

Open Access to Scientific Works: Axiology, History and Chosen Aspects of Copyright Solutions

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Problems concerning Open Access to human creative works, especially scientific works is complex. Development of research and growing number of scholarly papers as well as other materials demand systemic solutions – both in national and international perspective. The article outlines legal and practical problems concerning Open Access to scientific works – the basic phenomenon tending to ensure free development of sciences in the context of local, European and international cooperation and progress. The author describes the history of Open Access movement, starting in the 1980s with the development of free software trend and followed by Creative Commons licensing solutions. The first decade of the new millennium has brought many great strides in popularization of Open Access. Many initiatives of this kind have appeared launched by various actors. The basic legal problems of Open Access are obtaining research materials to on-line repositories and – on the other hand – liability of repository providers in the context of potential breaches of copyright.

Key words: Open Access, Creative Commons, scientific works, copyright law

Introduction

The problem of Open Access to the scientific output is not only local, i.e. national, but also strictly international. The issue was expressed by the European Union – e.g. in its initiative Open Data Strategy announced on 12 December 2011 or in the programs openAIRE and openAIREplus developing e-infrastructure for different dispersed repositories. Simultaneously, Open Access implementation is launched on the non-government basis – there are disciplinary repositories (arXiv, Social Science Research Network), research foundations (Wellcome Trust), as well as open and hybrid publishers (PLOS).

The describing issue demands changes in thinking – overcoming egoist monopoly attitude towards any output of creative activity and treating it only as a trade good. Paradoxically, this change in thinking is especially hard to be implemented in the Central and Eastern

European countries formerly belonging to the communist block. It seems that the first decades of development of free market economy in this part of Europe resulted in the attachment to private property and treating any kind of human output, including works of creativity, as a trade good potentially giving financial income. In this attitude taking into account wider and long-term perspective is not easy to be caught. Sharing creative output on a large-scale demands changes not only in the society's and academics' attitude but also obviously in the legal, administrative and financial frameworks.

The aim of this article is to outline one of the most important problems of copyright law – Open Access to scientific works. Mostly, it is a reference paper – it covers axiology, meaning, history and accurate solutions concerning Open Access, posing a question: is the international cooperation possible?

The author intends to describe the axiological background of Open Access, its historical development, legal solutions in introducing Open Access in various national systems and legal problems concerning Open Access. The paper consists of four main parts. In the first one, we can find a short description of axiological background of Open Access as well as its definitions and classification. The second part introduces historical perspective of Open Access beginning from free software movement and names the crucial legal solutions implied. In the third part, one can find brief summaries of chosen national and transnational solutions within Open Access. Finally, in the fourth part the basic legal problems concerning Open Access are characterized, namely questions of obtaining of the repository rights and liability of the repository provider.

Literature Review

Although the problem of Open Access is quite new, being strictly connected with expansion of internet communication and dating since approx. 2003 or 2004, there are quite many contributions on the subject within the specialist literature. The scope of this article does not allow citing all of them. Below please find only some chosen contributions in the literature on the matter.

A very interesting expert report is a joint publication by a team of Polish academics lead by Prof. Marek Niezgodka of Interdisciplinary Centre for Mathematical and Computational Modelling, entitled *Wdrożenie i promocja otwartego dostępu do treści naukowych i edukacyjnych [Implementation and Promotion of Open Access to Scientific and Educational Content]* (Niezgodka et al. 2011).

The leading Polish specialist in Open Access is Krzysztof Siewicz.

He has provided a strong input in both development of Open Access in Poland and literature on the matter. He is the author of such papers or publications as 'Prawo autorskie i wolne licencje' ['Copyright and Free Licenses'] (Siewicz 2010), 'Prawne możliwości wprowadzenia otwartego mandatu wobec publikacji naukowych' ['Legal Possibilities to Introduce Open Access Mandate to Scientific Publications'] (Siewicz n. d.), *Otwarty dostęp do publikacji naukowych: kwestie prawne* [*Open Access to Scientific Publications: Legal Problems*] (Siewicz 2012).

The basic classification of Open Access was formed by Peter Suber, especially in his articles 'Gratis and Libre Open Access' (Suber 2008) and 'Strong and Weak OA' (Suber and Harnad 2008). There are quite a lot of materials covering national experience with Open Access. Research analyses concerning Open Access as implied in Australia can be found in papers by Australian scholar Artur Sale (2006a; 2006b; 2006c) of the University of Tasmania. He has run research to prove development of Open Access in various aspects including growth of citations. Other national contributions can be found in Costa and Leite (2008). There is also a wide range of source materials – institutional declarations, legal acts and implemented ready-made legal solutions.

