Open Access in Academic Publishing on Law and Jurisprudence

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Open Access aims to ensure that scientific findings are disseminated as widely as possible and thus reach (and can be further exploited) where they are of greatest use. Open Access assumes that the unrestricted access to research findings will enable further research and boost scientific progress. This is not restricted to STEM-subjects where speed is often essential to find solutions for looming problems but also applies to studies in the Humanities and Social Sciences including Law and Jurisprudence.

For an academic publisher the dissemination of scientific findings is of course nothing new but exactly what they, what we have been doing for centuries. Academic publishers are an integral part of the scientific system. In this system, it is the publisher's task to prepare research results in such a way that these results end up as precisely as possible where they are needed and can be of use.

In the field of jurisprudence, this starts with formatting and typesetting the texts created by our authors in such a way that readers can easily access the content. These texts then become part of journals or books, and are printed or published electronically as an e-book or as part of a database.

There can be no doubt that printed books in general and monographs in particular open up a unique kind of access to their content. According to the findings of reading research,[1] printed books are much better suited to „transport" complex contexts and to stimulate readers to generate new insights. It is not without reason that libraries with their kilometres-long shelves filled with books are still considered to be the true temples of science. And printed books continue to be enormously important for the dissemination of the knowledge and insights they contain:

- For example, reviews are immensely effective to disseminate books – as researchers are as likely to follow their peers' recommendations as in every other context. But who will write a review without ever having picked up the physical book?
- The success of anthologies of all kinds is based not least on whether the printed book can be distributed in such a way that researchers will find it on their own bookshelf and may consult it if necessary. This is often so much easier than spending a long time researching on the internet. At least in my experience anthologies that have been disseminated in such a way tend to be cited far more often.
- And finally, printed books that are displayed at conferences or other events play an important role in arousing the interest of potential readers in the content of these books.

Publishing Means (far) More than Printing Books

All this notwithstanding it is a strange misunderstanding (or misconception?) that academic publishing is all about printing books or setting up their digital equivalents in databases. If typesetting, printing, and e-publishing would be the only services provided, there would be no future for academic publishing. Nowadays it is possible to convert texts and graphics to printing templates or PDF files by using one of many easily available commercially word processing programmes. Furthermore every “copy shop” provides printing services to transform these PDF files into printed books. And it doesn’t need any real effort to move these files on a webserver – and wait until the next data crawler comes along.

Any academic publisher worth its salt must have realised by now that it is not (only) the printed book itself that matters, but rather helping potential readers to find the specific book they need – and find those passages in that book (or a journal) that help them to solve a particular problem or even to recognise something to be a problem. That’s why academic publishers today don’t just produce books, but they disseminate content. To do this, they need and use the data from which the printed books were created. The full texts and the books’ bibliographic data are enriched by numerous so-called metadata, i.e., keywords, classifications, abstracts, identifiers, etc. These metadata are in turn stored in as many different formats and fed into as many systems as possible, from catalogues and discovery services to search engines and databases.

Academic publishers have to continually explore these services and their performance. They have to make sure that their works are as visible and accessible as possible. This is by no means an easy task, because not only are these services constantly evolving, but most services in turn require data to be delivered or offered in certain formats – and at certain times. And if a publisher misses the right moment, misinformation is sometimes dragged on for years, gaps once created are never closed again or certain content is simply not registered: Who hasn’t been annoyed that a book is advertised on Amazon or other online booksellers with the wrong cover? The consequences are somewhat more dramatic if a publisher does not scrupulously follow the specifications for the crawlers of major search engines (for example Google Scholar), because these specifications may be changed without notice – and the change itself may be only documented in an obscure online forum. This can lead to the publisher’s works no longer being indexed by the search engine – and in consequence not being found with this search engine. Knowing that referrals from search engines and similar services constitute the vast majority of hits on most databases, it becomes obvious how important the correct „enrichment“ and preparation of metadata is for scientific progress.

All this applies to all kinds of academic publications. It is of no importance if the content itself is openly accessible or if it may only be accessed after surmounting a paywall. In fact, the publisher’s efforts may often be a little bit more complex with OA publications as there are some services restricted to Open Access publications that need to be addressed separately.

Academic Publishing and Scientific Progress

Nevertheless, there is no need to deceive oneself: Most of what academic publishers do could probably be done by the authors if they only put their mind to it. If an author is halfway clever, she or he can have a broad impact through self-publishing – but they need to take time to find out how to effectively *disseminate* content, while they could spend this time far more productively with *creating* content. Academic publishers relieve academics, as authors, of the effort involved in disseminating their findings themselves. At the same time, they help researchers by preparing new findings and making them available in such a way that they are accessible and can stimulate further research. That alone is a weighty achievement, without which modern science would probably not function.

