

Kluwer Copyright Blog

ALLEA Statement on Open Access Publication under “Big Deals” and the New Copyright Rules

P. Bernt Hugenholtz (Institute for Information Law (IViR)) · Monday, December 12th, 2022



The increasing costs of publication under the Gold Open Access model and “Big Deals”

The European Federation of Academies of Sciences and Humanities (ALLEA) has for many years supported the move away from proprietary models of scientific publishing towards Open Access (OA).^[1] OA publication of publicly funded scientific research bears the triple promise of (1) fostering access to published research and knowledge by researchers, and the general public, all over the world; (2) recognising that outputs derived from publicly funded research are essentially a public good; and (3) reducing the mounting costs of accessing published research for universities and other academic institutions.

ALLEA, therefore, welcomes recent studies showing that OA publication in scientific journals is on the rise.^[2] An important driver of this development are the so-called “Big Deals”; “read and publish agreements” that have been negotiated in recent years between (consortia of) research libraries, institutions, and universities on the one hand, and scientific publishers on the other. These agreements, also known as “transformative agreements”, have replaced the subscription deals that were previously agreed between research libraries and publishers, and which provided for large bundles of subscriptions to proprietary journals to be made available electronically to libraries and their affiliated researchers.^[3]

The new generation of deals is “transformative” in that they additionally allow for OA publication under the “Gold” standard of (usually a finite number of) research articles by institution-affiliated researchers in return for payment of substantial “article processing charges” (APCs)³ that allow publishers to recoup their investment in OA publication.

As a recent study demonstrates, commercial publishers currently derive more than two billion USD annually from APCs.^[2] Despite gradually decreasing subscription revenues, the commercial

publishers have managed to embrace the Gold OA model without compromising their total revenues and enormous profit margins. Evidently, Gold OA publishing has become a new, highly profitable business model in and of itself,^[2] in addition to the subscription model which has remained partially intact. Incorporating Gold OA publication into all-encompassing read and publish agreements has thus allowed the major commercial publishers to effectively consolidate and enhance their already dominant position in the field of scholarly publishing,^[4] solidifying their role as the gatekeepers of publicly funded research.^[5]

While the rising number of Gold OA publications facilitated by these deals is to be applauded, they do not deliver on the triple promise of OA. In particular, they have not led to a reduction in the exorbitant costs to the academic community incurred in the process of research publication. While the downstream costs of journal subscriptions are gradually falling, the upstream costs of publication, made up of the APCs, have risen sharply.

Concomitantly, the imposition of APCs has created new, and sometimes insurmountable, barriers to publication for researchers that are not affiliated to a contracting institution.^[6] In addition, as already underlined in previous ALLEA Statements,^{[6],[7]} the Gold OA model creates a disadvantage for those coming from less wealthy countries and institutions, under-funded researchers in the social sciences and humanities, and early career researchers, among others. For these academics, OA of published research comes at the expense of closure of first-tier publication fora.

In addition, ALLEA is concerned that the conditions of the “Big Deals” that drive these developments do not adequately reflect the rules on copyright law in the European Union (EU) and fail to fairly value the creative and research endeavours of researchers and their institutions, as well as their investment and efforts over time to generate research results and publications to the benefit of the public.

The new copyright rules relevant to “Big Deals”

Under the law of copyright, the authors of works of science are the copyright owners of their published articles. Unless these rights are contractually assigned or licensed, it is for the authors, and the institutions that employ them, to determine the conditions under which their works are to be published, reproduced, and otherwise used (including by way of OA) – not for the publishers.

In current practice, authors are expected to assign or exclusively license their copyright to publishers. Under the new rules of the 2019 Directive on Copyright in the Digital Single Market, which have been recently implemented in most EU Member States, authors that license or assign their rights “for the exploitation of their works” are entitled to receive appropriate and proportionate remuneration,^{[8]a} except where they have granted OA licences.^{[8]b} Ordinary publishing contracts between authors and publishers on which the “Big Deals” largely rely, however, rarely, if ever, provide for such remuneration. To the contrary, researchers or their institutions are expected to remunerate the publishers through APCs for having their scientific research published.

