

1.4 Open Access and remuneration of researchers: considerations on the author's perspective

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In the context of the discussion concerning remuneration systems under the law of copyright, it seems fitting to reflect on the role and challenges that a particular group of authors currently face. This group is composed of academic authors in their role of creators and contributors to research outputs traditionally published in academic journals. Following the adoption of open access policies by universities, by a large number of public and private funding institutions¹ worldwide and by international organisations,² academic authors have been called to comply with terms that directly affect their ability to exercise rights conferred to them by law. As discussed in this note, the remuneration derived from their creative outputs is also likely to be affected in the long run.

'Open access' is an expression characterized by many connotations but that lacks a straightforward and univocal definition. Open access policies share common justifications but, in their implementation, tend to vary from one university to another or from country to country. Significantly, the ways explored to ensure that open access to publicly funded research is granted to the general public do not venture in the field of exceptions or limitations to the exclusive rights of authors. Therefore, the question of whether an exception for the purpose of open access would trigger a system of compensation – as it does for other copyright exceptions – is not the focus of the discussion contained in this note. Conversely, open access policies are firmly based on copyright licences and related contractual practices adopted by the relevant stakeholders.

In this note, it is observed that, in the semantic confusion surrounding the open access discourse, the role of authors risks to be reduced to that of accidental extras, who have left the stage to other key actors in the negotiations, such as higher education institutions, funding bodies and academic publishers. Ultimately, however, the voice of academic authors should not be neglected. In the context of academia, the researcher is a protagonist in the creation and authorship of publishable outputs. This note offers a few observations on the understanding of incentives, of both monetary and non-monetary nature, that drive academic authors, in order to fully appreciate and evaluate the impact and desirability of open access policies currently rolled out in academic institutions worldwide.

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¹ Bill & Melinda Gates Foundation Open Access Policy (<http://www.gatesfoundation.org/How-We-Work/General-Information/Open-Access-Policy>, accessed on 20 June 2016).

² UNESCO Open Access policy 'grants an irrevocable right of access to copy, use, distribute, transmit and make derivative works in any format within certain constraints' (www.unesco.org/new/en/openaccesspolicy, accessed on 20 June 2016).

I. Justification for Open Access to scholarly publications

The focus of formal open access requirements is publicly funded research, but the approach to open access taken by funding bodies could extend beyond this scope. When research is supported by public funds, the awarding body is called to justify how those funds are spent. The main argument is that the public, as indirect contributor to research funding (e.g. via taxation), should obtain access to the relevant outputs generated by such research. In this sense, research outputs would be fully accessible as public goods, presenting non-exclusionary and non-rival characteristics. In this context, 'Free licenses attempt to draw lines to nurture and protect free culture'.³

Accordingly, the European Commission illustrates this approach in the following terms: 'The vision underlying the Commission's strategy on open data and knowledge circulation is that information already paid for by the public purse should not be paid for again each time it is accessed or used, and that it should benefit European companies and citizens to the full'.⁴ This logic naturally encourages to associate the terms 'open' with the term 'free'. Nevertheless, these two terms have quite different meanings when addressing the matter of remuneration due to authors. While monetary and non-monetary incentives characterise the work of an academic author, it is important to emphasise that the production of publishable academic outputs is not cost-free,⁵ for individual contributors, the academic institutions to which they belong, the university libraries that host their content and especially in the eyes of the funding institutions that award grants to applicants.

A disambiguation, however, ought to be highlighted here. In theory, 'free access' refers to the notion of unrestricted entry. Initially, it does not trigger issues related to the re-use of content. Conversely, the concept of 'open access' as currently developed, seeks to ensure that re-use is allowed in the widest and most flexible manners.

In this discourse, researchers are described, for example, as 'generators of research papers'.⁶ It is possible that some authors and copyright communities

³ V Grassmuck, 'Towards a New Social Contract: Free-Licensing into the Knowledge Commons', in L Guibault and C Angelopoulos (eds.), *Open Content Licensing – From Theory to Practice* (Amsterdam University Press, Amsterdam, 2011), p. 48.

⁴ European Commission, Communication 'Towards better access to scientific information: Boosting the benefits of public investments in research', 17 July 2012, COM(2012) 401 final, p. 4.