Axiological Origin of Open Access and Its Essence

Each copyright law system is situated on the basic conflict – on one hand, there is a crucial need to protect output of human creativity,¹ and on the other – the society does have the right to use and exploit this output.² The mentioned conflict is extremely visible in the case of scientific works – on one hand there is an obvious need to copyright them and protect authors' rights, but on the other – freedom of science and what is more – development of science demand legal framework for as wide as possible access to this kind of human works.

Legal bases on which access to scientific works can be offered are both statutory and contractual. Statutory one derives from the will of the lawgiver (public domain, permissible use of protected works), contractual – from the will of a copyright holder (contracts between interested parties including free licenses). In the context of scientific works, we can name a phenomenon of Open Access movement.

THE TERM OF OPEN ACCESS

Open Access can be described as a free and with no technical restrictions making available to the public of the scientific works in such a

way that members of the public may access them from a place and at a time individually chosen by them.³ In short, it means that Open Access means making available in the public internet networks with no fees. Traditionally, Open Access refers to reviewed scholarly papers published in learned journals supported by impact factor. It does not mean that Open Access shall be constraint to this type of scientific works. Optionally, it shall cover a wide range of research output.⁴

In Budapest Open Access Initiative (BOAI) declaration, we read the following definition of Open Access ('Read the Budapest Open Access Initiative' 2002):

By 'Open Access' to [peer-reviewed research literature], we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.

OPEN ACCESS CLASSIFICATION

Open Access can be divided into two types – Open Access gratis and Open Access libre.⁵ The former sort is a narrower term and it means making works available according to statutory regulations of permissible use of protected works, excluding possibility of sublicensing. In the Polish Copyright and Related Rights Act of Feb 4, 1994, there are articles 23–35. There are also regulations of this kind in European legislative acts, for example Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in thee information society.

Open Access libre is a wider term and it means not only possibility of making the gathered materials available to the public via web networks but also possibility of sublicensing them and creating derivative works upon them.⁶

Realization of Open Access defines two methods or ways – the green one and the golden one. The latter means publication of scholarly papers in open peer-reviewed learned journals. The former means introducing and making available research materials in open repositories through self-archiving.

There is one more term to be defined – ‘open mandate.’ It means an obligation levied on the author to introduce his work or works in an Open Access system and make them available to the public.⁷

Open mandate can be levied on the author by his employer, research financing institution or the lawmaker. Up until now, none of the copyright law system has introduced obligatory open mandate. In result, we can only name the ones implemented by research institutions, universities or research financing institutions.

Creative Works as Common Goods: Short History of the Idea and Implied Solutions

OPEN SOURCE MOVEMENT

Historically, the idea of Open Access derives from the free software movement started in the 1980s and then supplemented by the open source movement – the movement in informatics in which programmers or soft developers decided to make their informatics works, i.e. computer programs and source codes available to the public including possibility to create derivative works on this base.

The free software movement formed a new perspective within author’s rights – ‘copyleft.’ ‘Copyleft’ is a term connected with GNU Project launched by Richard Stallman, a software designer and one of the founders of the free software movement. It is a system of licensing allowing a licensee to use the original work and to modify it creating derivative works and on the other hand demand that the licensee has to make such a derivative work available to the public under the same terms. The symbol of *copyleft* is the reversed copyright icon.

Institutional framework for the free software movement covers Free Software Foundation (FSF) and Open Source Initiative (OSI). Free Software Foundation was founded by R. Stallman in 1985. The headquarters is in Boston, USA. Since 2001, there is a European division – Free Software Foundation Europe.

The Open Source Initiative is an American non-profit organization founded in 1998 by Bruce Perens and Eric S. Raymond. On the contrary to the Free Software Foundation, the Open Source Initiative was aimed at promoting open source ideas on pragmatic and business grounds.

Within the free software movement model license terms were developed. The two most popular model license terms were implied within GNU Project – GNU GPL and GNU LGPL. Presently, there are several dozen model licenses like these among which GPL and LGPL

are still very popular but also others like BSD and MIT are common. Every model license allows nearly not-limited exploitation of software. Additionally, some of them cover a *copyleft* clause – it demands that both the original and any derivative work shall be made available by a licensee under the same terms.

CREATIVE COMMONS

Later on, another movement of this kind has begun, covering all kinds of creative works, in all fields of creativity except software – Creative Commons. Creative Commons is an international project encouraging sharing of all kinds of creative works apart from software (e.g. literary, musical, audiovisual etc.) and stimulating creativity and even more – free culture understood as common assets, through open legal solutions.