In addition, various EU Directives allow Member States to provide for limitations and exceptions to copyright for the purpose of scientific research. For example, EU law allows Member States to

exempt the reproduction and making available of works “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”.^{[9]a} While not all Member States have implemented this provision, and modalities of implementation vary,^{[5],[10]} downloading and sharing of articles for the purpose of conducting or producing scientific research is permitted without authorisation in many EU Member States. Where such limitations and exceptions exist, publishers that have acquired the copyrights may not subject the downloading of articles by researchers to licensing conditions and payment of licence fees, as the European Court of Justice (ECJ) has clarified in its case law.^[11]

Other relevant limitations and exceptions in EU law permit the use of “quotations for purposes such as criticism or review”^{[9]b} and the making available of articles on dedicated terminals in library networks.^{[5],[9]c} Moreover, the 2019 Directive on Copyright in the Digital Single Market requires EU Member States to grant non-profit research institutions broad freedoms to reproduce works for the purpose of “text and data mining”.^{[8]c} Accordingly, publishers may not restrict or condition text and data mining from scientific journals to which the researchers have lawful access.

Additionally, an increasing number of Member States (e.g., Germany, Netherlands, Austria, France, and Belgium) have introduced special rules permitting researchers to reproduce and make available published articles in non-profit repositories, regardless of having transferred their rights to publishers.^[12] These so-called Secondary Publication Rights allow authors of scientific works that are the product of fully or partially publicly funded research to provide Open Access to their articles, following the expiry of a variable embargo period set by national legislation or good practices.^[5] National rules vary as well in respect of the version of the article that is subject to the Secondary Publication Right. While some countries limit the right to the Author Accepted Manuscript, the law in other countries seems to extend the right to the printed version, the so-called Version of Record. In all countries, the right is limited to articles; entire monographs and other scholarly books are therefore excluded.^[5]

While ALLEA applauds the introduction of these new rights, we believe that, with the accelerated pace of scientific output and the need to adequately respond to today’s societal challenges, embargo periods are unnecessary impediments to the timely dissemination of publicly funded research. Today, as recently underlined in a Guidance of the White House Office of Science and Technology Policy (OSTP) of 25 August 2022,^[13] research that is made “widely available to other researchers and the public (...) can save lives, provide policymakers with the tools to make critical decisions, and drive more equitable outcomes”, and therefore “there should be no delay or barrier” for the research outcomes to be made available to the public which has funded this research. ALLEA agrees, and therefore favours copyright rules that allow for OA publication of (partially) publicly funded research with immediate access and no embargo.

While EU and national copyright laws provide for a variety of rules intended to facilitate the free use and sharing of scientific works, without the need to compensate copyright holders, the current “Big Deals” do not generally factor in these statutory free uses.

Admittedly, the value added to the scientific article during its journey from submission to final

publication is the result of a review and editing process that deserves financial reward. However, much if not most of this work (such as peer-reviewing and journal editing) is outsourced by the publishers to members of the academic community directly affiliated to institutions that are also parties to the agreements. To better judge the added value provided by publishers, there is a need for greater transparency on the pricing of journal publishing services and fees, and developments like the cOAlition S “Journal Comparison Service” are to be welcomed.^[14]

All in all, it is difficult to see why an overall licensing agreement between research institutions representing the authors of thousands of publicly funded works, allowing affiliated researchers to publish and access the products of their own research or their fellow researchers’ endeavours, would justify payment of “read and publish” fees in the order of magnitude of the present “Big Deals”.

