

Copyright & related rights and access to & reuse of scientific publications, including via open access

Exceptions and Limitations, Rights Retention Strategies and the Secondary Publication Right

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Scientific journal business model and impact

- Most scientific publishers require assignment of copyright or an exclusive licence in the scientific articles they publish.
- But much funding for scientific research – whether by universities employing researchers or third party funders – is public.
- → the “commodification” (Caso & Dore, 2022) of public investment into research by publishers.
- Research institutions obliged purchase access to proprietary scientific journals and databases for their employee-researchers – i.e., pay to access their own products.
- Publishers emerge as the “gatekeepers” (Bellia & Moscon, 2022) to scientific literature.
- Particularly problematic given subscription prices in the context of the “serials crisis”.

Current EU copyright framework: E&Ls

- **Research exception** (Article 5(3)(a) ISD): “use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved”.
- **Quotation exception** (Article 5(3)(d) ISD): “Member States may provide for exceptions or limitations [...in case of...] quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose”.
- **Quotation obligatory under Article 10(1) Berne**: “It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.”

→ L Bently and T Aplin, “Whatever Became of Global Mandatory Fair Use? A Case Study in Dysfunctional Pluralism” (2019): “dysfunctional pluralism”

Fundamental Rights

‘freedom of information and freedom of the press, enshrined in Article 11 of the Charter, are not capable of justifying, beyond the exceptions or limitations provided for in Article 5(2) and (3) of Directive 2001/29, a derogation from the author’s exclusive rights of reproduction and of communication to the public.’

BUT:

‘a national court must, having regard to all the circumstances of the case before it, rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter.’

– CJEU, *Funke Medien*, C-469/17 (2019), [64] & [76] and *Spiegel Online* C-516/17, [49] & [59]

“[I]t is also possible to read the Court’s strict reliance on effective harmonization and legal certainty as an appeal to the legislator to correct the balance within copyright law.”

– Jütte & Quintais, “The Pelham Chronicles” (2021)

Fundamental Rights

“However, although Article 5 of Directive 2001/29 is expressly entitled ‘Exceptions and limitations’, it should be noted that those exceptions or limitations do themselves confer rights on the users of works or of other subject matter”

– CJEU, *Funke Medien*, C-469/17 (2019), [70] and *Spiegel Online* C-516/17, [54]

Re-use v. access:

“End users/consumers in particular researchers, are generally unsatisfied with the current situation. Even though a research exception exists in some Member States, respondents still report **problems in accessing scientific publications or scholarly articles**. [...] The cost of subscriptions is seen as disproportionate and excessive for individual researchers. Researchers [...] believe that publications which present the results of publicly funded research should always be made available without restriction. Most respondents consider that open access publishing is a suitable solution to increase access to research content. [...] A problem often raised by researchers is that scientific publishers often require that they (as authors of scientific publications) agree upon unduly restrictive contract conditions, for example that their work cannot be put in open access databases.”

Report on the responses to the Public Consultation on the Review of the EU
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“Coping Mechanisms” A: Non-legislative

- **Rights Retention Strategies (RRS) & OA Mandates**
- Legal issues:
 - National copyright contract rules on assignments and exclusive licenses over future works.
 - What about copyright ownership in scientific publications created by employees in the course of employment?
 - Fundamental rights: “**Academic freedom shall be respected**” (Article 13 of the Charter).

“Coping Mechanisms” B: Legislative

Secondary Publication Right

Currently exists in:

Germany
the Netherlands
Austria
France
Belgium

But important to consider:

- The three-step test (Article 5(5) ISD, Article 9(2) Berne)
- Implications of PIL
- Academic freedom (Article 13 of the Charter)

LIBER Draft Law for the Use of Publicly Funded Scholarly Publications:

1. The author of an article in a research periodical, or the author of a book chapter in a multi-authored monograph (collectively referred to as “scholarly work”), their employer or research funder shall be entitled to make the scholarly work in any of its forms available to the public via any open access repository immediately after its acceptance for publication, including any third party content, such as images and tables, that are required for the specific purpose of understanding the scholarly work, on the condition that:

a) the research to which the scholarly work relates has been paid in whole or in part by public funds; and

b) it is accompanied by a sufficient acknowledgement of the author, and when the version being made available is the version of record, the source of its first publication.

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

Recommendations

A) Non-legislative:

- Research funders and employers should take care in drafting OA mandates;
- Universities claiming copyright in their researchers' output?

B) Legislative:

- **Clarifying the scope** of the research and quotation exceptions;
- Making **research and quotation exceptions mandatory for MS**;
- Targeted harmonisation of **copyright contract law** to ensure RRS and OA mandates are permitted;
- Introducing an **EU-wide Secondary Publication Right**?
- **EU harmonisation of first ownership of copyright**? One option: ownership for universities subject to obligation to grant exclusive licences to authors to publish in OA?

Thank you very much for your attention!