But academic publishers do help scientific progress even more by introducing and safeguarding quality assurance procedures. This does not mean that they, or the editors they employ, are themselves able to check and confirm the quality of every text down to the last detail. The complaint unfortunately heard all too often, that even renowned academic publishers no longer provide a “real” editing service cannot hide the fact that this has never been any different. A “real” editing service would presuppose that there is at least one person working for the publisher who can keep at the same professional level as the authors whose works are supposed to be published. This may not have been realistic in times of a manageable world knowledge that could be understood in its entirety by „universal geniuses“, but at least it was conceivable. In the modern world, it is an obviously unattainable ideal. And I am speaking here from the experience of a professor of constitutional law who is aware that he would probably not be able to even guess at the scientific significance of an investigation into a detail of commercial law or a specific feature of criminal procedure.

Quality control by academic publishers is based on the individual editor’s roots in science. Regarding jurisprudence and legal publications this means that all editors are qualified lawyers or at least experienced scholars who can find those people and institutions that can assist the publisher in selecting and examining the works to be published – whether as reviewers in academic procedures or as editors of series or individual works in their respective special fields. This anchoring in the system of science, the continuous exchange between editors and legal scholars enables academic publishers to develop and maintain a high-quality programme that reflects the state of the art of legal scholarship and, in turn, helps science and scholarship to continually produce new findings.

With all this, publishers have an indispensable function in the scientific community. Of course, this comes at a cost, as the people who produce books, build and feed databases, ensure quality assurance and keep the dialogue with researchers alive in publishing houses do this with the full commitment of their labour and need to earn their living.

Sales and Customs

On the one hand it is widely accepted, that „actual scientists“ should be paid by the public purse, at least when they are not working on solving directly economically significant problems (i.e., in basic research and the humanities, but also in large parts of the social sciences). On the other hand, the dissemination of scientific findings has been left largely to private-sector companies, i.e., academic publishers, in large parts of the world.

In many countries, academic publishers have traditionally financed themselves solely from sales revenues. When selecting the titles to be published, they must therefore ensure that there are enough customers who are interested in the content of the works and are willing to pay a reasonable price for this content, which in turn covers the publisher’s costs. Of course, the public sector also plays a central role here, since (academic) libraries are traditionally among the best customers of academic publishers. But there are some crucial differences between subjects and academic traditions that have a significant impact on academic publishing.

First of all, in jurisprudence, unlike in many other sciences, books (i.e., monographs and anthologies) still play a central role in academic publishing. Journals may have become more and more important, but they have not yet replaced the book as the most important means to prove an academic qualification. In general, this applies to all jurisdictions. But there is one crucial difference: In the English-speaking world, theses (dissertations and habilitations) do not have to be published at all. As publishers have to rely on sales revenues to cover the cost of publishing, they try to publish only one book on any given subject, and they need to find as many customers as possible who are willing to pay for just this book. As even university libraries will not acquire books that seem to be “too academic”, even outstanding dissertations written by native speakers, are often declined for publication by American or British publishers. Sometimes it suffices that the book’s preface contains the word „thesis“ to make it un-publishable. This leads academics to thoroughly revise their thesis after completing their doctorate. They usually try to discard any „academic ballast“ (like footnotes or considerations on methodology). In jurisprudence, it is quite common that texts are tailored to the needs of legal practitioners.

In the German speaking countries, the situation is quite different: The publication of a thesis – and in the exact version that had been submitted to the competent academic bodies for examination – is either obligatory or at least customary. In the case of jurisprudence this is unlikely to change in the foreseeable future as there are no absolute truths in law (“two lawyers, three opinions”). As there may well exist more than one compelling solution to a specific legal problem, there may well be several books on any subject. Academic libraries have to put up with this fact and acquire theses as a matter of course. However, as there are only far less than 100 institutions that systematically collect works on jurisprudence, sales revenues are usually not sufficient to cover the costs of the publishers’ services. At the same time the authors are not only required to publish their work, but they know that there is a far higher chance for their findings to enter the academic discourse if they publish

their work with a professional academic publisher. This is the main reason why academic publishers in German speaking countries have always relied on subsidies to cover the cost of publication and dissemination of their authors' findings. This seems to be a fair deal for the authors too, as the publisher provides an important service by disseminating their findings and thus helping them to make a name for themselves in the scientific community.[2]

Obviously, the public sector's share of academic publishers' revenues has been rising steadily in recent years and decades. Most academics no longer obtain the literature they need for their work privately but rely on their library's resources. Publishers may have been quite ingenious at reducing the cost of publishing and disseminating research findings – but this alone did not help to counteract the steady decline of sales numbers. So, prices have risen. The fact that these increases may have been fairly moderate in the field of German-language jurisprudence, may well be because the publishing landscape in this particular field is (still) dominated by small and medium-sized enterprises – and thus has been spared the (alleged) excesses of major international academic publishers. Still, these excesses have been one of the main reasons why the idea of Open Access has quickly gained a foothold, especially in academic institutions and libraries. After all, in view of the profits made by major international publishers, it was an obvious conclusion that it would probably be better and more efficient for the public sector to no longer pay for the access to knowledge, i.e., for books, journals and databases, but for the publication and dissemination.