Creative Commons was founded in 2001 in USA as a non-government organization. Their founders – academics, especially lawyers, and intellectuals, aimed to develop solutions to prevent and protect cultural goods as common goods. Nowadays, branches of Creative Commons are run in more than 80 countries worldwide. In Poland, division of Creative Commons has functioned since 2005 being one of the oldest in the world.

Creative Commons Licenses: Main Types

The organization gives ready-made legal solutions for both authors and users of copyrighted materials. It rejects the rule ‘all rights reserved’ for the sake of another rule – ‘some rights reserved.’ It means that the author decides what usage restrictions he intends to levy. The Creative Common model harmonizes the need of standardization of license types with the author’s will as to the terms under which he intends to make his work available to the public.

In result, Creative Commons has developed so called cc licenses – four contractual clauses (license attributes) giving special restrictions to usage of copyrighted works. These clauses define obligations on the user’s side to comply with if he wants to exploit a given work. These clauses are as follows: BY, SA, NC and ND.

- cc BY clause – attribution. This clause allows the user to disseminate the work on a very wide basis, even commercially, as long as he credits the author for the original creation.
- cc SA clause – share alike. This clause allows the user to disseminate the work on a very wide basis, even commercially, as long as he licenses his new creations under the identical terms.

- **cc nc** clause – non-commercial use. This clause allows the user to disseminate the work and build upon the work non-commercially.
- **cc nd** clause – no derivative works. This clause allows for redistribution, commercial and non-commercial, as long as it is passed along unchanged and in whole, with credit to the author.

Creative Commons Licenses: Combinations

These clauses can be mixed resulting six combinations.

1. **BY** – attribution. This license allows the user to disseminate the work on a very wide basis, even commercially, as long as he credits the author for the original creation. This is the most accommodating of licenses offered. Recommended for maximum dissemination and use of licensed materials.
2. **BY, NC** – attribution, non-commercial. This clause allows the user to disseminate the work and build upon the work non-commercially. The new work must also acknowledge the original author and be non-commercial, but the new author does not have to license his derivative works on the same terms.
3. **BY, ND** – attribution, no derivative works. This license allows for redistribution, both commercial and non-commercial, as long as it is passed along unchanged and in whole, with credit to the author.
4. **BY, SA** – attribution, share alike. This license allows the user to disseminate the work, build upon the work both commercially and non-commercially, as long as the user credits the original author, and license his new work under the identical terms. This license is often compared to ‘copyleft’ i.e. free and open source software licenses. All new works based on the original one will carry the same license and in result, any derivatives will allow commercial use. This kind of license is used for example by Wikipedia, and is recommended for materials that would benefit from incorporating content from Wikipedia and similarly licensed projects.
5. **BY, NC, SA** – attribution, non-commercial, share alike. This license allows the user to disseminate the work and build upon it only for non-commercial use, as long as the user credits the original author and licenses his new creations under the identical terms.
6. **BY, NC, ND** – attribution, non-commercial, no derivative works. This license is the most restrictive of the six main licenses. It

allows only downloading the work and sharing it with others as long as the user credits the original author, does not changing it in any way or using it commercially.

Creative Commons project offers detailed license terms – they are specific for each country to comply with national general copyright regulations. This is the most practical and useful solution. The trials to create universal, transnational version using terms from international law act (including the Berne Convention) were launched and resulted in versions 4.0 International and Unported although it is not the preferable tool.

Creative Commons licenses are a very popular tool for free licensing although there are some critical views. Some of them deal with among the others such questions as character of a legal binding between the licensor and the end-user (the dispute is if it is an agreement or a unilateral legal act), term of a license agreement and possibility of its termination (it is discussed if a Creative Commons license is 'endless' or not).⁸ Nevertheless, Creative Commons licenses because of their uniformity, coverage of all kinds of human creativity (except software that applies GNU licenses and others accepted by FSF and OSI) as well as flexibility for authors' sake gain more and more enthusiasts and practical users.

Free Science Movement: National and International Perspective

Open Access movement is a specific part of free culture movement – it is devoted to idea of free science. It seems obvious that contemporary copyright law implies strict restrictions on possible usage of copyrighted works although there is a space for permissible use of protected works – present in any legal system of copyright. In result, any free culture or more strictly free science movements can be based either on the statutory act or on volitional decisions of copyright holders.

