

PUBLICATION OF RESEARCH RESULTS: SELECTED LEGAL ASPECTS

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Abstract

This contribution focuses on the legal aspects of raw grey literature that is understood as yet to be published, interim or incomplete scientific results (e.g. raw primary data or drafts of scientific papers). Specifically the contribution deals with the limits of further re-use of such scientific results, when these were offered for publication in traditional publishing houses, and when these results should be available under Open Access conditions.

Keywords

Copyright, Database Rights, Grey Literature, Open Scientific Data, Open Access

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Introduction: A new scientific revolution

In 2006 Banks (Banks 2006) drew attention to erasing distinctions between standard published literature and grey literature. The significance of this finding has grown increasingly popular with the movement toward open access to the results of publicly funded research and development.¹ One of the ways to implement it lies precisely in the publication of "borderline" forms of scientific outputs - the so called "e-prints", i.e. electronic versions of scientific papers in various phases of publication process. The trend of Open Access also applies to the research data,² which the published scientific papers are based on. Only such a comprehensive disclosure can fulfil one of the basic ideals of scientific knowledge, namely its reproducibility.³ This change in communicating research results significantly shatters the established practices. Achenbach talks directly about a "new scientific revolution" (Achenbach 2015).

For the area of grey literature and its exploration this change has a major impact on its very subject.⁴ The traditional "New York" definition of grey literature is seen as "information produced on all levels of government, academic, business and industrial institutions, both electronically and in paper form, which have not undergone the standard publishing process, and which are not distributed in the standard sales network, i.e. they are issued by institutions whose main activity is not publishing" (Schöpfel 2011, p. 5).⁵ In the case of the implementation of the green road to open access (Open Access)⁶ and open research data⁷ the traditional white and grey literature then blend together as they are published both officially, as well as "unofficially" in institutional or disciplinary repositories (auto-archiving), or repositories of grey literature.

To the complicated legal issues that need to be addressed in the case of making grey literature accessible,⁸ others are added regarding the standard publishing process and the implementation of Open Access,⁹ and new ones that relate to the interconnection of these two modes of publication are generated. Specifically, this brief paper deals with the possibilities and limits of dealing with such scientific results in a situation when they were offered for publication. In the first part the issue of the property rights to such results and the possibility of dealing with them are addressed, that is how to implement auto-archiving, without interference with the rights of the holder. Attention is then paid to the individual phases (stages) of the scientific paper publishing process and the related contractual arrangements in the publisher's license agreement. The theoretical description of the issue is complemented by

¹ A typical example of the trend towards openness is the Framework Programme for Research and Innovation Horizon 2020, which mandates Open Access for all supported results in the form of scientific papers. In selected calls Open Access to research data is then tested in a **pilot program**. In details see (European Commission 2014).

²The European Commission officially adhered to this trend in its Communication "Towards better access to scientific information: Boosting the benefits of public investments in research", Brussels, 17.7.2012 COM (2012) 401 final.

³Karl Popper stated that "*a random unique occurrence of phenomena has no meaning for science.*" (Popper 2002, s. 66)

⁴ The Open Access movement is a challenge to the very understanding of science and its role in society and the manner of its communication to the public. Such considerations, however, go beyond the intent and scope of this paper. However, readers can be recommended the basic work of the "spiritual father" of this movement Peter Suber (Suber 2012). Copyright issues in Open Access are dealt with by Marc Scheufen (Scheufen 2015). The legal aspects of "opening scientific data" were comprehensively elaborated on by Guibault and Wiebe (Guibault and Wiebe 2013). I then solved selected aspects of Open Access in (Myška 2014).

⁵ Translation according to: NRGL Definition of grey literature. Available from: <http://nusi.techlib.cz/index.php/Definice>.

⁶In the details of the green road to Open Access see (Suber 2012, s. 52–58).

⁷The research data was then called grey literature by e.g. Banks (Banks 2006, s. 9).