⁵ For reference, see T Dreier, 'Overview of Legal Aspects in the European Union' in J M Asanu and P F Uhler (eds.), *Open Access and the Public Domain in Digital Data and Information for Science* (The national Academies Press, Washington DC, 2004), p. 20.

⁶ Research Councils UK, 'RCUK Policy on Open Access and Supporting Guidance', (8th April 2013), p. 2

feel uncomfortable with this description. Moreover, this approach does not reflect the inevitable and significant variations that exist in attitudes to academic publishing in different disciplines.⁷

To add to this picture, it is acknowledged that higher education institutions are key players in the process of adoption and implementation of open access policies. They employ a large number of academic authors. With their libraries, they are also the designated holders of large-scale repositories, which facilitate access to publicly funded research. Often, university libraries have been called to coordinate the activities necessary to ensure that authors comply with open access policies when required. Accordingly, '[l]ibraries play an essential role in open access developments by their expertise in building infrastructure, in creating user-friendly services of high quality and in securing long-term access... Open access has... changed the profile of academic and research libraries. National libraries are involved in developing national open access policies and supporting national research infrastructures and open access to cultural heritage. Public libraries disseminate open access content targeted for their users'.⁸

II. The rationale and implementation through 'green' and 'gold' open access

In order to fulfil the aims and objectives of open access policy, access to research outputs is not the only requisite. Funding bodies also require the possibility for users to be able to re-use freely accessible content for example by 'right to copy, distribute, search, link, crawl, and mine'.⁹ On this basis, two main publishing models have been elected as the preferred routes to comply with open access requirements, with slight variations that are specific to each funding body or other institutions involved in the process.

The Green route consists in self-archiving research outputs in institutional repositories, such as those set up by universities. The archived document submitted to the repository by a researcher should be the final peer-reviewed

(<http://www.rcuk.ac.uk/documents/documents/rcukopenaccesspolicy-pdf/> , accessed on 20 June 2016).

⁷ Evidence based results on this matter are discussed, for example, in T Eger, M Scheufen and D Meierrieks, 'The determinants of open access publishing: survey evidence from Germany', (2015) *European Journal of Law and Economics*, Volume 39, Issue 3, pp. 475-503.

⁸ International Federation of Library Association, 'IFLA Statement on open Access' (18 April 2011) (<http://www.ifla.org/files/assets/hq/news/documents/ifla-statement-on-open-access.pdf> , accessed on 20 June 2016).

⁹ European Commission DG for Research and Innovation, 'Guidelines on Open Access to Scientific Publications and Research Data in Horizon 2020' (Version 2.1) (15 February 2016), p.2 (http://ec.europa.eu/research/participants/data/ref/h2020/grants_manual/hi/oa_pilot/h2020-hi-oa-pilot-guide_en.pdf , accessed on 20 June 2016).

version as accepted by the publisher. An embargo period may apply but, after that period expires, the content should be freely available to everyone.¹⁰

Via the Gold route, a publisher offers access to the relevant research output immediately and free of charge. However, behind this system, there is a nexus of agreed terms which often entail the payment of fees known as ‘article processing charges’ (APCs). Effectively, APCs are sums transferred to publishers, which determine the flexible availability of content in compliance with open access policies. APCs are often a budgeted component for funded research projects, so that when the time of publication arrives, researchers will be in the position to be compliant with the open access requirements contained in the agreements they signed with the funding institution. Especially in a time of transition and adaptation of publishing business models, several university libraries, schools and departments have set aside monies to ensure that also non-funded researchers could be given the opportunity to publish outputs under open access conditions.

With the Gold route, several publishers have chosen to use Creative Commons Attribution Licences (CC-BY), which allow third parties to copy, ‘distribute, remix, tweak, and build upon’ the work, as long as the author is credited.¹¹ Significantly, this permits non-commercial and commercial re-use of the output in question. Moral rights remain unaffected under this licence.¹²

The Gold route is preferred by some funding institutions¹³ for the immediate and unrestricted nature of the access guaranteed by the publisher. This aspect is noteworthy because it highlights the persistent confusion between free and open forms of access. Remuneration, in fact, remains a key factor of copyright licensing.

III. Scope

Three examples I include in this note will briefly illustrate the possible scope of open access policies.