USA – THE WORLD'S PRECEDENT

The world precedent in Open Access comes from USA – in 2005, American Congress (House Report 108-636) introduced a solution that all research papers created within the National Institute of Health grants shall become part of Open Access repository after 12 months of their publication (National Institute of Health 2008). This is the first statutory and mandatory solution realizing an idea that research output financed with public means shall be made public

available. At present in USA, there are legislative trials to introduce public and all-national mandatory Open Access system.

OTHER COUNTRIES

Situation of other countries is diverse. Factors that influence the situation are as follows: attitude of the main actors (i.e. scholars, publishers, universities, research institutions, and politicians), legal aspects (especially within copyright law), and administrative framework, financial questions, and last but not least – general way of thinking or cultural aspects. In some cases there is a strong resistance of traditional publishers is clearly visible (UK, Australia). In others – legal restrictions in existing legal system are decisive (Germany, UK). Finally, the reluctant attitude of scientific communities is of overwhelming importance (Poland, China, and Brazil (Costa and Leite 2008)).

EUROPEAN UNION

European Union plays crucial role in the Open Access development. The issue has started in 2004. There are two-way actions – on one hand there is implementation of requirements that all research data created with EU support shall be disseminated within Open Access system (e.g. European Research Council implemented Open Access rules). On the other hand – the Commission tries to work upon political agreement. In result, we have such initiatives as Digital Repository Infrastructure Vision for European Research (DRIVER) that combines national research repositories, and portal openAIRE (Open Access Infrastructure for Research in Europe) – consisting of research materials derived from researches financed by the European Union (Driver 2008).

Another international achievement is World Bank Open Data Initiative. Its service is available at <http://data.worldbank.org>. It has a wide range and high quality. World leaders in Open Access are private foundations that finance scientific research, e.g. a British foundation Wellcome Trust.

POLISH CASE

The interest of Open Access in Poland is still limited yet it has begun quite early.⁹ According to new regulation within the Higher Education Act of 2005 (amendment of July 11, 2014, in force since Oct 1, 2014) each Polish university has to introduce rules of procedure of management of copyright and related rights. Thanks to these regulations in some Polish universities, there are Open Access repositories.

Unfortunately, there is no unified system but many particular ones. The same is the international perspective.

In Poland, one of the highly estimated examples is ceon – Centre of Open Science launched by Interdisciplinary Centre of Mathematical and Computer Modelling at the University of Warsaw. The founders of this repository introduced the two most liberal Creative Commons licenses as legal bases of the collection – Creative Commons – Attribution 3.0 PL and Creative Commons – Attribution – Share Alike 3.0 PL. Moreover, this institution formed a ready-made Open Access legal solution trying to prove that implementation of Open Access within a research unit or university is not a big deal (Siewicz 2012).

INTERNATIONAL COOPERATION

Differences between cultural, legal, economic and administrative systems of even culturally and economically similar countries do not give a lot of hope to ensure international cooperation in the aspect of Open Access. Nevertheless, it seems that transnational initiatives can give strong impact on the development of Open Access solutions in local systems. The major role in this development the European Union shall play. Although even EU shall not unify cultural, legal, economic and administrative systems of member states.

The possible way of cooperation is creation of central repositories of scientific works covering research output from different countries. The example of such a solution is the Registry of Open Access Repository Mandates and Policies (ROARMAP). It is a searchable international registry charting the growth of Open Access mandates and policies adopted by universities, research institutions and research funders that require or request their researchers to provide Open Access to their peer-reviewed research article output by depositing it in an Open Access repository. At present, it covers nearly 800 Open Access mandates and policies.

Basic Legal Problems Concerning Open Access

OBTAINING OF THE REPOSITORY RIGHTS

Undoubtedly, Open Access implies specific problems within copyright. Introduction of a research paper or other copyrighted material is a method of usage and requires a permission of a copyright holder. The same problem is with further methods of exploitation of a copyrighted material – e.g. sublicensing or preparation of derivative works. No less important issue is protection of author's moral

rights, especially proper attribution and protection of integrity of the work.

The basic practical issue is obtaining of the rights to the materials planned to be introduced into the repository system. In some legal systems, there is a problem – who the copyright holder is. Is it the author or the employer being a scientific institution or maybe the publisher?

There are several options. First of all the copyright holder of the copyrighted material has to be identified. One of the options is that a given scientific work was created by an employee of a research institution – in such a case in some legal systems the copyright belongs to the employer, sometimes with some liberated provisions for the sake of scientists working on the employment basis. This is the Polish case. Such a solution is quite advantageous in the context of Open Access – subjects of copyright are less dispersed. At present Polish public universities work upon terms of procedure concerning copyright management of their employees' works to make it clear and unified within one entity.

