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Diamond open access and open peer review: An analysis of the role of copyright and librarians in the support of a shift towards open access in the legal domain.

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ABSTRACT

The aim of this paper is to support initiatives that stimulate volunteer involvement in creating qualitatively good conversations about the law on the internet. The article's core argument is that policies on open access, copyright and library services all concentrate nowon the results of scholarly conversations, while a shift in focus towards the process of scholarly communication is needed to develop new incentives for a culture of sharing. Ways to foster openness in scholarly communication need to be discipline specific. This will be elaborated by discussing the plan for an open environment for collaboration on an English translation of a Dutch introduction to private law.

1. INTRODUCTION

The aim of this paper is to support initiatives that stimulate volunteer involvement in creating qualitatively good conversations about the law on the internet. The article's core argument is that policies on open access, copyright and library services all concentrate now on the *results* of scholarly conversations, while a shift in focus towards the *process* of scholarly communication is needed to develop new incentives for a culture of sharing. Ways to foster openness in scholarly communication need to be discipline specific. This will be elaborated by discussing the plan for an open environment for collaboration on an English translation of a Dutch introduction to private law.

Recently the focus of making scholarly results available on the internet, especially in de U.K., has been on the 'gold road' to open access, which concentrates on peer-reviewed journal articles. This policy's core idea is that article processing charges are paid to publishers by the author or his/her institution or research funder. The golden road towards open access accepts the role of the publisher in the organisation of the review process and the publisher will receive a fee for performing this role instead of a transfer of copyright, which would enable exploitation based on exclusivity. Costs of knowledge dissemination, after a transition phase, will thereby shift from the institution´s library budget to its research budget and libraries will eventually no longer

have to negotiate for licenses based on the publisher's exclusive rights. A focus on supporting scholarly communication and not on research outputs is a chance for libraries to explore new roles in this transition phase.

As Mac Síthigh & Sheekey (2012) point out, paying for publication does not align well with the publication-culture in the field of law. Almost all open access journals have been set-up without the involvement of a publisher. Moreover, they conclude that this reluctance to pay for publishing exists in all disciplines in which time and brainpower instead of costly laboratories form the main costs of research. An alternative to paying for the peer review is that researchers themselves organise the process. 'Diamond open access' is the term used for this approach.

2. FUNDER'S MANDATES AND EU RECOMMENDATIONS

The emphasis mentioned above on peer reviewed journal articles and gold open access in the U.K. is based on the Finch report. The Research Councils United Kingdom (RCUK) policy does not cover monographs, books, critical editions, volumes and catalogues, or other forms of non-peer-reviewed material, although the RCUK encourages authors of such material to make them available in open access whenever possible and the RCUK Policy on Open Access and Supporting Guidance states that the other costs of dissemination can still be covered. Grant proposals may include the publication costs associated with the production of research outputs that are not covered currently by the RCUK OA policy. Publication costs for monographs, books, critical editions, volumes, catalogues , etc. may be requested but, as with any cost, they will still need to be fully justified in the application.

The EU, as both a research funder and a governance body, choose in 2012 for an open access mandate in Horizon2020 and also for experiments making research data public. Several recommendations with relevance to the diamond road to open access can be identified in the EU's document on the access and preservation of scientific information (European Commission, 2012). Member states should define OA policies to ensure that (p.4) …:

- licensing systems contribute to open access to scientific publications resulting from publicly-funded research in a balanced way, in accordance with and without prejudice to the applicable copyright legislation, and encourage researchers to retain their copyright while granting licenses to publishers;
- the academic career system supports and rewards researchers who participate in a culture of sharing the results of their research, in particular by ensuring open access to their publications and by developing, encouraging and using new, alternative models of career assessment, metrics and indicators;
- transparency is improved, in particular by informing the public about agreements between public institutions or groups of public institutions and publishers for the supply of scientific information. This should include agreements covering the so-called 'big deals', i.e. bundles of print and electronic journal subscriptions offered at discounted price;….