Under the European Commission’s FP7¹⁴ Grant Agreement, which can be considered a precursor of the current Horizon 2020 model discussed below, the requirement was for beneficiaries to ‘deposit an electronic copy of the published version or the final manuscript accepted for publication of a scientific publication relating to [results, including information, whether or not they can

¹⁰ Research Councils UK, ‘RCUK Policy on Open Access and Supporting Guidance’ (fn 7), p. 6.

¹¹ Creative Commons Attribution 4.0 International (CC BY 4.0).

¹² On this aspect, see, however, C. Scollo Lavizzari, in this book, at p. 351.

¹³ This is the case of Research Councils UK (‘RCUK Policy on Open Access and Supporting Guidance’ (fn 7), p. 1 and p. 6).

¹⁴ The 7th Framework Programme funded European Research and Technological Development from 2007 until 2013.

be protected, which are generated under the project] published before or after the final report in an institutional or subject-based repository at the moment of publication.¹⁵ Beneficiaries were required 'to make their best efforts to ensure that this electronic copy becomes freely and electronically available to anyone through this repository'¹⁶ in line with the Green or Gold routes illustrated above.

The Horizon 2020 Model Grant Agreement sets stricter and more specific requirements: '[e]ach beneficiary must ensure open access (free of charge, online access for any user) to all peer-reviewed scientific publications relating to its results.'¹⁷ In comparison to the FP7 Agreement, here the Commission preferred not to rely uniquely on the 'best effort' of beneficiaries. However, the requirement specifically refers to 'peer-reviewed scientific publications' relating to the results of the project,¹⁸ and not to the wider array of results generated under a project.

Research Councils UK indicates that its 'policy covers all peer-reviewed research and review articles normally published in academic journals or conference proceedings, and which acknowledge Research Council funding. The policy does not cover monographs, books, critical editions, volumes and catalogues, or forms of non-peer-reviewed material. However, RCUK encourages authors of such material to consider making them Open Access where possible.'¹⁹ According to this policy, an author is afforded more freedom as to the licensing conditions when he or she decides to publish a monograph or an edited book.

The Horizon 2020 Grant Agreement contains an obligation for the successful grant applicant to disseminate the results of the research funded under this scheme. The Grant Agreement reads as follows: 'Unless it goes against their legitimate interests, each beneficiary must — as soon as possible — 'disseminate' its results by disclosing them to the public by appropriate means (other than those resulting from protecting or exploiting the results), including in scientific publications (in any medium)'.²⁰ From an author's perspective, this

¹⁵ This was the case also under the FP7 scheme (European Commission, 'FP7 Grant Agreement – List of Special Clauses' (Version 4, 14 February 2012), Clause 39 (http://ec.europa.eu/research/participants/data/ref/fp7/100308/rea-special-clauses_en.pdf), accessed on 20 June 2016).

¹⁶ *Ibid.*

¹⁷ European Commission, 'H2020 General Model Grant Agreement – Multi, Version 2.1., 1 October 2015, Article 29(2) (http://ec.europa.eu/research/participants/data/ref/h2020/mga/gga/h2020-mga-gga-multi_en.pdf), accessed on 20 June 2016).

¹⁸ *Ibid.*

¹⁹ Research Councils UK, 'RCUK Policy on Open Access and Supporting Guidance' (fn 7), p. 4. See also G Crossick, 'Monographs and Open Access', a report prepared for the Higher Education Funding Council for England (January 2105).

²⁰ European Commission, 'H2020 General Model Grant Agreement – Multi, Version 2.1., 1 October 2015, Article 29(1) (http://ec.europa.eu/research/participants/data/ref/h2020/mga/gga/h2020-mga-gga-multi_en.pdf), accessed on 20 June 2016).

note illustrates how a legitimate question can be raised as what constitutes a beneficiary's legitimate interest.