Different contract regulations implemented by scientific publishers are a crucial problem. Some of them demand under the terms of these contracts the grant of exclusive copyright. In result, an individual author cannot decide upon introduction of a research paper into an Open Access repository. A solution can be negotiating in each particular case to make contract restrictions looser or obtain a so-called return license but practically it does not seem effective.

With no doubt the best tool aimed at launch of wide Open Access systems are statutory regulations – definite provisions of law allowing a national institution to use scholarly materials within repository regardless of particular contract restrictions.

LIABILITY OF THE REPOSITORY PROVIDER

Problem of liability of repository provider or repository publisher is a delicate yet crucial issue. The recommended solution is to form the role of the publisher as a host provider – the subject giving a digital tool (search engine) to embed and disseminate the materials within the repository collection. In such a solution, the publisher is not obliged to filter the materials gathered within the repository in the context of any legal infringement, e.g. infringement of copyright or moral rights or data base rights etc.

This liberal mechanism has its legal basis – it comes from Directive 2000/31/Ec of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in

particular electronic commerce, in the Internal Market (Directive on electronic commerce). In the mentioned legislative act there are so called safety islands – i.e. disclaiming rules. One of them is expressed in article 14 giving hosting disclaiming rule.

Article 14

Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) The provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

In practice the publisher does not license or sublicense the gathered materials to the end users – the terms of procedure introduced within the given repository shall strictly preordain that the license relation is formed between the copyright holder (an author or research institution) and end user.

Concluding Remarks and Implications

CONCLUDING REMARKS

1. There are obvious advantages of Open Access in the global perspective – it affects development of scientific research. Introducing a scholarly paper into an Open Access repository increase quotation rate by 25 per cent up to 250 per cent (Arthur Sale, University of Tasmania, 2006). No research institution can afford traditional subscription of all scholarly journals – estimated at 24.000 altogether. Open Access to research materials is crucial for developing countries with weaker financial support for research.
2. Because of cumulative essence of knowledge, the basic factor of its development is exchange of ideas. On the other hand, there are economic constraints in access to research materials especially sold by subscription. Thus, the Open Access seems to be

the optimal way to engage in the process of idea exchange as much subjects as possible – both authors and users.

3. National copyright law systems give stronger impact on copyright protection than making access to copyrighted content more liberal and open. There is still a very much monopolistic attitude to copyright and its objects treated as trade goods.
4. There is a strong need of change in scholars' and publishers' attitude to Open Access solutions.
5. Diversity of legal systems in various countries makes international cooperation in introduction of a unified transnational Open Access system roughly possible but they do not make it impossible.

Policy Implications

1. The only solution to create the widest Open Access systems seems to be the lawmakers' interventions in different countries. Simultaneously, it shall be a strong impact on international cooperation resulting in launching unified systems – regional or divisional.
2. Development of Open Access is not only the question of legal solutions. Nevertheless, the development of technical means appears of great importance.

Notes

- 1 There is an interesting statement in the literature that copyright law tries to transfer public goods into private ones. 'Copyright law can be compared to a magic wand. Its result is this kind of human attitude towards immaterial goods as if they did not have features of public goods' (Siewicz 2010).
- 2 Siewicz (2010, 3) states that there are two rules in the copyright law: the first one says that an author decides upon exploitation of his work, the second – that an author's power ends when the society's interest is threatened.
- 3 The liberal definition is suggested by a group of authors in *Wdrożenie i promocja otwartego dostępu do treści naukowych i edukacyjnych* ['Implementation and Promotion of Open Access to Scientific and Educational Content'] (Nieżgódka et al. 2011). The authors suggest the following definition of Open Access: 'access to scientific content, especially pre-reviewed scholarly papers.' A wide definition is proposed by Siewicz (2010).
- 4 Siewicz (2010, 12) demands on strict defining of Open Access to avoid misunderstandings, p. 12.

- 5 This contradistinction was formed by Peter Suber and borrowed from free software movement (Suber 2008). A little bit earlier the same author together with Stevan Harnad suggested another contradistinction – ‘weak’ and ‘strong’ Open Access (Suber and Harnad 2008).
- 6 Definitions of Open Access gratis and Open Access libre can be found in Siewicz (2012).
- 7 One can find explanation of a term ‘open mandate’ in Siewicz (2012).
- 8 More thorough explanation of these disputes exceeds the range of this paper. An interesting analysis of the problem can be found in Siewicz (2010).
- 9 A thorough analysis of this phenomenon one can find in Niezgódka et al. (2011).

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