⁸In the Czech Republic, they were dealt with by e.g.: (Polčák a Šavelka 2009),(Polčák 2010).

⁹On the issue of the implementation of Open Access in the context of an effective copyright see (Scheufen 2015).

a practical analysis of the relevant agreement of the largest publisher Elsevier, which publishes more than 2,000 scientific journals.¹⁰

The results of research and development and the rights to them

The results of research and development are understood in the context of this paper as professional scientific papers designated for publication in professional scientific journals and the research data on which these papers are based. These are then protected by specific absolute rights - namely copyright and the sui rights of the database maker.¹¹

Assessing whether the legal requirements for obtaining copyright protection for a scientific paper (or for its "developmental phase") were met is still a matter of national regulation since harmonization still has not occurred in this field.¹² In the Czech Republic the fulfilment of the character of a copyrighted work will then be assessed, i.e. whether pursuant to Section 2 para. 1 of the Copyright Act¹³ it is a scientific work, a unique result of creative work and is expressed in an objectively perceivable manner. The provision of Sec. 2 para. 3 of the Copyright Act under which copyright applies to "*a completed work, its different developmental stages and parts*" is important. As stated by Telec a Tůma (Telec a Tůma 2007, p. 45), this protection applies to individual parts of a work, regardless of whether they may be "*used separately outside of the work as a whole or not.*" However, these individual parts must separately satisfy the above-mentioned essential characteristics of the copyrighted work. In terms of further discussion, it is necessary to mention the extent of the rights that are granted to the author with a view to the publishing practice of publishers. In the context of the implementation of open access the basic property right is that of the author to use the work, in both the original and in other adapted forms, as well as the personal rights to the inviolability of the work. Another issue, whose solution, however, goes far beyond the scope of this paper is who, when and under what circumstances, is entitled to exercise these rights.¹⁴ It must be particularly taken into account, whether one author or more authored the concerned work. It is also necessary to solve what kind of work it is¹⁵ and whether the rights are contractually modified.¹⁶ For example, in the case of employee's work a different regime from the statutory one can be negotiated or e.g. the employer may leave the employee the exercise of the rights by an internal directive, or a can representation of the employer (copyright holder) by the employee can be constructed. Finally, copyright protection is granted when the work is expressed in an objectively perceivable form (Sec. 9 of the Copyright Act). It is therefore

¹⁰ Elsevier. At a Glance. Available from: <https://www.elsevier.com/about/at-a-glance>.

¹¹ In the details on the protection of scientific databases by intellectual property rights, see (Rieger 2010).

¹² As noted by Husovec, however, the European Court of Justice has already more or less harmonized the concept of copyright works in its decision-making (Husovec 2012).

¹³ Act No. 121/2000 Coll., Copyright Act, as amended, hereinafter referred to as the "Copyright Act".

¹⁴ It is the question of who is entitled to implement Open Access which is one of the most complex, especially because of the distinct national regulation and the plurality of entities. For details on the Czech legal environment see (Myška 2014, p. 613–614). A detailed comparative analysis is submitted by (Guibault 2011, p. 140–151). In order to simplify the following analysis, we will assume that the author is only one natural person who is authorized to dispose of the copyrighted work - a scientific paper. Likewise, in the case of the existence of protective database regimes, we assume that these rights also indicate the author.

¹⁵ Employee (Sec. 58 of the Copyright Act), collective (Sec. 59 of the Copyright Act), school (Sec. 60 of the Copyright Act) or upon request (Sec. 61 of the Copyright Act).

¹⁶ In the details on these special types of works and deviation from the standard treatment of the handling of copyrighted works see the comments to relevant sections in (Telec a Tůma 2007).

irrelevant whether there has been a publication or not. This means that both the grey and white "version" of scientific papers are copyright protected.