The mandatory nature of open access in H2020 marks a significant change from the FP7 scheme. The effectiveness of dissemination of research results funded by H2020 will also be enhanced by the 'Pilot Action on Open Research Data'. This affects beneficiaries in certain strands of the H2020 scheme and works accordingly to a policy of 'open access as the default mode (but including an opt-out option) and obligatory data management plans'.²¹ A Data Management Plan can be considered as a further supporting tool to ensure the widest possible dissemination of results through accurate budgeting.²²

A researcher's decisions to divulge or publish content appear to be safeguarded under grant model contracts. This point is of significance in countries where this is recognised as a moral right belonging to the author (such as France) as well as in countries where the decision falls within the realm of the economic right of distribution (such as the UK). Accordingly, 'open access requirements in no way imply an obligation to publish results. The decision on whether or not to publish lies entirely with the grantees. Open access becomes an issue only if publication is elected as a means of dissemination'.²³

IV. Incentives

Authors who have been offered the opportunity to enter into an agreement with a funding institution, in accordance with the contractual conditions illustrated in this note, have also been asked to reach a compromise between the possible requests of commercial publishers and the requirements with the terms of the grant agreement. It has been argued that room for negotiations with academic publishers is often limited, with authors 'confronted – as a pre-condition to the publication of their article – with the publisher's standard form agreement, according to which the author grants the latter a transfer of the rights on his work'.²⁴ However, a 'take-it-or-leave-it' approach is not a practice exclusively

²¹ European Commission, Communication 'On the Response to the Report of the High Level Expert Group on the Ex Post Evaluation of the Seventh Framework Programme', 19 January 2016, COM(2016) 5 final, p. 8.

²² European Commission (Directorate-General for Research & Innovation), 'Guidelines on Data Management in Horizon 2020', (Version 2.1, 15 February 2016) (http://ec.europa.eu/research/participants/data/ref/h2020/grants_manual/hi/oa_pilot/h2020-hi-oa-data-mgt_en.pdf, accessed on 20 June 2016).

²³ European Commission DG for Research and Innovation, 'Guidelines on Open Access to Scientific Publications and Research Data in Horizon 2020', (Version 2.1) (15 February 2016), p.3 (http://ec.europa.eu/research/participants/data/ref/h2020/grants_manual/hi/oa_pilot/h2020-hi-oa-pilot-guide_en.pdf, accessed on 20 June 2016).

²⁴ L Guibault, 'Owning the Right to Open Up Access to Scientific Publications', in L Guibault and C Angelopoulos (eds.), *Open Content Licensing – From Theory to Practice* (Amsterdam University Press, Amsterdam, 2011), p. 150.

adopted by publishers. Overall, the open access and copyright clauses of a standard form agreement by a funding institution impose precise conditions on the author. They may be seen as 'take-it-or-leave-it' clauses themselves, whereby the author is asked to choose between being the beneficiary of a grant, or renouncing it.

Overall, it could be said that the academic author finds himself or herself in between two 'take-it-or-leave-it' scenarios. Naturally, it would be highly desirable if these two sets of conditions did not develop in opposing directions, and the market was capable of evolving in a way that facilitated the alignment of aims and incentives of publishers and funding institutions. Could authors be the key to the resolution of this riddle? A process aimed at enhancing the effectiveness of open access to published research should engage with academic authors to fully appreciate the nature of the incentives and pressure that drive their choices.

In the relationship with commercial publishers, it is not a taboo for authors in certain disciplines to negotiate terms of publishing agreements, for example with regard to moral rights and royalty rates for monographs. But it is also accepted that, in certain disciplines more than in others, remuneration based on prestige and/or prospects of promotion is closely linked to the number of peer-reviewed articles published by an author and to the destination of such articles in terms of scientific ranking of the targeted journals. Economists have argued that '[p]restige is the currency of academia. Aside from the pure enjoyment of prestige, a scholar's chances for promotion, tenure, a higher salary, etc., increase with his or her prestige. Prestige comes from doing high-quality research'.²⁵ Also, '[p]ublication would bring... monetary benefits to academics even if academic copyright were eliminated... That academics in fact generally obtain only insubstantial or no royalty income from publishing yet they devote great effort to writing implies that the incentives to publish that are unrelated to copyright must be strong'.²⁶

The monetary incentive is often dismissed as irrelevant to academics. However, it has been argued that 'free access and accessibility are somehow linked to pricing'.²⁷ Overall, it would be imprudent to dismiss the impact of copyright royalties for all academics. In response to the observation that 'in the scholarly journal publishing context, authors do not typically receive royalties or other payments based on the sale of copies of their articles',²⁸ here it is submitted that it would be preferable to obtain reliable evidence on actual earnings by such authors from schemes set up in order to distribute remuneration earned from

²⁵ M J McCabe and C M Snyder, 'The best business model for scholarly journals: an economist's perspective', *Nature Web Focus*, 16 July 2004.