Recommendations

1. *Negotiate future deals considering national and EU copyright law.*

Now that the first generation of “Big Deals” is soon to expire, ALLEA recommends that research institutes and affiliated authors reconsider the terms of these agreements. In particular, ALLEA advises negotiators on the part of the research community to better leverage the rights and limitations accorded to authors and research institutions under national and EU copyright law, in order to further enhance the possibilities of (immediate) OA publication and substantially reduce the costs of APCs and journal subscriptions. ALLEA is concerned that if researchers perceive present and future “Big Deals” as vehicles that further strengthen and enrich the scientific publishing oligopoly, their willingness to permit OA publishing will dissipate.

2. *Move away from the current rights assignment models.*

Future “Big Deals” should pave the way for a future of scientific publishing where publicly funded research is freely available from multiple competing platforms, whether operated for profit or not-for-profit, including platforms operated by the research community itself.^[15] Therefore, future deals with scientific publishers should depart from the rights assignment model that still prevails today. Rather than forcing authors to individually negotiate with publishers, universities and other research institutions might consider reserving certain rights in employee-produced publications to themselves, for example, by way of (collectively bargained) labour agreements. In addition, funding organisations should ensure that all researchers participating in the research they fund commit to publishing the research outcomes under an OA model that does not impose APCs or embargos.

3. *Harmonise EU legislation to allow publication of post-print versions without embargo.*

ALLEA recommends that national legislatures follow the example of an increasing number of European states in providing for Secondary Publication Rights that give researchers the right to make the post-print version (i.e., the Version of Record) of articles that are the product of fully and partially publicly funded research available in public repositories without embargo. Authors of scholarly books, scholarly book chapters, and edited research books should also be encouraged to publish their work in OA where reasonably possible. Ideally, such Secondary Publication Rights should be harmonised and made mandatory at the EU level.^{[5],[10]} In doing so, the EU would set an important step towards operationalizing the 2018 European Commission Recommendation, which advised that all scientific publications resulting from publicly funded research be available OA by 2020,^[16] while refraining from creating new barriers for authors. Additionally, with a view to international collaborations that go beyond the EU, further efforts should be made to harmonise Secondary Publication Rights globally.

4. Develop a sustainable non-profit publishing ecosystem.

Finally, ALLEA recommends that research institutions and funding organisations prioritise the development of a sustainable non-profit publishing ecosystem that allows for OA of scientific publications without imposing undue financial barriers to publication, and that prevents scarce financial resources from being syphoned off by the private sector.^[3] The development of community-driven journals that charge no fees to authors and readers (Diamond OA) are an important contribution to a more equitable publishing landscape and an enrichment in bibliodiversity. ALLEA therefore welcomes and supports the Action Plan for Diamond Open Access that was published in March 2022.^[17]

About ALLEA

ALLEA is the European Federation of Academies of Sciences and Humanities, representing more than 50 academies from over 40 countries in Europe. Since its foundation in 1994, ALLEA speaks out on behalf of its members on the European and international stages, promotes science as a global public good, and facilitates scientific collaboration across borders and disciplines. Learn more: www.allea.org

About this Statement

This ALLEA statement has been prepared by ALLEA's Permanent Working Group on IPR, with Prof P. Bernt Hugenholtz as principal author. Through its Working and Expert Groups, ALLEA provides input on behalf of European academies to pressing societal, scientific and science-policy debates and their underlying legislations. With its work, ALLEA seeks to ensure that science and research in Europe can excel and serve the interests of society. Read more about the ALLEA Permanent Working Group on IPR and its members: <https://allea.org/intellectual-property-rights/>

^[1] See, for example: <https://allea.org/portfolio-item/allea-response-to-plan-s/>; <https://allea.org/portfolio-item/ethical-aspects-of-open-access-a-windy-road/>; <https://allea.org/portfolio-item/allea-statement-on-enhancement-of-open-access-to-scientific-publications-in-europe/>

^[2] Zhang, L., Wei, Y., Huang, Y. et al. “Should open access lead to closed research? The trends towards paying to perform research”. *Scientometrics* (2022): <https://doi.org/10.1007/s11192-022-04407-5>

