

Scientific and Technical Information Department - CNRS

White Paper — Open Science in a Digital Republic — Strategic Guide Study Review and Proposals for Implementing the Act

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The consecration of a legal right to open access

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The consecration of a legal right to open access

- 1 There is wide agreement on the risk of drifting towards the privatisation of knowledge among all scientific communities and in particular the higher education institutions, for which the total cost of subscriptions to publishers' platforms are increasing exponentially.
- 2 These elements have been welcomed by the sponsors of the Digital Republic Act, who have introduced the principle of a French version of open access to scientific publications.

Article 30 of the Digital Republic Act: Open access

- 3 The Digital Republic Act consecrates this right of access to scientific publications in the following terms:
 - In Chapter 3 of Title 3 of Book V of the Research Code, an Article L. 533-4 shall be inserted as follows:

“Art. L. 533-4. – I. – When a scientific text arising from a research activity financed at least 50% by grants allocated by the state, by regional or local authorities or public institutions, by grants from national funding agencies or by European Union funds is published in a periodical appearing at least once a year, its author, even after having granted exclusive rights to a publisher, has the right to make available free of charge in an open format, in digital form, subject to the agreement of any co-authors, the final version accepted for publication, as soon as the publisher itself makes the latter available free of charge in digital form, and, failing this, on expiry of a period running from the date of first publication. This period is a maximum of six months for a publication in the field of the sciences, technology and medicine, and twelve months in that of the human and social sciences.

The version made available in application of the first subparagraph may not be exploited in the framework of a commercial publishing activity.

II. – Once the data from a research activity, financed at least 50% by grants allocated by the state, by regional or local authorities or public institutions, by grants from national funding agencies or by European Union funds, are no longer protected by specific rights, or special regulations, and they have been made public

by the researcher, the research establishment or organisation, they can be freely reused.

III. – The publisher of a scientific text mentioned in I shall not limit the reuse of research data made public in the framework of its publication.

IV. – The provisions of this article are public policy and any clause to the contrary is deemed to be unwritten.”

4 The Article organises open access as follows:

- concerning publications:

- Article 30 provides the right for the author of a scientific text to make the final version of the manuscript accepted for publication freely available in an open digital format;
- this version may be made available either immediately, if the publisher places the publication online free of charge, or after an embargo period;
- embargo periods are six months for a publication in the field of the sciences, technology and medicine and twelve months in that of the human and social sciences, in compliance with EU recommendations;
- clauses on exclusive transfer of copyright laid down in publishing contracts shall not hinder the author’s right to make content available;

- on research data:

- research data may be reused freely once the research institution has made them public;
- the publisher may not retain ownership of the research data associated with a publication.

- The provisions of Article 30 are public policy and any clause to the contrary shall be deemed unwritten.

Making scientific texts freely available

5 **A requirement for researchers.** A general consensus emerged from the public consultation on the Digital Republic Act regarding a clear demand to strengthen the rights of researchers to disseminate their work freely, when the work has been financed by public funds.

6 **Legal consecration.** The new legislation has introduced into the French Research Code a right for the author of a scientific text to make **the final version of the manuscript accepted for publication** available free of charge, when this text is the result of a research activity financed at least 50% by public funds.

7 While the intention of the Act to open up access to and facilitate the sharing of scientific publications can only be welcomed, some clarification is needed, particularly concerning the notion of “final version of the manuscript accepted for publication”.

8 **Clarifications.** The problem is that the law (neither in the Intellectual Property Code nor in the Heritage Code) provides no definition of “manuscript”, “author’s version”, “publisher’s version”, “pre-publication”, “post-publication”, etc. These terms taken from publishing practice must be defined, legally qualified and given legal recognition (ownership of rights and the corresponding rights of exploitation).

