

Chapter 3

Legislative Developments in Scholarly Publishing

Carlo Scollo Lavizzari
Lenz Caemmerer, Switzerland

ABSTRACT

The legal developments in scholarly publishing began back at the time of the Gutenberg press. The scholarly journal publishing industry evolved over the centuries. The 1960s through the launch of the internet saw the industry explode with growth. With the advent and development of the digital journal, open access, and other clandestine illegal databases, it is essential that the industry work to protect its interests. This chapter will provide a history, overview, and developments that will be required to ensure the ongoing concerns of the industry.

LEGAL DEVELOPMENTS: THE PRISM OF THE FIVE FLOWS

Content industries are said to thrive in relative stability, if they are able to align a “three-legged stool” comprising the legs of business model, legal rules and technology in such a way to create value for all participants. This Subsection will focus on the leg of “legal rules” of that stool, with a special emphasis of legal rules on the horizon or emerging for scholarly publishing in the context of Blockchain and AI.

Yet, legal rules are not art for art’s sake. It is for any legal rules important to keep in mind what they try to regulate: In order to engage successfully in any Content or Tech industry, the writer has embraced, for analysis purposes, the concept of five inter-connected flows along which legal rules can be defined:

DOI: 10.4018/978-1-7998-5589-7.ch003

1. **Content flow:** Content understood here as the output of Scholarly publishing, including increasingly datasets, databases, metadata and raw data:

Legislative Developments concerning Content include the implementation of the Digital Single Market Copyright Directive (DSM): These rules will be implemented in the EU by 7 June 2021 and include new rules on platform responsibility, affecting article sharing on social scientific networks, as well as rules on text and data mining. EU and national consultations on AI and IP augur legislative reform in 2021: chiefly about the value to be appropriated from owners of databases or the return of a portion of the value created through AI to them; further rules will include the Digital Services Act with rules on harmful and illegal content as well as rules on the responsibility of digital market places, also expected for 2021, and also set rules on due diligence about customer identity online (know your customer rules);

2. **Rights flow:** publishing relies on intellectual property, chiefly copyrights and database rights¹ that subsist in the Content (as defined above): the review of the EU legislation on Collective Management Organisations and crossborder licensing by way of Independent Management Entities will continue into 2021; Standards on safety and reliability of AI devices, eg medical diagnostic devices may stipulate access to training data rules to ensure “explainability” and guard against biased decision making.
3. **Money flow:** to be sustainable, compensation both monetary and non-monetized but otherwise valuable reputation or intangible benefits frequently flow in opposite direction to the flow of Content: Part of legislative developments under this title are rules on the re-use of public sector information to be included in the Data Governance Act of the EU, as well as internationally the UNESCO draft Recommendation on Open Science, the coming into force of Horizon Europe with new Open Access and Open Science rules, as well as the policy agreed by some science funders known as “plan S” and various policies. Money flow elements also concern commitments by owners of technology, trade secrets or patents that negotiate reasonable licensing fees, so called FRAND licensing of Standard Essential Patents.
4. **Data flow:** “Data” for purposes of “Data flow” is to be understood as distinct from “Data” that is part of Content, ie the object of scientific output. Data here denotes “data about data”, ie metadata about Content and any stakeholder or event relevant in the flow, as well as data about any of the other four flows, ie money, culture/social, rights. Also as distinct from the other flows, the “Data flow” is at least bi-directional, if not multi-directional (Aschermann, 2018)²: GDPR, Privacy Shield, WTO rules on free flow of non-personal data and local data retentions rules chiefly from Russia, China, India, as well as ePrivacy

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