

Secondary Publisher Right, v. 2

Proposal to LIBER Board

This is the second version of the secondary publisher right model law that LIBER's Working Groups on Copyright and Legal Matters and Open Access would like to promote. The memo is updated by the recent lessons from the COVID-19 pandemic and the changes observed in the scholarly communication field. It makes a bold step to propose a zero-embargo period for lawful self-archiving on open, public, non-for-profit repositories.

Background

Over the last ten years six European countries (France, Germany, Belgium, Italy, Netherlands, Spain) have passed laws which allow publicly funded research articles, after a certain period of time, to be put online. France for example appears to go even further, and potentially allows any type of activity to be performed on the article by end users (see a second memo "National legislation for the promotion of Open Access in EU countries"). This type of legislation aims at supporting Open Access and cuts through the many different and contradictory Green Open Access policies that exist or deals with publicly funded journal articles where the publisher has no Green Open Access policy.

In the current strategic period, 2018-2022, LIBER envisions a world where in 2022 "*Open Access will be the predominant form of publishing*". Despite sounding ambitious, the aim is pragmatic, as LIBER understands that the current scholarly communication system requires fundamental socio-economic changes, which -consequently- require more time. Numerous studies, including the observations of the Open Science Monitor by the European Commission,¹ show that we still have a long path to tread. Thus, in the short time until 2022, LIBER aims Open Access to be the *predominant*, and not the *only* form of publishing, and all of its relevant Working Groups are committing their expertise and thoughtful work.

LIBER's Copyright & Legal Matters and Open Access Working Groups have worked on draft wording for a Model Law based on the laws we already see, with the intention of improving on all of them from the perspective of libraries. The intention of the model law is for LIBER to take a public policy position that all European countries should have an Open Access law – either by the introduction of such wording in law at the EU level, or by member states at the local level introducing such laws. In terms of public policy, we believe it makes most sense to aim at both member state level and the European Commission/European Parliament simultaneously.

¹ Indicatively, Piwowar, Priem and Orr (in "*The future of OA: a large-scale analysis projecting Open Access publication and readership*", <https://doi.org/10.1101/795310>) project the growth rate of Open Access and conclude that in 2025 half of the published literature will be open. The authors support that currently only 30% is in Open Access. Also, the European Commission Open Science Monitor shows an average of 40% OA availability, but only 10-15% of this is in Gold OA (see https://ec.europa.eu/info/research-and-innovation/strategy/goals-research-and-innovation-policy/open-science/open-science-monitor/trends-open-access-publications_en).

Outline of Secondary Publisher Open Access Model Law

As explained above the aim of secondary publisher laws is to provide a guaranteed lowest common Open Access law across Europe, or the countries in which the law is passed, to guarantee where articles are publicly funded, but not for publication, that access after a defined period of time is lawful. Without this, publicly funded articles that are not Gold are subject, if they exist at all, to a myriad of differing publisher rules around republication in local, national or international repositories.

Recently, we have seen new formats of publications to be introduced, such as the “journal pre-proof” by ScienceDirect journals, that claim that the author can not proceed to self-archive. This obscures even more the legal state of publications and makes republishing, as well as monitoring of Open Access an arduous work.

The Model Law relates to public and charity funded publications in any of their final forms, and allows for their republication *immediately*, including tables, images, etc. Upon first publication by scholarly publishers it requires them and the author to acknowledge the source of funding and put it in the article and in its metadata – this is often ignored by publishers at the moment despite it being research funder policy.

When republishing, if it has been majority public funded, then no downstream restrictions can be placed on the reuse by anyone in regards to the elements of the articles which are publicly funded (i.e. this does not apply to the elements which are third party IP). The model law also requires on republication that clear terms of use are appended, as often repositories put no terms of use against journal article materials. This undermines Open Access, as people do not know what they can do with the publication they find online.

