Academic copyright and Open Science: an impossible combination?

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What is Open Science?

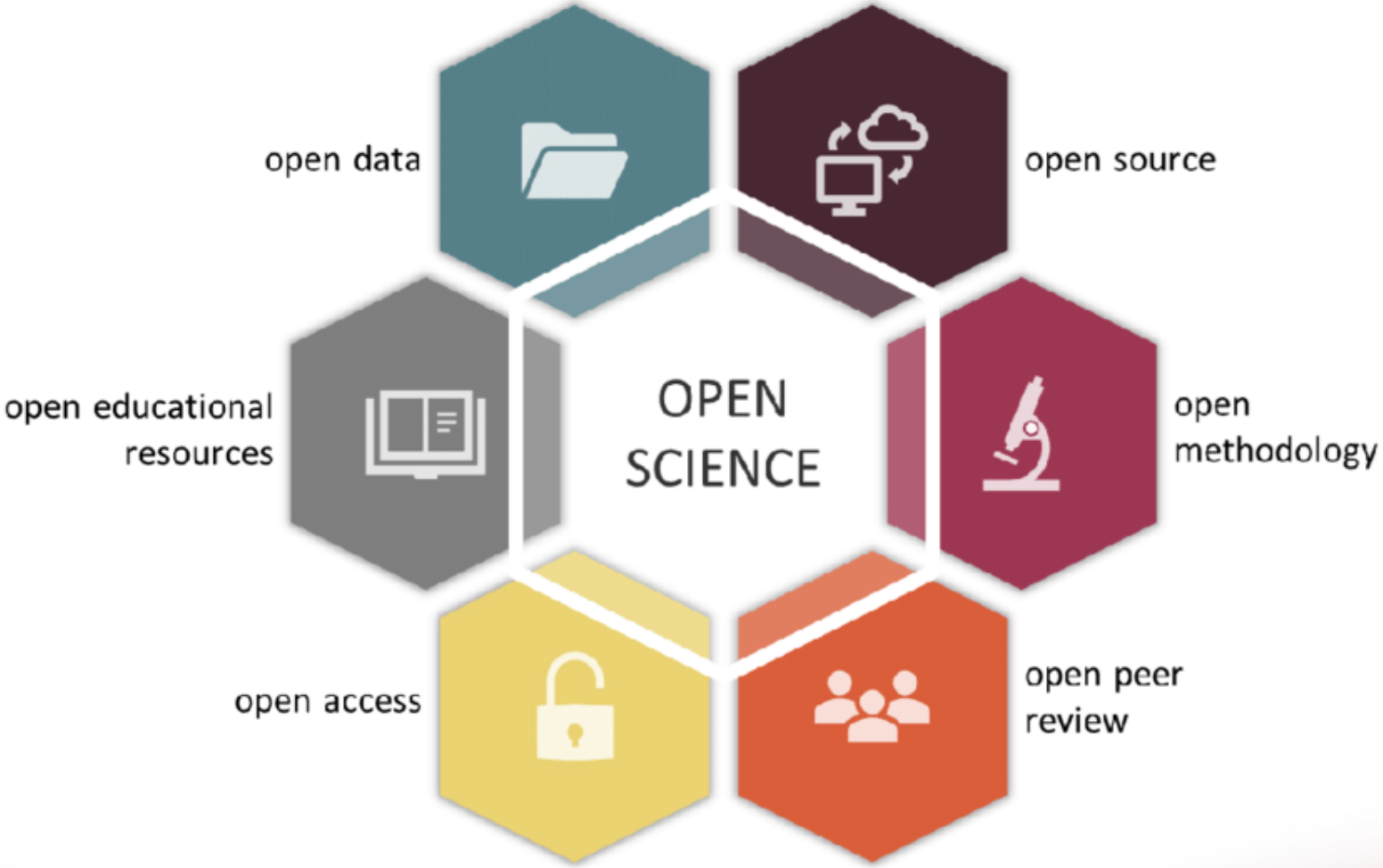
UNESCO Recommendations on Open Science (2021)

Edmunds, Scott & Zauner, Hans & Nogoy, Nicole & Zhou, Hongling & Zhang, Hongfang & Goodman, Laurie. (2022). A Decade of GigaScience : Milestones in Open Science. GigaScience. 11. 10.1093/gigascience/giac067

The UNESCO 2021 definition

"Open science is defined as an inclusive construct that combines various movements and practices aiming to make multilingual scientific knowledge openly available, accessible and reusable for everyone, to increase scientific collaborations and sharing of information for the benefits of science and society, and to open the processes of scientific knowledge creation, evaluation and communication to societal actors beyond the traditional scientific community. It comprises all scientific disciplines and aspects of scholarly practices, including basic and applied sciences, natural and social sciences and the humanities, and it builds on the following key pillars: **open scientific knowledge, open science infrastructures, science communication, open engagement of societal actors and open dialogue with other knowledge systems**".

