Kluwer Copyright Blog

Study on Copyright and Scientific Publications: Encouraging Access and Re-use

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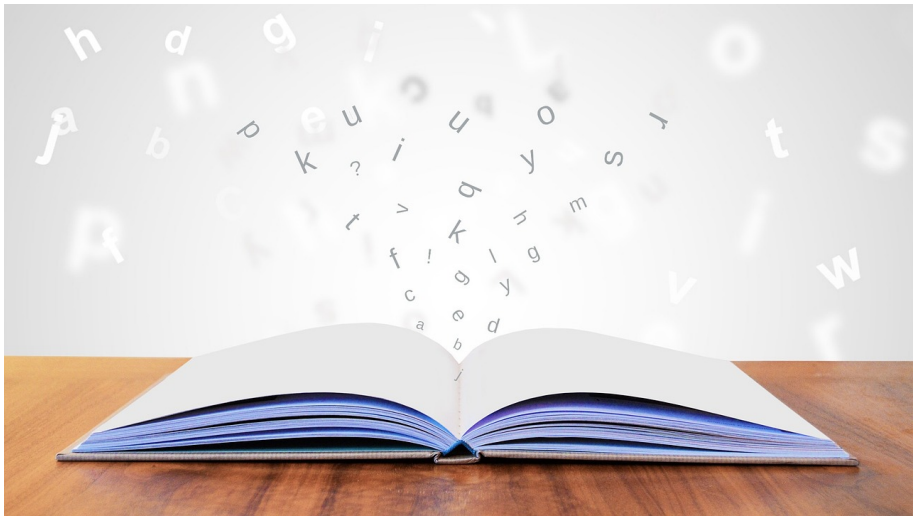

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In August 2022, the European Commission's Directorate-General for Research and Innovation published a study on EU copyright and related rights and access to and reuse of scientific publications, including open access. The study analyses the relationship between EU copyright law and access to and reuse of scientific publications, including open access, as well as potential legislative and institutional initiatives to address the limitations on access and re-use imposed by copyright. On this basis, it produces recommendations for possible legislative and non-legislative measures that could be adopted at the EU level and by research institutions. In this post, its author provides a brief outline.

Background analysis

The issue of access to and re-use of scientific publication is highlighted by the dysfunctions that characterise the current scientific publishing business. Current practice in scientific publishing requires copyright assignments or the issue of exclusive licenses by researcher-authors to publishers. The result is an appropriation of copyright in scientific publications by private entities that is particularly problematic for publicly funded research. As research institutions are obliged to purchase access to proprietary scientific journals and databases from publishers to enable future research by their employee-researchers, and with subscription prices to journals having increased in the context of the so-called "serials crisis", publishers have emerged as the "gatekeepers" to scientific literature.

Current EU copyright framework

Against this background, a robust understanding of the ways in which copyright law operates to encourage or hinder access to and re-use of scientific publications can help highlight how it can be more effectively managed by researchers and institutions, as well what legislators can do to improve the applicable legal framework.

A starting point can be found in copyright law's rules on exceptions and limitations (E&Ls). The study focused on two relevant E&Ls in the EU's Information Society Directive (ISD): the exception for the purpose of scientific research of Article 5(3)(a) ISD and the exception for the purpose of quotation, including criticism and review, of Article 5(3)(d) ISD.

The exception for the purpose of scientific research

According to Article 5(3)(a) ISD, EU Member States can adopt an exception, under certain conditions, for uses of protected works "for the sole purpose of illustration for teaching or scientific research". As commentators have observed, this wording does not make clear whether "illustration" attaches only to teaching or also to scientific research. The implications are significant, as "illustration for scientific research" (aside from being rather counter-intuitive and obscure language) would exclude copying the whole or parts of articles for the purposes of individual study. This would deprive the exception of much of its usefulness over the more general quotation exception.

Moreover, like most of the E&Ls of Article 5 ISD, the research exception remains optional for the Member States. In fact, as research has established, not all Member States enjoy a research exception and those that do often limit it in various ways.

Quotation

Similar problems plague the quotation exception. As Lionel Bently and Tanya Aplin have explained, the best interpretation is that the quotation exception is obligatory under the Berne Convention and enjoys a broad scope. Nevertheless, the ISD appears to treat the exception as optional, and Member States subject it to a wide variety of restrictions. The result is what Bently and Aplin have termed a "dysfunctional pluralism".