The conditions for granting protection for a collection of research data (a database)¹⁷ have already been harmonized on the EU level.¹⁸ Directive 96/9/EC on the legal protection of databases (hereinafter referred to as the "Directive") lays down the conditions for the protection of databases by copyright and the sui generis right of the database maker. Copyright protection¹⁹, according to Art. 3 para. 1 of the Directive applies to databases that "by the selection or arrangement of their contents constitute the author's own intellectual creation". The national legislator can then implement protection for the so-called "creative databases" that are for example protected in the Czech Republic as a collection in accordance with Sec. 2 para. 5 of the Copyright Act. In the case of research data, however, these modes will rarely be applied.²⁰ The selection and arrangement of content will be determined by "technical factors and or imperatives of accuracy and exhaustiveness." (Guibault a Wiebe 2013, p. 21) and thus ineligible for protection. Unoriginal databases can be protected by special rights (sui generis rights) pursuant to Art. 7, para. 1 of the Directive (Sections 88-94 of the Copyright Act). Requirement for obtaining the protection is a qualitatively or quantitatively substantial investment in the acquisition, verification or presentation of their contents. The Court of Justice of the European Union has clearly stated in its judgments that the protection does not arise when this investment (i.e. cost) relates only to the creation of elements (content) of the database.²¹ Guibault and Wiebe rightly inquire whether it is actually possible to protect a database of scientific data with such rights, as in the case of scientific data and its collection into databases, most investments are linked precisely with its creation. This criterion is therefore quite uncertain and must be considered on a case-by-case basis. (Guibault a Wiebe 2013, p. 26). The findings of this ad hoc assessment are quite essential since the actual research data, not protected by any of the above-mentioned exclusive rights, is then not protected at all (cf. Sec. 2 para. 6 of the Copyright Act). In the context of the CJEU decision in the Ryanair case,²² it should however be noted that the absence of any such protection does not mean that it would not be possible to regulate and limit the handling of databases contractually. As in the section dealing with copyright it should be noted that the rate of access to a database or the form of its publication, i.e. whether it is white or grey "literature" are not relevant for the granting of protection.

From grey to white

Grey and white literature intersect in a problematic manner precisely at the moment when the relevant right holder decides to publish the given result by one of the traditional publishers, or to "officially" publish the research data underlying such an outcome. Other areas of friction then arise when he or she would like to make such scientific results available under Open

¹⁷ A database is then under Art. 3 of this Directive, 'a collection of works, data or other independent elements which are systematically or methodically arranged and individually accessible by electronic or other means. "

¹⁸On databases in general (Derclaye 2008; Herr 2008; Connelly Kohutová 2013).

¹⁹ Paper. 3 to 6 of the Directive.

²⁰This statement, however, does not apply categorically in the area of qualitative research, where in the case of questionnaire surveys it would be possible to consider the protection of databases by copyright. I thank JUDr. Jakub Harašta for this idea.

²¹ Judgments C-203/02 BHB point 31, 32, C-444/02 point 41, C-46/02, point 41 and C-338/02 Svenska Spelbod 24, 25. In the details of these regulations (Adamová 2011), (Davison a Hugenholtz 2005).

²² The ruling of the Court of Justice of 15 January 2015. Ryanair Ltd v. PR Aviation BV, Case C-30 / 14.

Access conditions. Attention will be paid first to the possibility of implementing Open Access to copyrighted works (scientific papers) and subsequently to the set of research data.

The pre-condition of publication is usually the conclusion of a publishing (license) agreement. Such contract sets out, in accordance with the focus of the relevant publishers, different rules regarding the handling of scientific output - a paper protected by copyright - as well as the possibility for achieving open access for it. By default, these contracts require the maximum possible transfer²³ of rights to the publishers. The publishers then justify this process by the argument that they need to have legal certainty regarding the acquired rights so that they can safely realize the required substantial investment in the distribution of the relevant scientific result (Guibault 2011, p. 148). One cannot ignore the interpretive principle of the limitation of the scope of the license according to its purpose ("Zweckübertragungsgrundsatz"). The German courts have already stated that it also applies in the case of such "maximum" unlimited licenses, if it does not correspond to their actual purpose (Telec a Tůma 2007, p. 519).

