

What does copyright mean to open access?

- and how can we make it mean more?

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Research means copyright

- Most research-output is automatically protected by copyright:
 - “Works” in the form of **texts, computer programs, pictures, sounds etc.** if “original”
 - The result of free and creative choices made by the author
 - Even structure and composition may be protected
 - “ideas”, “arguments”, algorithms cannot be original
 - Joint authorship (but just for “authors”)
 - Legal entities (universities etc.) cannot be (first) authors
 - Other output than works
 - **Databases** (compilations) if the result of investments
 - “collected” and not “created” data
 - Legal entities may be right holders

Copyright means exclusivity

- Authors of works (and for databases etc. producers) enjoy exclusive rights
 - **Economic rights:** The right to reproduce, distribute or make works available to the public
 - Prevent others from e.g. publishing, uploading, downloading works or (original) parts thereof
 - **Moral right (droit moral)**
 - Unharmonised but usually paternity rights and right of integrity
 - often the moral rights are not fully transferable (if at all)

Exclusivity means control

- Without the consent from the “author” (“first holder of the right”) most uses are prohibited
- Decisions on whether, when where to publish and on what conditions can only be made by the author
- Unless the law provides otherwise
 - “Work for hire”
 - The Nordic countries has no such limitations
 - “professors privilege” and “the teachers exemption”

Control means freedom of choice for authors

- “Freedom of contract”
 - Pacta sunt servanda
- “Real freedom” presupposes a level playing field
 - Facing big publishers authors are in a weak bargaining position
 - Contract law (unreasonable contracts)
 - DSM Directive, Chapter 3 on “Fair remuneration in exploitation contracts of authors and performers”
 - “Principle of appropriate and proportionate remuneration” (Art. 18), “transparency obligation” (Art. 19), “Contract adjustment mechanism” (Art. 20), “alternative dispute resolution procedure” (Art. 21) “right of revocation” (Art. 22).

What does copyright mean to Open access

- University researchers are motivated by many factors
 - to most copyright isn't about money
 - to all its about career and fame
 - "publish or perish", "h-index", "bibliometric research indicators"
- Copyright's control is crucial because it allows researchers to profit from the research in the ways they deem to be the best
 - Because of copyright universities cannot decide where, whether and how to publish research

Copyright supports academic freedom

- **Universal Declaration of Human Rights, Article 27**
 1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
- **The Swedish Higher Education Act Section 6**
 - Higher education institutions must operate under the general principle that academic freedom must be promoted and protected:
 - research issues may be freely selected,
 - research methodologies may be freely developed, and
 - research results may be freely published.

The way forward: Make researchers' good choices easy!

- Copyright and academic freedom both begin with **the researcher's right to control the use of his/her research**
- That freedom should include the right to choose open access as well as the right not to
- More open access requires a multifaceted and multidimensional approach:
 - Much is outside of copyright
 - Overly greedy publishers: "One Journal Publishing Company is More Profitable Than Netflix"
<https://library.missouri.edu/news/lottes-health-sciences-library/one-journal-publishing-company-is-more-profitable-than-netflix>
 - Rethink recruitment criteria
 - Rethink funding conditions
 - But copyright is important too

Stronger and better copyright laws

- Make sure that “copyright works”
 - It all begins with the creative effort of the individual author (employee)
 - Protect that person better against one-sided contracts
 - DSM-Directive is a step in the right direction but too general to help university authors
- But more should come
- Example
 - Provide authors with statutory muscles to opt out of exclusivity clauses:

The Dutch Copyright Act: “The maker of a short scientific work, the research for which has been paid for in whole or in part by Dutch public funds, shall be entitled to make that work available to the public for no consideration following a reasonable period of time after the work was first published, provided that clear reference is made to the source of the first publication of the work.”

Similarly in e.g. Germany: “*Der Urheber eines wissenschaftlichen Beitrags, der im Rahmen einer **mindestens zur Hälfte mit öffentlichen Mitteln geförderten Forschungstätigkeit** entstanden ... hat, das Recht, den Beitrag nach Ablauf von zwölf Monaten seit der Erstveröffentlichung **in der akzeptierten Manuskriptversion** öffentlich zugänglich zu machen, **soweit dies keinem gewerblichen Zweck dient.***”

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Final remarks and reflections

- Copyright puts authors in control of the use of their works
- This is the foundation for academic freedom. It spurs creativity and it promotes research ethics and fairness
- If we want authors to choose open access it should be in respect of copyright
 - Avoid obligatory models
 - Nudging
 - Easy to chose open access
 - Beneficial to choose (career, funding)
 - Strengthen Copyright Acts with contractual provisions

- Thank you for your attention
- Questions and comments are welcome at jens.schovsbo@jur.ku.dk