These policy recommendations address the member states, whereas research

communities most often transcend borders. Therefore, discipline-specific working methods for researchers to participate in a culture of sharing should be articulated. That the possibilities for openness are different in all fields is supported by recent research in Germany (Eger, Scheufen, & Meierrieks, 2013). A philosophical underpinning of the need for discipline-specific norms for scholarly communication on the internet was conceived in 2002 by Helen Nissenbaum (2002).

Involvement of legal scholars is important for they are able to develop self-regulating models that ensure open access and to define discipline-specific needs to support a culture of sharing. Further, the objectives of the EU mention a shift in the way researchers handle copyright. There is an inconsistency since there is no reason to transfer copyright or even grant an exclusive license to a publisher, if an author pays for the services in the publication process. Also, after a transition process there would be no reason to be transparent about big deals for they would no longer exist in a model in which the publishers are paid for their services. Yet the question remains whether the policies on open access are not focussing too much on output, especially of peer-reviewed journals articles, instead of on innovation in scholarly communication. Whereas all roles in the publication process are performed on a voluntary basis for journals without article processing charges, the diamond road to open access gives a frame of reference to rethink the role and methods of peer review.

3. OPEN ACCESS IN THE LEGAL DOMAIN

In a series of articles by the British Academy on open access in the humanities and social sciences, Martin Paul Eve lecturer in English literature and founder of the Open Library of the Humanities, argues that peer review is the elephant in the room in the present discussion in the U.K(Eve, 2013). This *view* is also valid for legal scholars, for example in comparative law, whose working methods are similar to those in the humanities and social sciences. At the same time the publication culture in the legal domain has specific features, as shown in the U.S.A where there is a strong emphasis on involving students in the review process. As early as 2004 Dan Hunter argued that a shift towards open access would be feasible and effective for those American law reviews which are edited by students as a marketing strategy for law schools (Hunter, 2005). For the field of law changes in the regulations on public sector information will also be of importance. In the Netherlands a feasibility study was done to add comments to open access case law (Piepers & van Wees, 2011). Presumably such an interoperable environment will at present specifically suit Netherlands with its strong tradition of comments to case law. Recent research shows a great diversity in Europe in the regulation of the access and re-use of public sector information. Even for documents from the legislature and from judicial authorities, comprehensive analyses of disclosure/public access norms is not readily available (van Eechoud & Janssen, 2013). So also, while the national publication culture in law will be intertwined with these norms, there is a need for experiments in the field of law with open collaboration on the internet transcending these differences.

4. FOCUS ON OUTPUT

Both the new U.K. policy based on the Finch report (Finch, 2012)and the EU Horizon2020 open access policy (European Commission Directorate General for research & innovation, 2012) focus on peer reviewed journal articles. A simple, historical explanation for this is that the first objections against open access were that anyone could publish anything on the internet. Therefore, the green and the gold road to open access are aiming at peer-reviewed journals articles. The green road promotes self-archiving of either the author's final version of a peer reviewed article or the publisher's version. In this way the discussion on open access was disentangled from the discussion about quality of publications on internet. Yet, the definitions of open access, like the Berlin Declaration on Open access(Max Planck Society) of 22 October 2003, take a broader objective including all the results of research and the right to use these materials. Of course the declaration also mentions the importance of maintaining the standards of quality assurance and good scientific practice. Yet the means to achieve that vision are not restricted to two roads and peer-reviewed journal articles. The declaration, for instance, also encourages holders of cultural heritage to support open access by providing their resources on the Internet.

Recently Peter Suber published a concise introduction (2012) to open access which, after an embargo, is now available in open access. He explains that journals articles are considered to be the low-hanging fruit for open access policies, because academic authors have no interest in the exploitation of their works and willingly transfer their copyright to publishers without receiving remuneration. For books some scholars succeed in negotiating royalties from their publishers. If we take a closer look at the organisation of peer-review and its costs, we might find a shortcut on the road to open access. Cutting these costs is the core element in the newly identified diamond road to open access.

