific publisher Elsevier with strict open access demands. These demands were not met and, as a result, the Bibsam Consortium decided not to renew its agreement with Elsevier.[36] As a result, researchers from organisations participating in this Consortium will not be able to access content that was published on Elsevier's platform after June 30th 2018.

Conclusion

Over the course of the past decade, open access in the European Union has evolved from a limited pilot project set up within the confines of the research programme of European Commission to a general EU policy that is implemented by more and more EU member states. However, the recent clash with Elsevier in Sweden proves that the open access debate is still controversial.

There is no denying that science is fuelled by scientists and by past scientific research—by 'giants,' as Mr. Newton would say—, and that in the digital economy innovation is key. The open access paradigm undoubtedly provides a useful tool to unlock the scientific potential of our society, but it poses new challenges to the business models of publishers and other intermediaries. ■

Available at Social Science Research Network (SSRN): *https://ssrn.com/abstract=3218576.*

35. See *e.g. https://openaccess.blogg.kb.se/english/ and https://blog.frontiersin.org/2018/06/01/sweden-open-access-publishing-deal/.*

36. See *https://openaccess.blogg.kb.se/2018/05/16/sweden-stands-up-for-open-access-cancels-agreement-with-elsevier/.*