The implementation of Open Access is contractually characterized by leaving the possibility to exercise certain property rights to the author. These allowed uses are then referred to as "Allowed uses", or "Retained Rights". The SHERPA/RoMEO portal provides general, but at the same time clear information on the allowed uses. Individual publishers²⁴ are then differentiated depending on which version of a scientific paper the author can use for realizing Open Access. The terms to describe each phase is then based on the traditional publishing process, which Guibault described in brief as follows (Guibault 2011, p. 149). The author sends the Editorial Board the manuscript in the final wording (the so-called "Last hand" version) (Telec a Tůma 2007, p. 482), which is known as "pre-print" or the "submitted version."²⁵ Subsequently, the manuscript is sent to the review process (peer-review). The comments of reviewers are then incorporated by the author and if the amended paper is accepted for publication, it is called "post-print" or also the "accepted version."²⁶ The final version after editing of the publisher and typesetting is then called the "publisher's edition" or the "final published version." Publishers who allow the auto-archiving of a paper in the last two stages are marked in green. If the publishing contract enables only the deposition of a version before the review process, such publishers are marked in yellow. White colour refers to publishers who are not in favor of Open Access and do not allow any form of auto-archiving. The exercise of retained rights may be bound by a time clause, i.e. the expiry of a certain period – the embargo.²⁷ This form of open access is then called "delayed open access".²⁸ The time of the acceptance of a paper for publication is then normally set as the moment of the effectiveness of an agreement, and therefore the application of the above possible restrictions. If a paper is

²³ Namely both translative and constitutive, if the translative transfer (transfer, assignment of rights) is not permitted, as e.g. under Czech copyright law (Sec. 26 of the Copyright Act).

²⁴ Resp. individual journals as it is not uncommon for the publishing policies to differ within the publishing house for the individual journals.

²⁵ It is this version of a scientific paper that is traditionally referred to as grey literature. See the definition of grey literature above.

²⁶ As noted by Scheufen (Scheufen 2015, s. 154) the only adequate substitute for a publishing version of an paper is solely the post-print version, which includes and incorporates the comments of reviewers and any suggested modifications. A paper without publication approval and thus the review process is not an adequate scientific output, but only self-publication ("vanity press").

²⁷ Typically six or twelve months.

²⁸ Another differentiation and a detailed insight into the issues is offered by (Guédon 2004).

not accepted for publication, as a result of the review process, the author can store grey literature in the repositories without risk because no publishing contract was concluded.

The crucial question for discussion in relation to grey literature and its publication (or deposition in repositories of grey literature) is the position of the pre-prints, which they are traditionally referred to as grey literature. Certain sources do in fact claim (ANON. undated) that the handling of pre-print is fully in the power of the author, even if a publishing contract is concluded and this issue is not specifically addressed when he or she concludes a publishing agreement. On this issue, however, I share the dissenting opinion of Carroll (Carroll 2006). During the whole process of traditional publishing, a scientific paper is in fact an identical work in all its stages in my opinion. Subsequent minor revisions made by the author are not fundamental enough to lead to the emergence of a new copyright protection on the basis of which the author could use the work other than as set out in the publishing agreement. For example the author cannot thereby grant any Creative Commons public licenses for pre-print,²⁹ if he or she has already transferred (whether constitutively or translatively) the rights to the publisher. This conclusion, in my opinion, remains unchanged notwithstanding the moment when the auto-archiving has been implemented, i.e. whether before or after the conclusion of a publishing agreement. The consequence of this assertion, among others, is also that the author must withdraw the pre-print version of the paper from the repositories of grey literature if the final paper is accepted for publication in the journal, whose policy does not allow the implementation of Open Access. By failing their obligation to withdraw the pre-print they would not meet the obligations of their agreement. Any version could then only be used within the applicable exceptions and limitations to copyright pursuant to the applicable law, such as a gratuitous legal license for citation. Such cases will not happen regularly, because the authors usually retain these rights.