5. DIAMOND OPEN ACCESS AND OPEN PEER REVIEW

The metaphor of a diamond can be used to shift the focus to the multi-faceted needs of research communities and the hard labour needed to make it shine. How can the characteristics of this alternative be defined? First of all, it involves no payment for the organisation of the review process. As Bamberg (2012) says: you need hard-working volunteers. The work of reading and commenting on working papers or manuscripts should itself be a rewarded activity in the subject field of research. It can, for example, be an advantage for editors to be the first to read about new perspectives in their fields of study. Editors of open access journals could also be rewarded by their institutions for demonstrating involvement in a culture of sharing in their fields, which is one of the EU recommendations as an objective of new open access policies. Organising a network of reviewers around a theme could very well be an accepted learning activity for a PhD.

Could it be an option to pay more attention to the process of organising discussion and quality control and to experiment with processes where publication and quality control are disentangled? The role of editors, reviewers and librarians could then become a more transparent part of the scholarly communication process and open peer review would become an important facet of the diamond road towards open access. There are also open access publishers, like Copernicus, that experiment with open or public peer review in

combination with an article processing charge for accepted papers. Copernicus, a commercial spin-off of the Max Planck Society, aims for an optimal infrastructure and services at minimal cost. Transparency might be a way of showing that papers are not accepted mainly as a means to generate more income. It is not the aim of this article to explore the issue of costs of open access publishing in detail; This article merely want to point out that it is crucial that scholars develop ways to organise a transparent filtering system that aligns with the needs of their fields of research. A good example of multi-stage open peer review, supported by Copernicus, can be found in the field of chemistry. Ulrich Pösch (2012) claims that not only the virtue of transparency, but also self-regulation, can be identified as merits of the system now at the core of the interactive open access journal Atmospheric Chemistry and Physics . Discussion papers are posted online, then publicly discussed and rewritten into final papers. Parallel to the publication of the discussion paper, the paper is reviewed by traditional referees. Authors have then a much stronger incentive to maximize the quality of their manuscripts and referees can also claim authorship for their contribution. In a short time the journal reached one of the highest ISI impact factors in its field. At the same time the transparent process enables new forms of metrics because the discussion paper and the comments are also archived and citable.

5. ANONYMITY AND OPEN PEER REVIEW

Another interesting key feature of open peer review is the optional anonymity of the designated referees. We will see later on that this is also reflected in the policy on personality rights on comments. An advantage of an open names policy is that it may help to strengthen the community of researchers and, in particular, include those who are not able to travel to important conferences (Sandewall, 2012 section 7.1.) Pöschl argues that an open names policy might be the best approach for an ideal world, but that optional anonymity is necessary to enable critical comments and questions by referees who might be reluctant to risk appearing ignorant or disrespectful (section 7). He concludes that the ever-increasing flow of manuscripts makes it more important to protect referees rather than authors. But a shift in the attention towards the ways of constant, collaborative and simultaneous knowledge production is needed (Adema, 2012; Nosek & Bar-Anan, 2012).

One can doubt whether anonymity is eventually in the interest of reviewers, since anonymous reviews cannot be taken into account in innovative metrics and alternative career assessment methods. An editorial policy that articulates a process for open peer review will encourage supportive criticism and lower barriers for people to engage in the debate. Diversity of opinion is in itself a goal of an open review process; as a recent report on open peer review concludes (Fitzpatrick & Santo, 2012), the best open review processes promote a wide range of opinions, interpretations, and experiences. Of course the discussion on approaches to organising the review process can profit from experiences in the world of journal publishing. Also the extent to which technical infrastructure is available to cut the costs of organising the process is relevant. The recent report funded by the Mellon Foundation on open peer review in humanities-based scholarly communication also explores the use of software for open journals and blogs (Open Journal Systems, Wordpress). In addition to technology, the

practices and desires for open or peer-to-peer review were explored under guidance of Kathleen Fitzpatrick and Avi Santo. They found that no single set of tools or rules for open review can meet the needs of all scholarly communities. Communities of practise need to set and communicate their own standards for review, depending on the desired outcome of their work. This approach of "structured flexibility" resulted in a useful report determining the best practises and discussing the complexities that come up in the process.

