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Open Science and the Legal Regime of Scholarly Publications

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Plan for today's talk

- State of play
- What is a Secondary Publication Right?
 - existing national solutions for the introduction of SPR
- What is a Secondary Publication Obligation?
 - existing national SPO regimes



The “Fifth Freedom”

- **Enrico Letta** - “Much more than a market – Speed, Security, Solidarity. Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens”
- “Fifth freedom” = “freedom of movement of knowledge”
 - interpreted also as the freedom of access to and circulation of research results



The tools of Open Science

- Public Money = Public Access
- Soft law instruments
 - Recommendations (Recommendation (EU) 2018/790 of 25 April 2018 on access to and preservation of scientific information)
 - Funding
 - RFO policies



Use of copyright mechanisms can hinder access to research

Action 2 of the **European Research Area (ERA) Policy Agenda 2022-2024** aims to 'Propose an EU copyright and data legislative and **regulatory framework fit for research**'.

Report, identifying impediments and challenges to the access and reusability of publicly funded research and innovation outcomes, inclusive of scientific publications and data.

Propose SPR as a possible solutions.*

* 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>>.



Access to results of publicly funded research

Specificities of the legacy academic publishing system:

- RPOs and RFOs as 'assignors'
- Individual Researchers - authors (primary rightsholders)
- Academic Publishers - receive copyright on exclusive basis, close publications behind paywalls
- General Public

SPR:
legal nature and
existing solutions at the national level



What is SPR?

- **public** funding
- when dealing with the publisher, the author can **retain** some of their rights
- **re-publishing** the respective work (usually an academic article)
- in a **not-for-profit repository**
- after a certain period (**embargo** period)
- usually this secondary publication can be accessed freely, but cannot be reused



Provisions on SPR



Germany (2014)

Section 38, para 4 of the German Copyright Act (*UrhG*):

- the **author** of a scientific contribution has the right, **even if he has granted** the publisher or editor an exclusive right of use, **to make the contribution available** to the public
- '**any deviating** agreement **to the detriment of the author** shall be **ineffective**.'
- Section 38 is entitled 'Contributions to collections' and follows the regime on granting usage rights; is generally **part of the rules of copyright contracts**



Austria (2015)

Art. 37a of the Austrian Copyright Law:

- the **author** of a scientific contribution [...] **retains**, even after he grants the publisher or editor a right to use the work, the right to **make the article available** to the public [...].
- 'any **deviating** agreement to the **detriment of the author** is **invalid**'
- Part of Section V of the Copyright Law, entitled '**Reservations in favour of the author**'



The Netherlands (2015)

Art. 25fa of the Dutch Copyright Act:

- 'the **creator** of a short scientific work [...] has the right to **make that work available** to the public [...] **after its first publication** [...]'
- All provisions in Chapter Ia, incl. on SPR, are **safeguarded from contractual override** (Article **25h(1)** Dutch Copyright Act)
- Part of Chapter Ia of the Copyright Act dedicated to **exploitation agreements**, which also includes provisions on appropriate and proportionate remuneration, reclaiming copyright in cases of insufficient use, dispute resolution measures etc.



France (2016)

Art L533-4 of the French Research Code:

- 'author has, **even after granting** exclusive rights to a publisher, **the right to make available** [...] subject to the agreement of any co-authors, the final version of its manuscript accepted for publication [...]'
- 'The provisions of this article are of public policy, and **any clause contrary to them** shall be deemed **unwritten**.' (Section IV of Art L533-4)



Belgium (2018)

Article XI.196 § 2/1 of the Code of Economic Law:

- the **author** of a scientific article [...], **even if [...] he has ceded his rights** to a publisher of a journal or has placed them under an ordinary or exclusive license, **retains** the right to make the manuscript available [...]
- Under the last subparagraph of Article XI.196 § 2/1 'this right is **mandatory**'
- As a bonus, it applies **regardless of the law chosen by the parties** as long as there is a link to there is a connection to Belgium; as well as to works that have created before the entry into force of this paragraph.
- Part of Section 8 of Book XI of the Code of Economic Law, entitled '**Publishing contract**'



Bulgaria (2023)

Art. 6o (2) of the Bulgarian Copyright Act:

- the **author** of a work of academic literature [...] shall **retain** the **right to make that work or parts thereof available** [...] after its acceptance for publication by a publisher [...]
- **any arrangement which prevents or restricts** what is provided for [...] shall be **null and void**
- Part of a chapter of the law entitled '**Contracts for publishing in periodicals**'



Slovenia (2025)

Art. 41(6)(7) of the Slovenian Research Law:

- the **researcher** (or the research-performing institution) shall be deemed to be **entitled to publish** or make available to the public the results of the research [...] as soon as the result of the research has been accepted for publication [...]
- 'Contractual **provisions contrary** to the preceding paragraph of this Article shall be **null and void**.'



Common Denominators


- the holder/beneficiary of SPR is, without exception - the **author** (as a primary **rightsholder**)
- in most national solutions it's clear that the author **retains** their right to republish vis-a-vis the publisher
- all existing solutions are **non-overridable by contract**
- SPR as a tool is usually systematically placed in the Copyright Law, in a section related to **publishing contracts**



Whose interests does SPR serve?

- Academic Authors
- Research institutions
- General Public

SPO:
legal nature and
existing solutions at the national level



Spain (2011)

Section 37 of the Spanish Research Act (Ley 14/2011, de 1 de junio, de la Ciencia, la Tecnología y la Innovación):

- “public agents,” promote open science;
- the “research staff in the public sector” (or those mainly publicly funded), deposit works and data in repositories;
- repositories make these resources freely available to society
- **SPO partially repealed in 2022**



Germany (2014)

Higher Education Act of Baden-Württemberg:

- **universities**, through their internal statutes, must “**oblige members of their research staff** to exercise their right of secondary publication for non-commercial purposes [...]”
- University of Konstanz
- Legal Dispute



Italy

Article 4, para 2 of the Italian Law N° 112 of 7 October 2013:

“open access is achieved:

- through publication by the publisher at the time of the first publication, so that the article is freely accessible at all times, and
- through republication for non-commercial purposes in digital repositories, in the same manner, within eighteen months of first publication (for publications in the fields of technology and medicine) and twenty-four months (for the humanities and social sciences).”



Slovenia (2023)

Governmental Decree on the conduct of research activities in accordance with the principles of open science :

- detailed regime for open access and the reuse of different types of research results from publicly funded research



Bulgaria (2024)

Article 80, para 2 of the Bulgarian Research and Innovation Act:

- "Authors of publications
- created as a result of publicly funded research
- shall provide a digital copy of the publication or a version thereof for publication"
- in the Bulgarian Portal for Open Science.

SPR and SPO: a holistic approach to secondary publications



Thank you for your attention!

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