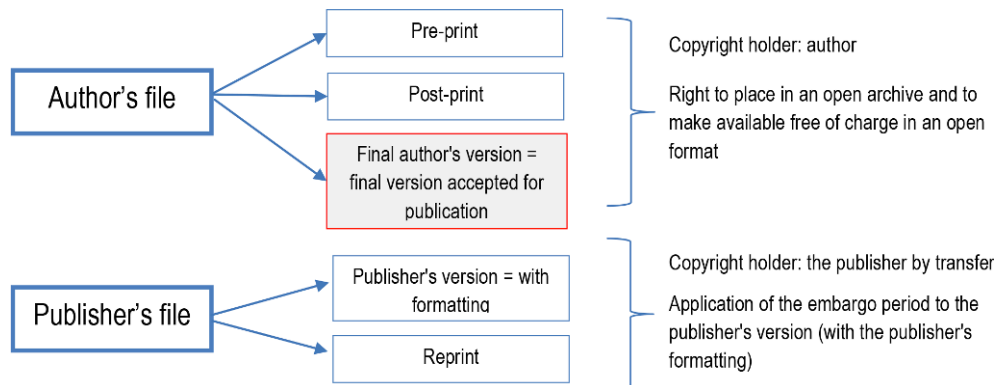
9 The scientific community and in particular the CNRS’s STI correspondents (CORIST) have considered the definition of the terms “manuscript” and “final version” in the light of current practice. When he was interviewed in the framework of the White Paper, Claude Kirchner of INRIA summarised the problem in the following manner:

“Any embargo period could concern only the ‘publisher’s version’ in its final form, in order to retain its commercial potential. Such restrictions are acceptable only if

the ‘author’s version’ can be freely distributed, and the duration of the embargo should then be set in compliance with international practices.”

(INRIA hearing, Claude Kirchner, 15 October 2015)¹

- 10 Implementation decrees would provide an opportunity to propose definitions corresponding to their use in practice and especially in scientific publishing.
- 11 To this end, these Guidelines propose that a **reference base of uses** be created, which could contain a glossary and a definition of the terms used in practice, as well as the regime applicable to each different version of an article. The different versions of an article are referred to as follows:



- 12 The concept of “final version of the manuscript accepted for publication” seems to mean the author’s last version before publication, and therefore before formatting by the publisher. Article 30 of the Digital Republic Act should therefore be clarified by decree to specify which version is covered by the embargo period.

△ Decree: to create a reference base of uses and to specify which version of the manuscript is subject to an embargo.

Contractual clauses granting exclusive transfer of copyright to have no effect

- 13 The text of Article 30 stipulates that the right of researchers to make their scientific publications freely available applies “even after having granted exclusive rights to a publisher”.
- 14 Since publishing contracts between a researcher and a publisher most often take the form of a standard form contract, in the interest of open access the new legislation declares that any clause granting exclusive copyright should be “unwritten”.
- 15 **Proposal: Model contract.** In order to guarantee the rights of researchers regarding their published material and to take into account the risks of contractual asymmetry, a model contract could be promulgated by decree for transferring copyright for use in public research.

- 16 This contract would lay down the rules governing the relationship between the parties and protect researchers in their relationship with publishers. It would in particular ensure that there was no exclusive transfer, and guarantee the rights of researchers to:
- authorise the depositing and the reproduction in an open archive of the publication in the author's version immediately, and in the publisher's version after expiry of an embargo period;
 - allow the immediate exploration of the content of the article using digital data-processing tools;
 - prevent all forms of private retention or reservation of ownership concerning the content of the article and the corresponding data.
- 17 This contract could be promulgated by decree and thus have a regulatory status that would be imposed on the publisher for any scientific publication resulting from public research.

△ Decree: creation of a model contract concerning the transfer of rights intended for scientific publications.