Editorial policies must assess to what extent small modular contributions of reviewers in the translation process need to be valued. The possibility of cooperating on different versions of a text introduces an idea of fluidity that challenges the concepts of authority and authorship. These issues were explored in the Liquid Publications project (Osman et al., 2010). For instance, an editorial policy for a translation project, as will be discussed later on, needs to decide if anyone may add comments to the translation. And what kind of norms for the quality of a contribution can be formulated to be accepted as 'peer'. Will the reviewers also be named as co-creators? And who can decide in what stage the translation will be finalised and published in printed form? One might perceive such a project as an example of digital humanities (Burdick, Drucker, Lunenfeld, Presner, & Schnapp, 2012). in the field of law, but it can also be perceived as a pre-publication alley on the diamond road to open access.

6. TRANSPARENCY IN A CULTURE OF SHARING: COPYRIGHT AND EDITORIAL POLICY IN THE PAUL SCHOLTEN PROJECT

The aim of the Paul Scholten project (Huppes-Cluysenaer, 2013)is to make an English online translation of still one of the most authoritative introductions to Dutch private law available. The work was written by Scholten in 1931 as the first general volume in a series of handbooks on private law (Scholten, 1931). The project also intends to make related resources available on the web and to stimulate comparative law scholars to comment on the translation and to supply (as answers to formulated research questions) research input for the explanatory notes, such as updates of statutes, translations and summaries of case law and notes on the theoretical relevance of Scholten's ideas in comparison with his contemporaries. These comments and research input will be published directly on the project's website. One of the major advantages of the website and the translation lie in providing the context for these scholarly publications. Tedious explanations of their relevance, which now form a hurdle for publications of many scholarly discussions, will no longer be needed. The comments on the translation can, like the submitted research input, be elaborated into peer reviewed articles for the journal of the project's website. The editorial board will at some stage invite reviewers to evaluate the submissions for the discussion on the project website and will publish those which are selected, together with the evaluations of the reviewers, in the journal of the website. In this way the innovative set-up will be combined with the present academic career system, which asks for reviewed publications. Issues on copyright are and should be dealt with in the editorial policy. For example the contribution of a reviewer can lead to an article and the reviewer can be credited as author of that article. This can be perceived as a copyright issue relating to the personality rights in the review, but it needs to be taken up as a practical,

organisational issue in the editorial policy in order to provide an incentive to contribute to the translation project. Moreover, this relation between the research project and issues on copyright and open access is also recognised in a sector on the website for meta-research questions. As described above the project wants to experiment with directly published comments to a translation and contributions to research questions in combination with the online publication of peer reviewed articles selected from these additions in the project's journal. It still needs to be decided if a standard Creative Commons license can support that model and how affiliation of the project can be arranged.

The digitisation issues are also interesting from a re-use perspective. Since one of the reasons for translating the work of Scholten is to make his discussions with the international community of researchers more visible, it was also relevant to make earlier translations of his work available online. The approach of the project to digitising other related works was both practical and effective. Through an advertisement in a general law journal, the holders of the rights to a French translation were encouraged to contribute that work to the website. Work-by-work rights clearance imposes a prohibitive burden on publicly funded libraries and archival institutions (Deazley & Stobo, 2013). However, in this case a community of scholars got engaged in clearing rights. Maybe the clear perspective on the need to digitise these works brought about a reaction by the rights owner to the request of the scholars through their networks. Non-response of rights owners is at present one of the biggest problems in digitization projects. Remuneration is not an issue since the material has an academic rather than a commercial value. In fact, the heirs of the author of this out-of-print work welcomed digitisation. An attempt to get an Indonesian translation by a former Indonesian publisher online failed, however, because it was not possible to find the present rights owner. This demonstrates the so-called orphan works paradox. As Deazley and Stobo explain: 'the lower the commercial value of a work the less likely it is that the owner can be found to grant permission, which in turn means that the least commercially valuable works generate the highest transaction costs in terms of searching for the owner in attempting to clear rights.' (It exceeds the frame of reference for this article to consider recent legislative developments - both in Europe and in the UK - concerning the use and re-use of orphan works; for a discussion, see Deazley & Stobo). What the experience of the Scholten project does demonstrate, though, is that an open online scholarly collaboration can engage scholars to some extent in copyright issues from a public domain perspective.