^[3] European University Association “2019 Big Deals Survey Report – An Updated Mapping of Major Scholarly Publishing Contracts in Europe” (2019): <https://eua.eu/downloads/content/2019%20big%20deals%20report%20v2.pdf>

^[4] Frontiers. “It is not transformation if nothing changes” (2022): https://blog.frontiersin.org/wp-content/uploads/2022/06/Frontiers_transformative_agreements_whitpaper_2022.pdf

^[5] European Commission – DG for Research and Innovation “Study on EU copyright and related rights and access to and reuse of scientific publications, including open access” (2022): <https://op.europa.eu/en/publication-detail/-/publication/884062d5-1145-11ed-8fa0-01aa75ed71a1/>

^[6] ALLEA “Statement on Equity in Open Access” (2021): <https://allea.org/portfolio-item/equity-in-open-access/>

^[7] ALLEA “Statement on Enhancement of Open Access to Scientific Publications in Europe” (2013): <https://allea.org/portfolio-item/allea-statement-on-enhancement-of-open-access-to-scientific-publications-in-europe/>

^[8] (a) Art. 18, (b) Recital 74 and (c) Art.3 of the Directive on Copyright in the Digital Single Market, 2019/790: <https://eur-lex.europa.eu/eli/dir/2019/790/oj>

^[9] (a) Art. 5(3)a, (b) Art. 5(3)d and (c) Art. 5(3)n of the Information Society Directive, 2001/29/EC: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029>

^[10] Knowledge Rights 21 “A Position Statement from Knowledge Rights 21 on Secondary Publishing Rights” (2022): <https://www.knowledgerights21.org/wp-content/uploads/2022/10/Secondary-Publishing-Rights-Position-Paper.pdf>

^[11] Court of Justice of the European Union: Judgement of 27 June 2013, C-457/11 (VG Wort), ECLI:EU:C:2013:426. <https://ipcuria.eu/case?reference=C-457/11>

^[12] ALLEA “Supplementary Statement on Enhancement of Open Access to Scientific Publications in Europe” (2015): <https://allea.org/portfolio-item/supplementary-statement-on-enhancement-of-open-access-to-scienti>

[fic-publications-in-europe/](#)

^[13] OSTP Issues Guidance to Make Federally Funded Research Freely Available Without Delay: <https://www.whitehouse.gov/ostp/news-updates/2022/08/25/ostp-issues-guidance-to-make-federally-funded-research-freely-available-without-delay/>

^[14] cOAlition S – Journal Comparison Service: <https://www.coalition-s.org/journal-comparison-service/>

^[15] For example, Latin America has demonstrated for many years that an OA system based around federated institutional repositories works very well, and inspiration should be drawn from initiatives like [Redalyc](#) and [SciELO](#).

^[16] European Commission Recommendation on access to and preservation of scientific information, 2018/790. <https://eur-lex.europa.eu/eli/reco/2018/790/oj>

^[17] Science Europe, cOAlition S, OPERAS, and the French National Research Agency (ANR). “Action Plan for Diamond Open Access” (2022): <https://www.scienceeurope.org/media/t3jgyo3u/202203-diamond-oa-action-plan.pdf>

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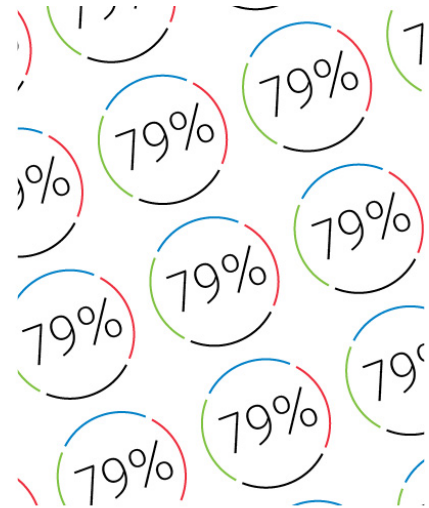
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