In a nutshell



Where does the problem lay?

- Copyright/related rights cover most research output and subject matter of Open Science
  - Publications
  - Databases (copyright and sui generis right)
  - Software
  - Educational materials
- An uneven copyright balance: exclusivity vs access
  - Fragmented, limited exceptions and limitations
  - No specific tool for Open Science purposes
- Freedom of contract dominates → negative effect of weaker bargaining power of (academic) authors

ERA Policy Agenda: 20 actions along four priority areas

DEEPENING A TRULY FUNCTIONING INTERNAL MARKET FOR KNOWLEDGE

1. Open sharing of knowledge, incl. EOSC
2. Data legislation fit for research
3. Reform of research assessment
4. Strengthen research careers
5. Gender equality and inclusiveness
6. Protect academic freedom
7. Better knowledge valorisation
8. Research infrastructures
9. International cooperation, reciprocity

TOGETHER FOR TWIN GREEN AND DIGITAL TRANSITION, AND INCREASING SOCIETY'S PARTICIPATION IN THE ERA

10. R&I Missions and Partnerships for ERA
11. Green energy transformation
12. Transition of industrial ecosystems
13. Empower higher education institutions
14. Bring science closer to society

AMPLIFYING ACCESS TO RESEARCH AND INNOVATION EXCELLENCE ACROSS THE UNION

15. Regional and national R&I ecosystems
16. EU-wide access to excellence
17. Strategic capacity of public RPOs

ADVANCING CONCERTED R&I INVESTMENTS AND REFORMS

18. Coordination national support for ERA
19. ERA monitoring mechanism
20. Prioritisation and coordination of R&I investments and reforms

European Commission

Source of image: Presentation of DG Research and Innovation at the Meeting of the Steering Platforms in Skopje, 2023

The ERA Study (May 2024)

- PPMI, IViR Amsterdam, CITIP KU Leuven, Scuola Superiore Sant'Anna
- Mapping of literature, OS policies, EU and national copyright and data legislation
- Surveys with researchers, RPOs, publishers (commercial and institutional)
- Impact assessment
- Policy options

Available at https://op.europa.eu/en/publication-detail/-/publication/77395a15-133b-11ef-a251-01aa75ed71a1/language-en/format-PDF/source-320174540

Study articulated around 3 pillars

- Mapping of EU and Member States' Open Science policies and interventions
- Mapping and assessment of EU and Member States' enablers and disablers for Open Science in copyright legislation
- Literature review (studies, reports, academic contributions) on interplay between Open Science and copyright legislation

GOAL: Laying the groundwork for surveys, assessment and development of policy options

Key findings 1: Member States' OS policies and interventions

- National approaches in alignment with EU policies and agenda, different timeliness
- Mostly soft law instruments, only a few legislative interventions (SPR-related)
- Access to scientific publications top priority (different tools, from CC to OA schemes and centralized agreements)
- Accessibility and reusability of data as second leading theme (DMP, FAIR principles)

Key findings 2: Enablers/disablers for OS in EU copyright law

- **Wide range of research-specific E&Ls**
- **Useful array of research-complementary instruments in the acquis (E&Ls, licensing schemes, public domain)**
- **Provisions use broad language → more discretion to MSs**
- **Positive paradigm shift towards mandatory provisions, not overridable by contracts (see CDSMD)**

- Research E&Ls tainted by optional nature, strict limitation to non-commercial uses, contractual overridability, lack of coverage of collaborative research
- Specific problem in Art 5(3)(a) ISD (teaching/research exception) impacting on national implementations
- Uncertain notions and vague definitions (e.g. lawful use), strict purpose limitation
- Weak coordination between general and sector-specific Directives
- No EU-wide definition of authorship/ownership, detrimental to cross-border activities
- Boundaries of public domain not harmonized
- Broad scope of sui generis database right (Article 7 DBD); expansive reading of Articles 2 and 3 ISD
- Member States' discretion to introduce related right for scientific publications in public domain (Art 5 Term)

Key findings 3: Enablers/disablers for OS in national laws

- Most MSs implemented optional research-specific E&Ls, except Article 9(2)(b) DBD (20 MSs) and Article 6(2) DBD (only a handful)
- High degree of harmonization of instruments complementary to research-specific E&Ls
- Some MSs show higher degree of flexibility towards research activities via additional E&Ls, licensing schemes, introduction of SPRs

- Optional nature and vague language of E&Ls lead to low harmonization
- Additional limitations in purpose constraints effectiveness of complementary provisions for OS
- Diverging court interpretations of key concepts = more uncertainties for cross-border activities
- Transposition of general ISD research exception (Article 5(3)(a)) tainted with problems
  - Focus on education rather than on research
  - Divergences in beneficiaries, works covered, permitted uses + introduction of additional limitations, remuneration requirements and conditions of applicability

Why an EU-wide Secondary Publication Right?