Fundamental rights

Whether relief can be provided by the law of fundamental rights is currently unclear. The CJEU has held that EU Member States cannot rely on fundamental rights to introduce E&Ls into their legal orders that are not foreseen by the harmonised *acquis*. At the same time, it has also emphasised that Member States must ensure that their copyright law fully adheres to the Charter and that E&Ls "confer rights" on users. The language of "rights" is interesting given that E&Ls are limited to the re-use of copyright protected works, but do not guarantee access. With regard to scientific publications, the question that therefore emerges is how researchers' "right" to re-use can be operationalised through the provision of access.

Non-Legislative Initiatives

To address this issue a number of what commentators have labelled "coping strategies" have emerged at both the legislative and non-legislative level. Regarding the latter, the study examines "open access mandates" – that is, requirements imposed by university-employers or by research funders requiring that the publications they fund be made available online in open access (OA).

National copyright contract rules imposing limitations on the licensing of copyright in future works may obstruct OA mandates. Such rules could potentially mean that funders and employers don't have the right to demand licences over future scientific works, even if these are OA licences. There is no EU harmonisation in the area and how courts will react to OA mandates in this context is unpredictable. It will likely depend on whether they view funders and employers imposing OA mandates as pursuing a benevolent aim or as wielding power to wrestle copyright control from vulnerable researchers.

Should problems emerge, a solution could be provided in the – also unharmonised – rules on the first ownership of copyright of scientific publications. In most Member States, employers are considered to enjoy first ownership of copyright over works created by employees in the course of employment. However, as a general rule, either an exception applies to academic staff or universities choose not to claim ownership of their researchers' publications.

A final consideration concerns academic freedom. There is an argument that academic freedom might invalidate OA mandates. However, while academic freedom certainly reserves for the author the freedom to decide when and where to publish scientific articles, it is hard to argue that this involves a right to publish in a journal of one's choice – as opposed to a mere right of submission. While journals may choose to reject submissions without a copyright assignment or exclusive license, the issue is better described not as a restraint on academic freedom by OA mandates, but as

a clash between that freedom and publishers' freedom to provide a business.

Legislative Initiatives

Beyond non-legislative measures, legislative solutions may also exist. Five EU Member States (Germany, the Netherlands, Austria, France and Belgium) have sought such a solution in the so-called **secondary publication right (SPR)** – that is, an inalienable, non-waivable right for authors of publicly funded scientific publications to make the text freely available to the public without the permission of the copyright owner.

The obvious question in this regard is whether an SPR could be adopted at the EU level. Two main obstacles emerge. First, despite its name, the SPR may be better classified as an exception or limitation to copyright. If that is the case, it must respect the three-step test established in international and European copyright law. While it is hard to predict the outcome of the application of the three-step test to the SPR, it may be that its reliance on mandatory embargo periods would allow it to satisfy the second and most challenging step of the test. The analysis, however, involves moving parts and could shift as institutional repositories and publisher practices evolve.

The rules of private international law must also be taken into account. While current national examples make the SPR mandatory, this does not mean that it is enforceable in foreign jurisdictions. This could cause problems in cases when the publishing contract is governed by non-EU law. Authors that choose to take advantage of the SPR may, as a result, be held liable for copyright infringement outside the EU.

Recommendations

On the basis of its analysis, the study makes a series of recommendations. On the non-legislative level, it suggests that employer universities consider claiming copyright in their researchers' output – although objections by employee-researchers and the need to safeguard academic freedom will need to be considered. Research funders should take care when drafting their OA mandates, paying particular attention to national copyright contract rules on future works.

On the legislative level, the study recommends the following:

- clarifying the scope of the research exception and the quotation exception and making both mandatory for Member States.
- harmonising copyright contract law to make clear that employers and funders are free to impose OA mandates in relation to scientific publications produced through public funding.
- an EU-wide Secondary Publication Right (SPR) may be considered, but should be approached with caution. The implications of public international law and the requirements of the three-step-test should be taken seriously. It should also be understood that – as opposed to OA mandates – the SPR only provides access, but no rights to reuse and does not allow for immediate OA.
- the European harmonisation of first ownership of copyright, whether generally or only in scientific publications, may provide an alternative. Such rules could grant copyright ownership in scientific publications to the scientific author or to universities. The latter option would likely prove sensitive in light of academic freedom – however, given that the general agreement that a

country of origin rule should determine initial copyright ownership, it may also be the best way to avoid the problems raised by the SPR. Ideally, more nuanced systems should be considered – for example, granting universities ownership subject to an obligation to provide exclusive licences to authors to decide when and where to publish, on condition that this occurs in OA. Complications can be anticipated, for example in relation to researchers not in an employment relationship with a university or research institution or researchers who change employer. Nevertheless, this may be the best way to bring scientific publications through the copyright labyrinth into the sunlight of Open Access.

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