²⁶ S Shavell, 'Should Copyright of Academic Works Be Abolished?', (2010) *Journal of Legal Analysis*, Vol. 2, Issue 1, pp. 316 – 317.

²⁷ T Dreier, 'Overview of Legal Aspects in the European Union' in J M Esanu and P F Uhlir (eds.), *Open Access and the Public Domain in Digital Data and Information Science* (The National Academies Press, Washington, D.C., 2004), p. 20.

²⁸ <http://www.authorsalliance.org/2014/10/16/open-access-faq/>, accessed on 20 June 2016).

academic publishing (including publishing in academic journals). Collecting societies – such as ALCS in the UK²⁹ – could provide valuable information to discover whether earnings derived by authors from the use of outputs published in academic journals are in fact a sizable amount.

V. Concluding observations

The market of academic publishing is experiencing significant changes prompted *inter alia* by the requirements included in model agreements of funding bodies. Consultations are being held to ensure that the views of stakeholders are heard and evaluated in the process.³⁰ It is observed, however, that the recognition of the role of researchers as authors and beneficiaries of rights is limited, and minimal evidential consideration is given to the potential direct and indirect commercial value of academic publishing for individual researchers. The matter of the link between publishing attitudes and earnings is a multifaceted one, and largely unexplored.

Crucially, academic authors are individuals who work towards peer recognition through publishing. Open access policies interfere with publishing decisions and therefore have an effect on authors' decisions and incentives. It can be argued that the different treatment that is granted by model agreements set out for publications in social sciences subjects on the one hand and publications in hard sciences subjects on the other hand is partly an acknowledgement of the different market incentives that influence authors' decisions.³¹ From this perspective, one can note the different embargo periods contained in the Horizon 2020 model agreement, to distinguish the requirements set for social sciences and humanities from those set for other disciplines.³² If an embargo period applies, the Agreement establishes a maximum term of six months, which

²⁹ Authors' Licensing and Collecting Society, 'The Business of Being an Author A Survey of Author's Earnings and Contracts' (April 2015) ([https://www.alcs.co.uk/Documents/Final-Report-For-Web-Publication-\(2\).aspx](https://www.alcs.co.uk/Documents/Final-Report-For-Web-Publication-(2).aspx), accessed on 20 June 2016).

³⁰ These include the European Commission one-day public consultation on open research data (2 July 2013) (<https://ec.europa.eu/digital-single-market/node/67533>, accessed on 20 June 2016). See also Higher Education Funding Council for England, 'Consultation on open access in the post-2014 Research Excellence Framework' (24 July 2013) (<http://www.hefce.ac.uk/pubs/year/2013/201316/>, accessed on 20 June 2016).

³¹ T Eger, M Scheufen and D Meierrieks, 'The determinants of open access publishing: survey evidence from Germany' (fn 7), p. 500.

³² This was the case also under the FP7 scheme (European Commission, 'FP7 Grant Agreement – List of Special Clauses' (Version 4, 14 February 2012), Clause 39, p. 18, fn. 6 (http://ec.europa.eu/research/participants/data/ref/fp7/100308/rea-special-clauses_en.pdf, accessed on 20 June 2016).

is extended to twelve months for publications in the social sciences and humanities.³³

The issues addressed in this note lead to two main observations. The first is that it would be a drawback to achieving effective open access not to consider the fine details of the economic impact of open access policy on monetary and non-monetary remuneration of academic authors. Copyright law grants them economic and moral rights: focusing policy concerns on moral rights and neglecting the patrimonial element would be a limitation of the analysis. The second observation is that the ethos shared in different academic and research disciplines should also be duly considered and evaluated on the basis of rigorous evidence across jurisdictions, in order to ensure that embargo periods are available when necessary, and that a degree of choice is left to authors as to the best possible journal to target for the publication of their research findings.

³³ European Commission, 'H2020 General Model Grant Agreement – Multi, Version 2.1, 1 October 2015, Article 29(2)(b)(ii) (http://ec.europa.eu/research/participants/data/ref/h2020/mga/gga/h2020-mga-gga-multi_en.pdf), accessed on 20 June 2016).