The Model Law is not conflicting with the new Digital Single Market Directive (“*Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*”, see <http://data.europa.eu/eli/dir/2019/790/oj>) as according to it (Art. 2, par. 5c), scientific publications are not subject to the limitations or the exceptions therein mentioned. We believe that the six countries that already have the law take the view that it is clarifying that as employers and/or funders they have the right to publish these publications, or that it falls under the scientific research exception in the 2001 Copyright Directive (“*Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*”, <https://eur-lex.europa.eu/eli/dir/2001/29/oj>). Also, the Model Law is not having any conflict with the Public Sector Information Directive (“*Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information*”, <http://data.europa.eu/eli/dir/2019/1024/oj>).

Request to the Board

To endorse this Model Law as official LIBER policy for the European Commission and / or Member States to adopt into law.

Issues

1. As an Open Access law focussing on access to articles which have not been funded for publication (so called Green Open Access), LIBER is likely to be criticized by publishers for wanting “something for nothing” and eroding their business models.
2. There may also be criticism from authors who are against Open Access and argue that it removes their academic freedoms (there is such a case before the German courts at the moment).
3. Both criticisms can be ameliorated to some extent by pointing out that six countries already have this law. LIBER may be criticized for undermining member state law, but given that laws are constantly adapting, this seems a less strong argument than the economic arguments that are likely to be brought by publishers.
4. Furthermore, the coronavirus pandemic has exhibited the need of immediate access to research and that the global challenges, also addressed in the sustainability goals, require evenness and equity of access.
5. The proposed law does not conflict with the implementation of either PlanS, or any other relevant initiative, for two main reasons: first, PlanS secures funding for Gold OA, while also -after much debate and pressure from organizations, including LIBER- permits Green OA and depositing in repositories with lower technical barriers. Further, PlanS does not cover all EU nation-members (currently, 10 out of 27, with the main German funders, such as DFG, Helmholtz, Max Plank, not signed), while we should also consider that the culture of openness is diverse in the European region.
6. The publishers have -under pressure- introduced their own highly varying (and therefore clashing) Green Open Access policies, but the law will create a clear right in regards to any form of the work. The shorter the period is the more concerned publishers will be around their business and the more criticism that is likely to arise. A longer embargo period will make LIBER unaligned from PlanS, which is pushing for immediate release, and LIBER may be accused of undermining PlanS or any other funding initiative. Similar, immediate, measures of republishing have been introduced by private charity funds.
7. Recent developments from the US show that there is increased pressure for an executive order by President Trump that will require all federal funded research to be published immediately, with zero embargo. This is also important as any embargo period above zero might be considered as a restraining and counter-progressive policy of the European countries.²
8. By proposing this, we believe that LIBER promotes the interests of the research community and connects science with societal needs, as exhibited in the recent pandemic crisis. This can be LIBER’s position in future consultations in EU bodies and research programmes.

² An interesting review can be found in the Bloomberg article “*Scientific Societies approach a moment of truth*” by Justin Fox, see <https://www.bloomberg.com/opinion/articles/2020-01-06/trump-executive-order-on-academic-research-vexes-science-groups>. Further, there is an open letter petition for American citizens at <http://oaintheusa.com>.

Secondary Publisher Right Model Law

1. The author of an article in a research periodical, their employer or research funder shall be entitled to make the work in any of its forms available to the public via any open access repository immediately after its acceptance, including any third party content such as images, tables, etc., contained therein necessary for the understanding of the article, on the condition that:
 - a. the research to which the article relates has been paid in whole or in part by public or research charity funds; and
 - b. it is accompanied by a sufficient acknowledgement of both the author and the source of first publication.

Upon being made available to the public in any of its forms in line with this provision the specific version being made available shall be identifiable, and clear terms of use shall be appended. No contractual or other restrictions on its reuse shall be enforceable regarding an article whose author has been majority funded by public or research charity funds.

2. The author and the publisher of the article in a research periodical shall ensure that the funder of the research is acknowledged clearly at the beginning or end of the article, as well as in the metadata.