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# Introducing a zero-embargo Secondary Publication Right in Bulgaria

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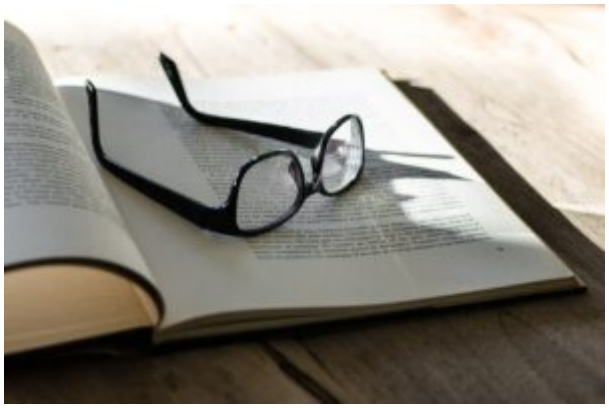

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In recent years, a so called 'Secondary Publication Right' (SPR) has been adopted in a number of European countries and become a policy hot topic at the EU level. The term encompasses a variety of special regimes empowering (or obliging) authors to retain some of the usage rights over their publicly funded works vis-à-vis scientific publishers in order to facilitate open access to scientific literature.

**A bit of context for the SPR**

The aim of the SPR is to address the problem of the public availability of publicly funded academic research outputs. Such a need arises as a result of the generally dysfunctional nature of the prevalent business model in scientific publishing, which creates incentives to publish behind paywalls.

Typically, in the case of scholarly publications, authors are publicly funded through payment under a standing contract with a university or research institute, or through project funding, including EU funding. In order to advance in their careers, academic authors must publish the results of their research in reputable scientific journals with high 'impact factor'. As a general rule, the publishers of these journals require the author to relinquish their copyright over the work by granting them an assignment of rights or an exclusive license. Furthermore, they do not pay any remuneration to the author for publishing the work, but rather either charge institutions and readers for access, or require the payment of publication fees. In this situation, the author is at risk of being incentivised to sacrifice, for reputational purposes, the accessibility and so visibility of their work. Meanwhile the research and/or funding organisation (and indeed the taxpayer) cannot access the fruits of the research they have funded unless they pay a second time for access – either under the form of licence fees for access, for example through a library, or by paying a compensatory fee for the 'opening' of the work to the general public through Open Access.

Laws aiming to remedy these issues have thus been adopted in Spain in 2011 and 2022, Italy and

Germany in 2013, Austria in 2015, France in 2016, the Netherlands and Belgium in 2018. The latest jurisdiction to introduce a SPR is Bulgaria, in the context of the amendment law of 1st December 2023 to transpose the CDSM Directive, introducing a non-overridable zero-embargo SPR.

**Pre-existing Bulgarian provision**

The SPR is not an entirely novel concept to Bulgarian copyright law. The pre-existing Article 60 of the Copyright and Neighbouring Rights Act (CNRA), entitled 'Right to Re-use', provided that "[t]he author has the right to use their work, which was already published in a periodical, after the date of publication, unless otherwise agreed in writing." This pre-existing mechanism did not set any restrictions on the type of publication eligible for re-use, on the version of the work that could be republished, nor on the way the creation of the work was funded. The provision also did not provide for an embargo period. However, the ability of the primary exploiter (the publisher) to request (or require) the author to sign away this right made it ineffective as a means of promoting open access and re-use of publicly funded publications and research data. It also left scholarly authors extremely vulnerable to unfair practices.

For this reason, an additional amendment was proposed by Members of Parliament during the parliamentary stage of the implementation of the CDSM Directive aiming at improving the position of academic authors vis-à-vis scientific publishers by granting them an unwaivable and untransferable right to republish specific works in a specific manner. Although the introduction of SPR was not directly required by the CDSM Directive, the proposed mechanism is consistent with its logic, as it constitutes an imperative rule limiting contractual freedom regarding licensing contacts that aims at strengthening the weaker bargaining position of authors and protecting them vis-a-vis primary exploiters of their works. It is thus very much in line with the spirit of Title IV, arts. 18 et seq. of the Directive.

**Introduction of a zero-embargo Secondary Publishing Right**

The CNRA amendment of 1st December 2023 includes the adoption of an imperative restriction to the parties' freedom of contract, prohibiting the contractual override of the above-mentioned *Right to Re-use* for certain types of re-use of certain works. The mechanism sets out specific rules concerning contracting between authors and publishers and is placed in a chapter of the law entitled 'Contracts for publishing in periodicals'. A new para 2 to art. 60 states that:

"[t]he author of a work of academic literature created on the occasion of a research, funded in whole or in part by public funding, shall retain the right to make that work or parts thereof available in educational or scientific repositories for non-commercial purposes after its acceptance for publication by a publisher, and shall be obliged to mention the publisher when doing so."