Empowering scientific authors and rebalancing bargaining powers in publishing contracts

Ensuring greater availability of publicly-funded research

Not an E/L but a right subject to specific conditions to strike a balance between conflicting interests

Harmonized and EU-wide to provide one single legal framework which could

- increase researchers' awareness
- facilitate collaborative cross-border endeavors
- avoid fragmentation of contractual practices in the internal market and European Research Area

SPR in 6 Member States

FEATURES	DE (2013)	NED (2015)	AT (2015)	FR (2016)	BE (2018)	BG (2024)
Source	**UrhG, §38**	**AW, Art.25fa**	**UrhG, §37a**	**CPI, Art. L.533-4**	**CDE, Art.XI.196**	**Bulgarian Copyright Act, Art.60**
Subject matter	• Scientific contributions • Appeared in collections periodically published at least 2 times a year	• Short works of science • No limitation as to venue of first publication	• Scientific contribution by member of staff of research institutions • Appeared in collections periodically published at least 2 times a year	• Scientific writing (*écrit*) • Published in a periodical issued at least once a year	• Scientific article • Published on a periodical (number of issues not specified)	Scientific work
Requirements	Research publicly funded for > 50%	Research financed entirely/partly publicly	Research publicly funded for at least 50%	• Research publicly funded for at least 50% • Agreement of all co-author(s) required	Research publicly funded for at least 50%	Research publicly funded, in whole or in part Publisher to be informed
Overrides contrary contractual clauses?	Y	Y (Article 25h AW)	Y	Y	Y	Y
Version limitation	Only for AAM version	No limitation	Only for AAM version	Only for AAM version	Only for AAM version	No limitation
Content of SPR	Right to make the contribution available to the public	Right to make the work available to the public free of charge	Right to make the contribution publicly accessible	Right to make available the contribution free of charge in an open format, by digital means	Right to make the manuscript available to the public free of charge	Right to make the work or parts thereof available to the public
Embargo	1 year after 1st publication	after a reasonable period	1 year after 1st publication	6 month (science, technology and medicine) or 1 year (humanities and social science) after 1st publication	6 month/1 year after 1st publication, but can be shorter (if so provided by contractual licenser) or longer (by law)	None
Use limitation	Non-commercial purposes	NO limitation (type of use not specified)	Non-commercial purposes	Non-commercial purposes	NO limitation (type of use not specified)	Non-commercial purposes

Policy options

Broad range of scientific output

- National SPR limited to journal articles
- RPOs advocate for it to increase OA, publishers highlight need to change business model (% dependent on revenue)

LEGISLATIVE MEASURES

- Fully harmonized EU regime covering broader range of products, to overcome obstacles to full OS (esp DB protection)
- Must investigate interplay with data regulation

NON-LEGISLATIVE MEASURES

- Stakeholders' dialogue for best practices to back development of common national approaches

Low threshold for public funding

- Imbalance/problems → large part of research is in public-private partnership
- Problems esp. in applied sciences
- RPOs in favour to increase OA; lower concerns among publishers

LEGISLATIVE MEASURES

- If E/L – limits in three-step test?
- If A's right – unaffected by % of funding

NON LEGISLATIVE MEASURES

- Unlikely to solve problem, but SH dialogue to discuss best practices to prevent overly restrictive public funding requirements

Cover version of record

- Limitation to AAM prevails in MSs
- VOR essential for accurate reference, no multiple version circulating
- Commercial Ps more against it for disruptive effects on business models

LEGISLATIVE MEASURES

- Protection of publisher's creative choice in typesetting/layout?
- Three-step test analysis if SPR = E/L
- Need to assess business models more broadly – what really erode business?

Policy options (ii)

Minimise embargo periods

- Differences among MSs
- RPOs prefer no/short embargo; Ps indicate need to reshape business model (lower ROI)

LEGISLATIVE MEASURES

- Careful balance needed + need for three-step test analysis if E/L
- Need to assess business models and impact more broadly

NON-LEGISLATIVE MEASURES

- Unlikely to be effective

No limit to non-commercial use

- Divergences in MSs may cause problems (private-public partnership)
- RPOs advocating for broader uses ; Ps indicate need to change bus model

LEGISLATIVE MEASURES

- OA goals need no confinement to specific type of re-uses
- Need for balancing conflicting interests and analysis of legal requirements (3ST and necessary changes in business models)

NON-LEGISLATIVE MEASURES

- Unlikely to solve problems – only to encourage MSs to follow less strict approach when amending law

Umbrella licensing and remuneration schemes

- Can raise problems; difficult to assess SHs' perception (too many different schemes)
- Problems: (a) unbalance in bargaining power; (b) unpredictability and national fragmentation of contracts
- Ps against it; RPOs in favour

LEGISLATIVE MEASURES

- Intervention on copyright contract law
- From exclusive to remuneration rights

NON-LEGISLATIVE MEASURES

- SHs' dialogue to identify common ground for umbrella solution based on ECLs examples, Marrakesh and CMOD

Thank you for your attention!

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