In the case of research data we are still missing an adequate regulation how to deal with them. A well worked-out methodology as is applicable in publishing does not exist. The reason for this state is that traditional commercial publishers do not consider (for the time being) the "publication" of data as part of the publishing process. The regulation of the disposition with databases protected by any of the above-discussed rights will then be governed by specific contractual arrangements. By analogy, it is possible to apply the same basic conclusions as for scientific papers - if the copyright or sui generis right to the database is transferred (constitutively or translatively) to the publisher, the author of the database / its maker must not use, extract or re-use the database apart from the cases permitted by law (i.e. within the scope exceptions and limitations). A fairly interesting question to debate is whether a new right of the database maker may emerge. This would be the case when the author of a scientific paper transfers raw primary research data to the publisher, for which the publisher would subsequently make a substantial contribution in its verification or presentation. At that moment, the sui generis right of the database maker would be granted to the publisher, and the original author of the paper could not later claim any such rights to the database.

The contractual practice of the publisher Elsevier

The above theoretically discussed publishing agreement is almost always concluded as a contract of adhesion, in layman's terms under the motto "take-it-or-leave-it". The author

²⁹For details and discussion of other errors when using public licenses see (Koščík and Šavelka 2013).

is the weaker contracting party and does not usually have the possibility to negotiate the individual arrangements. The purpose of the following section is to introduce contractual possibilities how to dispose with scientific results in terms of their opening and eventual storage in repositories if the result is published by the Elsevier publishing house. Attention is only paid to the free-of-charge implementation of the Open Access form of self-archiving, the so-called "green way".³⁰

The publishing house Elsevier in its standard publishing agreement³¹ requires a full transfer of rights (translative)³² for any kind of use and for the duration of copyright. The author retains the right to use the work for personal use, internal institutional use and for scholarly sharing, no matter the phases of the paper.³³ At first glance, it is a very liberal policy as regards the implementation of Open Access but a closer look reveals significant limitations. Firstly, in the case of post-print and the final version, the retained right never include commercial use, which is understood as use for commercial gain (e.g. use in advertising) and use that directly substitutes the services of the publisher (e.g. distribution by e-mail).³⁴

In the first case - personal use - the author can use the paper (versions thereof) in the classroom, distribute copies to colleagues for their personal use (including e-mail), include it in a compilation of the works of the author, include it in his or her thesis or expand it into book-length form.³⁵ Internal institutional use covers the use in the classroom and for internal needs, including reproduction distribution and communication to the public, as well as within e-learning platforms (but not the so-called Massive Open Online Courses) and the inclusion of a paper in grant applications. Scholarly sharing in the case of pre-print means sharing (communication to the public) on any sites and in repositories. After the can acceptance of the paper the author can (resp. it is recommended to) add the DOI and a link to the final version. In the case of post-prints Elsevier applies the delayed Open Access for scholarly sharing. Before the expiration of the embargo period the paper can be shared non-commercial on one's blog or homepage, in the framework of the institutional repository of his or her institution for internal institutional use or upon individual invitation. The paper can be further directly disseminated and reproduced to students and academic colleagues for their personal use; and for private scholarly sharing upon individual invitation to a commercial site, with which Elsevier has an agreement. After the expiration of the embargo the paper can also be shared publicly in the institutional repository and also within commercial sites with which Elsevier has the respective agreement. The final version of the paper can then be academically shared only by a reference to the DOI.

The fact Elsevier expressly recommends that the post-print versions should be licensed under the Creative Commons public licenses in the variant, which excludes commercial use, and modification of the work (i.e. CC BY-NC-ND) adds another level of complexity to the issues

³⁰ The attention is not paid to the various alternatives of the traditional publishers to gold journals (e.g. SpringerOpen), or hybrid models, where the traditional non-open journal offers the opportunity to "buy out" open access for specific papers (e.g. Springer Open Choice).