In terms of the type of works eligible for re-use, the new regime covers works of academic literature. There are no further requirements concerning the work or its length. Although the provision is placed in a chapter of the law regulating publications in periodicals, the scope of the norm itself is not limited to articles. In contrast with provisions in other jurisdictions, the new

Bulgarian SPR also contains no restriction as to the version available for a secondary publication. The mechanism can equally apply to the version of record (VoR), as well as the author accepted manuscript (AAM).

In order for the mechanism to be applicable, art. 60(2) requires that the work is the result of research that is funded in whole or in part by public funding. There is, however, no mention of a minimum percentage of public funding required for the publication to be subject to the SPR. There is also no embargo period – the publication is reusable immediately after its acceptance for publication by a publisher. The republication must take place in educational or scientific repositories for non-commercial purposes, and the publisher of the primary publication must be mentioned, but the Bulgarian solution does not specify any further conditions for the re-use of the work. The instrument implies no obligation for the author to republish.

What makes the new provision more advantageous for academic authors than what was previously in place is the express prohibition of contractual override of the norm. According to para 3, "[a]ny arrangement which prevents or restricts what is provided for in para 2 shall be null and void."

Finally, the amendment includes, in para 4 of art.60, the provision that 'a publisher may not impose restrictions on the publication of a work of academic literature solely on the grounds that it has already been published in an educational or scientific repository for a non-commercial purpose.' Although there are valid concerns about the enforceability of this provision in practice, this part of the mechanism appealed to policymakers and appeared to contribute to the instrument's adoption the most – ostensibly due to its significance for academic freedom.

**Synchronisation of the SPR and the 'works for hire' regime**

The new SPR mechanism requires some further synchronisation efforts to align it with the rules on the subsistence of copyright and the use of works in the context of employment and assignment relationships.

In Bulgarian law, the 'works for hire' regime is set out in arts. 41 and 42 of the CNRA. Art. 41 regulates the status and use of works created under an employment or service relationship. According to its provisions, copyright in a work created within the framework of an employment contract *belongs to the author*, unless otherwise provided for in the Copyright law. However, the employer *has the exclusive right to use the work so created for its own purposes* (insofar as the employment contract does not provide otherwise). On the other hand, art. 42 regulates the copyright status and use of commissioned works. Copyright in a work made for hire resides in the author of the work, unless the commission contract *provides otherwise*. Also, *unless otherwise agreed*, the commissioning party has the (non-exclusive) right to use the work for the purpose for which it was commissioned.

It should be clarified that the regime of arts. 41 and 42 can hardly be applied consistently in the academic context as direct commissioning relationships are rarely the case, and in view of the principle of academic freedom enshrined in Article 13 of the EU Charter of Fundamental Rights. Between the first and second readings of the proposed amendment to the Copyright Act in Parliament, civil society organisations suggested creating a specific regime for works created within a contractual relationship with so-called 'research performing organisations' (RPO) and 'research funding organisations' (RFO) referenced in open data legislation to correspond to and

supplement the SPR mechanism. This proposal was not taken into account. Indeed, it seems appropriate for efforts to synchronise copyright and Open Data/Open Science legislation to be initiated at the EU level. A solution to the legal and terminological discrepancies between the workings of copyright and open science would also probably require defining the (currently undefined) notions of RPOs and RFOs, or finding another tool to regulate academic authors' unique relationship with employers and funders.

**What's next?**

Apart from ownership over academic works in an employment setting, another issue that would require further detail is the practical implementation of the new SPR mechanism.

During the public consultation on the proposed amendment of the CNRA, a number of stakeholders such as research and higher education institutions raised questions as to where (in which repository) and how academic works would be 'republished'. In my view, all further considerations regarding the format of secondary publications (open format); the possible entities responsible for publishing the works to a repository; requirements for such a repository; possible obligations for the authors to deposit or self-archive their published works; the monitoring of processes etc., are not relevant to copyright law and should be dealt with separately.

A proposal for a Law on the Promotion of Scholarly Research and Innovation freshly tabled in Parliament is a great immediate opportunity to do just that. This also presents members of the Bulgarian academic community, as well as open access advocates, a second opportunity to work towards the synchronisation of the copyright and Open Data/Open Science regimes, at least to the extent permissible under the EU framework.

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