In most digitisation projects, no-one knows the views of the original rights holder on online access. This is not true in Scholten´s case. When the Dutch copyright act was introduced in 1912 he wrote an article expressing his view that copyright protection had become too broad and too long (Scholten, 1951). Scholten died in 1946, so his general introduction is still not in the public domain. In the early stage of the project commitment of all stakeholders was assured. The library provided the support for the repository, and the faculty and the research institute provided other support. The publisher consented to the project after consulting Scholten´s family. The family considered the ambitions of the project in alignment with his ethos of sharing. [2]Scholten is famous for his emphasis on the role of discussions in developing a clear insight in a legal

decision and considered sharing knowledge on the law as a moral demand for every lawyer. This example proves that digitisation is feasible in a specific project where the need for these resources online is perceived as relevant for the present-day scholarly communication, but digitisation of older works still in copyright is, however, generally problematic due to the issue of rights clearance. Solutions can be found through the combined inventiveness of scholars and librarians involved in open access.

7. THE ROLE OF LIBRARIANS

The role of the library in support of this kind of scholarly collaboration needs further attention. Based on its historical task of building collections of scholarly books and journals, one might conclude that the library is mainly object oriented. Yet, the role of the subject librarian also involves contributions to the research process. Blaise Cronin (2005) concludes - based on an extensive research of the forewords of books - which librarians contributed to the publication process even before the internet. In her book on open review in humanities, of which a version was made available for open peer review, Kathleen Fitzpatrick (2011)points to the new role university libraries, together with university presses and IT-services, could perform to support open review projects. In the Netherlands university libraries organised an efficient infrastructure for open access (Woutersen-Windhouwer, 2012). In the library in Groningen support is given to communities of researchers who want to make the shift to open access with the software of Open Journals Systems. Meanwhile, new services and infrastructure are introduced to raise the visibility of the outputs of the academic staff of our institution on the web. Advice, software support and hosting services for open peer review could be the next step. As the report of the Mellon foundation shows, a technical infrastructure to cut the costs of organising the review process is already available.

Recently Mary Auckland conducted an investigation for the Research Libraries UK on the needs and skills of librarians to support the evolving information requirements of researchers (Auckland, 2012). The study sees a shift moving subject librarians beyond their present tasks of information discovery and management, collection development and information literacy training, to a world where they play a much greater part in the research process and in particular in the management, curation and preservation of research data, and in scholarly communication and the effective dissemination of research outputs. A skills gap is identified in the knowledge to support researchers in complying with various mandates of funders, including open access requirements. Librarians should liaise with staff to understand their needs in the whole research process. An understanding of the general needs in becoming an established researcher as well as discipline specific needs is required. In general there is a need for librarians to become more involved in the research process. Involvement of the library in open review projects would be an ideal way to learn 'on the job.' Raising awareness on the mandates of funders in open access and preservation can be most effective in projects in which the researchers and editors define their needs on findable and re-usable resources and practical solutions for copyright issues. In most Dutch libraries advice on copyright is related to self-archiving research outputs in an institutional repository. Given the practice that most researchers still transfer their copyrights to publishers this

advice mainly focusses on the copyright policies of publishers (University of Nottingham, 2013). Copyright advice on projects that involve digitisation of related works and accounting for the contributions of reviewers can be of a more multi-facetted 'diamond' nature.

8. FINAL THOUGHTS

The hope is that the Paul Scholten project will flourish and set an example for open access in the field of law, but many hurdles still lie ahead. This article demonstrates that discipline specific roads to open access are required, and that that there is a special need for the involvement of scholars in experiments like this project in order to contribute to the development of an academic career system that supports and rewards researchers for sharing the results of their research. The diamond road to open access is most promising when it involves all roles in scholarly communication. In the process of reskilling for research, university librarians can also provide support by supplying the infrastructure and by exploring the rights issues related to these new roles.

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[2] The author of this article is the great-granddaughter of Paul Scholten. Liesbeth Huppes-Cluysenaer, lecturer in General Jurisprudence at the University of Amsterdam, initiated the project in 2010.