³¹ Sample "Journal Publishing Agreement" available from:

http://www.elsevier.com/_data/assets/pdf_file/0006/98619/Sample-P-copyright.pdf.

³² Under the Czech Law it could thus constitute a gratuitous exclusive license, with the right to sublicense, for all types of use and for the duration of copyright at most.

³³ Elsevier then specifically uses the terms "Preprint", "Accepted Manuscript 'and' Published Journal Paper."

³⁴ However, the paper can be expanded into a book or included in the compilation of works of the author.

³⁵ The author may also part of his or her work in other works - but this is covered by the above-mentioned citation licenses (here in concreto according to Sec. 31 para. 1 letter a) and b) of the Copyright Act).

examined.³⁶ This can lead to rather paradoxical consequences. If, for example an author publishes his or her paper under this public license still in the embargo period on his or her blog, the selected license entitles his or her colleagues to deposition of the work in any institutional or departmental repository. Thus, if the author does not want to violate his or her contractual obligations, he or she should never publish the work in such a way, even if Elsevier recommends it.

For the experimental primary data the publishing agreement uses the term "Supplemental material". If in addition to this the author of the paper uses the services offered by the publishing house, he or she also grants the publisher a nonexclusive license to publish, post, reformat, index, archive, make available, change format and link to such data including the right to sublicense it to this extent. The author, however, may store the data in one of the repositories of grey literature. Somewhat cryptically the publishing agreement stipulates that the above permission to use the data also applies to it even if it is made public by a reference in the paper. It is therefore evident that the agreement does not address in detail issues related to other property rights. The publishing agreement shall be thus interpreted in accordance with the above principle of the limitation of the scope of the license. The purpose of such contract is to entitle the publisher with the right to use the data in the above-mentioned foreseen manner. If the data collections handed over in this way are protected by any of the above-mentioned modes of protection the corresponding license would be also be granted to them (Telec a Tůma 2007, s. 519). Finally, in the case that the paper is not published the rights transferred to the publisher under the agreement will revert back to the author including any rights to supplementary material. It should be noted in conclusion that the publishing house Elsevier is generally regarded as a "green" publisher, however the respective journals have specific individual Open Access policies.

Conclusion

The gradual convergence of grey and white literature, as anticipated by Banks (Banks 2006), and the gradual move towards the openness of science and research brings with it new legal challenges. As this paper attempted to demonstrate in brief, the fundamental problem is the plurality of modes of protection of the results, as well as various contractual practices of the respective publishers and the complexity of the issue of the implementation of Open Access. The quest for an intuitive solution of the legal problems, as demonstrated on the issue of auto-archiving of pre-prints, can quite easily lead to a breach of the relevant publishing agreement and liability for damages caused. In the case of scientific papers there is a quite progressive proposal on ³⁷ how to overcome these problems by introducing the inalienable right to secondary publication, which, without any contractual arrangements, would ensure the author the *ex lege* right to auto-archive the post-print version.³⁸ For effective functioning such an exception would have to have a mandatory character for all EU members. Such an effective solution could then be used also for publishing of research data in the event that the publishing agreement also dealt with any transfer of rights to the compilation of research data. Without further arrangements, the question of the publication of research data in particular remains a subject matter for contractual regulation (with respect to the CJEU judgment in the Ryanair

³⁶This is however not an obligation – the verb "should" is used and this indicates a suggestion.

³⁷ The relatively extreme solutions such as the abolition of copyright protection for scientific works in General, as proposed by (Shavell 2010) are left aside.

³⁸In the details of this law, see the resources in the footnote. fn. 7 in (Scheufen 2015, p. 144).

case). A question for further research and discussion is to what extent such a new right (exception) would further blur the differences between grey and white literature.

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