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Open Access to Scientific Articles: Comparing Italian with German law

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The Italian Parliament recently approved a new law concerning the valorization of culture (Law of October 7, 2013, n. 112, G.U. n. 236, 8.10.2013). The law includes, in section 4, a regulation for Open Access (OA) to scientific publications.

With this new law, the Italian parliament aims to align Italy's national law with the European Open Access policies that are clearly expressed in the EU Commission's Recommendation of 17 July 2012 on "Access to and Preservation of Scientific Information" and the Communication "Towards better access to scientific information: Boosting the benefits of public investments in research".

Looking specifically at the contents of the new Italian law, one sees that several obligations are imposed on public bodies providing or managing the funding of scientific research, such as research institutions and universities:

The subjects mentioned shall take the necessary measures for the implementation of OA with regard to 'articles' published in periodical collections (at least biannual), which are based on publicly funded research. (The Law speaks literally of "article" which is technically a literary genre. Most likely the legislator wants to include the entire genre, excluding books).

OA publication shall regard works that are publicly financed (at least 50%).The Italian legislator has chosen to pursue, indifferently, both the OA models: the golden and green road; the two most common routes with regard to OA. On the golden OA road, authors publish their articles in OA journals that provide free and immediate OA to all articles. Authors that choose the green OA road, publish in "traditional" journals and, upon acceptance for publication, to make their peer-reviewed final draft freely accessible online by self-archiving or by depositing the article in an institutional

or disciplinary repository.

Following the green road, the work must to be stored in OA archives, no later than 18 months from the first publication for scientific, technical and medical disciplines, and no later than 24 months for humanities and social sciences.

Some comparative remarks and policy considerations

The first cornerstone is set by experiences with legislation in the United States. In 2008 the "Consolidation Appropriation Act" served as a legislative basis for the OA policy on the "National Institutes and the Health" (NIH), for the specific area of biomedicine, granting that "all articles arising from NIH funds must be submitted to PubMed Central upon acceptance for publication". With this regulation, the US became the first country adopting a national OA mandate. The peer reviewed version of articles based on research that benefits from public funding have to be re-published on PubMed Central within twelve months from the "official" publication.

The fulfilment of this obligation is subject to the implementation (by the publicly funded entity) of a policy that is compatible with the provisions of copyright law. This is a crucial passage, since the rule requires that the funded institutions manage the copyright issues in the relationship between author and publisher. More specifically, research institutions (e.g. a university) are obliged to prepare a regulation that supports the author in managing her or his copyrights. The rationale is clear: an author will be better able to properly administer his or her rights with the skills and the negotiating power of the institution.

A further benchmark, especially in the European research context, is the German scenario, characterized by a ferment of ideas. It is not surprising that a third of the foundational statements of OA originates from Berlin in 2003. The German law that aimed to end exclusivity in the field of scientific publications has recently become Law, effective from 2014.

The new German legal [Law of October 1, 2013 (BGBl. I S. 3714) Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes], modifies Section 38 of the German Copyright Act (Urheberrechtsgesetz o UrhG) and regulates the main obstacle to the green road of OA: copyright management. The rule is intended to allow the author of a scientific work that is generated in the context of a research activity, and that is funded for at least 50% by public funds, and that is published in a periodical collection (at least biannual), to make the accepted version of the manuscript publicly available for non-commercial purposes after a period of twelve months. The author's right to republish in OA prevails even if the author has assigned all the exclusive rights on the copyrighted work to an editor or publisher. All different restrictive agreements are invalid. It is, in other words, a mandatory provision.

The rule has the undisputed upside of finding a balance between the interests of authors, publishers and the public. Nevertheless, there are some grey aspects. Two important points deserve particular attention:

In the first place, the scope of the law is not clear, as it is possibly discriminating against the recipients of the right to republish. The law refers, in fact, generically to authors of scientific articles generated in the context of a research and teaching activity, which is funded for at least 50%. There are publications that may be excluded from this definition. Secondly, the application of the law must be carefully done within the framework of international private law. As a matter of fact, the rule suffers from the intrinsic limitation of being a national law (just imagine the case of

an author publishing with a foreign editor or publisher).

The Italian parliament, on the other hand, pursues, in a positive way, both the golden and the green road. The legislator, in fact, requires research institutions to adopt policies that promote open access that can be pursued both following the golden road and the green road. The positive sides of this law, however, should be balanced with some challenging features that certainly could be improved. Firstly, the law doesn't include a number of key definitions ('open access', itself, for instance, can be interpreted in different ways, just as that the word "article" can have many different meanings); secondly, the 'embargo' period (18 and 24 months from the publication date) is unjustifiably excessive. Besides that, the legislator leaves the implementation to the funding and research bodies, without providing them with the adequate economic resources.

Moreover, the new Italian law does not solve the fundamental problem underlying the development of the green road, namely the management of intellectual property rights.

Both the German and Italian lawmakers proceed along the path that has been traced by the European Union (EU). The EU indeed strongly fosters the promotion of the OA principles. The EU Commission suggests a "multi-level" setting, according to which the upper level is covered by the EU policy, followed by rules on Member State level and policies of funding agencies and research institutions. This setting addresses, finally, the contractual background, supporting the European establishment of a framework for licensing.

The recognition by legislators of the importance of Open Access is a development of great significance, but it is not sufficient. The success of Open Access depends on a radical change of values and customs of the scientific community, as well as on necessary economic, organizational and educational investments.

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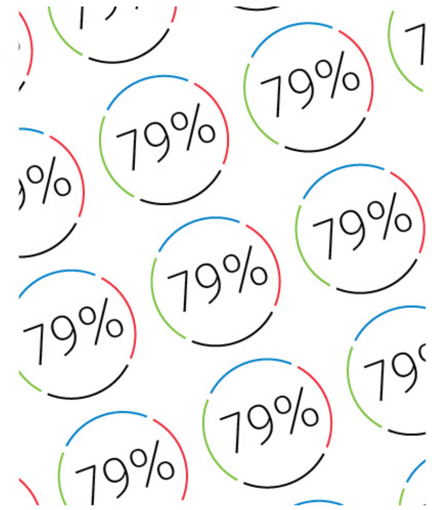

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