The recommendations of the European Commission on embargo periods

- 18 Seeking a new balance between the positions of the different stakeholders in the digital age and the knowledge society, the Government has included the following in the Act:
- the possibility of dissemination by free access of publicly funded scientific work, upon expiry of what is known as an “embargo period”;
 - “embargo periods” of six and twelve months, at the end of which authors of publications financed by public funds must make their texts freely available. If articles are made available by the online publisher free of charge, authors will be able to exercise their right immediately.
- 19 **EC recommendations.** The embargo periods laid down by the Act are the maximum deadlines provided for by the recommendation of the European Commission (C(2012) 4890):²
- 20 The EC recommends that Member States:
- “Define clear policies for the dissemination of and open access to scientific publications resulting from publicly funded research. These policies should provide for:
 - concrete objectives and indicators to measure progress,
 - implementation plans, including the allocation of responsibilities,
 - associated financial planning”.
 - They should also ensure that there is “open access to publications resulting from publicly funded research as soon as possible, preferably immediately and in any case no later than 6 months after the date of publication, and 12 months for social sciences and humanities”.
- 21 **Measures taken in other countries.** The French embargo periods are the same or similar to those applied under law by our European neighbours:
- in Germany: embargo period of 12 months with no distinction between disciplines;
 - in Spain: depositing in an institutional archive as early as possible, without exceeding 12 months, with no distinction between disciplines.

Prohibiting the privatisation of research data

- 22 **Need for sharing.** The French Research Code defines the following missions of public research (Article L.112-1 of the Research Code), among others:
- “sharing and disseminating scientific knowledge”;
 - “open access to scientific data”.
- 23 All the scientific communities agree that it is necessary to have free and unimpeded access to scientific data, in the greater interest of research, for which the stakes are very high.
- 24 In an article entitled “Préserver les données de la recherche à l’ère du Big Data” (Preserving research data in the age of Big Data),³ the problem of the preservation and the sharing of research data is fully and accurately presented and discussed.
- “As the massive amounts of data produced by research continue to increase exponentially, the issue of data storage has become crucial, both for preserving our scientific heritage and to enable their use by the scientific community. ... As analytical instruments and software improve, almost all disciplines have witnessed an explosion in the amount of data created each year. And these data are precious since they have very often been generated by complex and costly studies, in high energy physics for example, or else they are the result of periodic observations carried out over extremely long periods, such as tracking the position of stellar objects or demographic data.”
- 25 Article 30 of the Digital Republic Act expresses this need for free and open access “to data from a research activity”, and also the need to prevent any privatisation of these data, particularly by publishing contract.
- “II. – Once the data from a research activity, financed at least 50% by grants allocated by the state, by regional or local authorities or public institutions, by grants from national funding agencies or by European Union funds, are no longer protected by specific rights, or special regulations, and they have been made public by the researcher, the research establishment or organisation, they can be freely reused.
- III. – The publisher of a scientific text mentioned in I shall not limit the reuse of research data made public in the framework of its publication.”
- 26 The text establishes the principle of the free reuse of data generated by public research. However, the boundaries of “these research data resulting from a research activity at least 50% of which was financed by public funds” are not specified, and the procedures for sharing and accessing these data are not defined.
- 27 These clarifications, which are necessary for good governance of research data and Open Science, must be included in an implementing decree. The sharing of knowledge is the vital and historical basis of the scientific approach, and indispensable for research. The digital transition has disrupted previous practice by giving access to a growing and comprehensive mass of data, instantaneously and anywhere in the world. Big Data, when applied to science, entails the development of tools and practices involving intelligent exploration by automated data analysis and observation services.
- 28 The use of these text- and data-mining tools and the advent of new transversal and multidisciplinary scientific practices give rise to multiple issues, scientific of course but also human, economic and ethical. The legislation takes these issues into account, as well as the need to introduce this right to text and data mining in French legislation,

thus enabling French research to compete with its British, American or Canadian counterparts. What is now needed is an organisational structure capable of ensuring that these principles are implemented efficiently.

NOTES

1. Claude Kirchner, 15 October 2015, White Paper, p. 226.
2. https://ec.europa.eu/research/science-society/document_library/pdf_06/recommendation-access-and-preservation-scientific-information_en.pdf
3. Guillaume Garvanèse, “Préserver les données de la recherche à l’ère du Big Data”, *CNRS Le Journal*, 9 September 2016, <https://lejournel.cnrs.fr/articles/preserver-les-donnees-de-la-recherche-a-lere-du-big-data>