Nevertheless, OA is not only or even primarily about savings for the public sector. In fact, it has already been shown that the services which must be provided in connection with an OA publication are for the most part identical, or at least comparable, to the services provided in connection with a traditional publication. It may well be that print runs go down when books are primarily used electronically. But printing affects only a small (and declining) part of all costs of publication and the costs per unit rise with smaller print runs. And finally, with OA publications there are numerous "other" channels that want to be found and filled in order to disseminate the content in the best possible way. Open Access is therefore neither cheap nor free.

Science and its Values

The great charm of the idea of knowledge as a common good is that every new discovery has the potential to promote further discoveries. Thus, Open Access is supposed to promote scientific progress. And when one considers, for example, how much medical and pharmaceutical research on Covid-19 has benefited from the fact that the relevant studies were openly accessible, one can hardly doubt that this form of disseminating scientific knowledge has at least the potential to serve the good of humanity.

Of course, one can certainly doubt whether and to what extent all this applies to jurisprudence, which for the most part deals with national laws and regulations and is essentially a science based on language. Nevertheless, jurisprudence cannot

escape the general development and there is certainly reason to suspect that OA could promote new insights, especially in comparative law or in the fields of International and European law – not to mention the so-called *Grundlagenfächer*.

Furthermore, it is precisely here that an important limit to OA becomes obvious: the legal system does indeed protect scientific findings or technical processes that can be directly exploited commercially, for example through patent and trademark law. Here, too, the aim is to promote scientific progress by granting the inventor (or whoever holds the patent) the exclusive right to exploit this specific finding or process. Whether and to what extent the profits from the exploitation of exclusive patent rights are in turn used – or even must be used – to finance further research projects is an almost philosophical question that cannot even be answered here. With OA (at least in its “purest” form of a CC-BY-licence) most of the usual safeguards for the protection of IP fail.

Research and Practice

Anyway, even if jurisprudential findings cannot be protected by patent law, jurisprudence certainly leads to findings that have an economic value and can be exploited. This becomes particularly obvious in a typical legal genre of literature, namely the (article-by-article) commentary. As a rule, a commentary on any law or regulation does not contain any revolutionary new insights that promote progress. It offers legal practitioners a specific approach to the law, or more precisely to the individual norm. The commentary helps in the interpretation of this norm and thus in the resolution of conflicts in which this norm is applied. It thus facilitates the work of legal practitioners and makes a decisive contribution to their ability to earn a living. Commentaries can have a scholarly claim, which is particularly evident in that they not only describe those questions that have already been answered (by whom? when? how?), but also provide answers to questions that have not yet been asked in practice. Handbooks may work in a very similar way, as do many textbooks and above all journals aiming mainly at legal practitioners. It is not without reason that such books and journals are often published (or edited) by established and renowned legal scholars. In any case, these works for practitioners are academic publications in the broader sense.[3]

By their very nature, such works are not suitable for Open Access if one assumes that the costs of Open Access publications should be borne to a considerable extent by the public purse. For this would result in a massive subsidy programme in favour of practitioners, who currently bear most of the costs of legal publishers through their subscription and licence fees and the procurement of books. By doing this they enable the publishers to pay royalties to their editors and/or authors. This in turn is the only way how scholars may, at least to a small extent, participate in the creation of value.

Of course, the intrinsic motivation of researchers also plays a major role in the production of commentaries and other works for practitioners. However, the inclination to participate in such a work will hardly increase if the authors no longer profit economically. Why should they waste their time with collecting and compiling

all there is to know about any given norm if they don't get anything in return but are even forced to publish Open Access just because they are paid by a university or the public sector? And all this, when writing books or articles aiming at legal practitioners may be academic publishing in the wider sense but is certainly not part of their job description.

One may argue that publishing is in fact a crucial part of any scholar's work description. And there are compelling arguments why "real" academic publications (like dissertations and other theses) should be openly accessible even (or especially) in jurisprudence. But if scholars are required by their contract (or – in the case of *Beamten* – even by law) to at least try to finish a thesis during their time working at a university or a research facility, the thesis' publication could and should be included too. Considering that – at least in the German speaking countries – the author is usually required to subsidise his or her thesis' publication, it almost seems obvious that the institution requiring the publication also bears the cost, either as a part of the researcher's salary or through special funding. Luckily, more and more funders come to the same conclusion and no longer see OA as a way to save money but support the publication of research – and by this enable publishers to develop sustainable business models for OA publishing.[4]

[1] https://ereadcost.eu/stavanger-declaration/

[2] Even an author who does not expect to continue working in jurisprudence usually wants his or her efforts and academic endeavours to be recognized. There may be some scholars who are only interested in receiving their doctorate. But this is almost a rarity considering how long they have spent writing their thesis.

[3] If one looks closely, similar formats may also be found in some other academic disciplines, which primarily aim at (scientifically trained) practitioners: in addition to theology, which has many parallels to jurisprudence, for example there is medicine, but also some social sciences or engineering.

[4] How this may be achieved is shown by the contract between the Nomos Verlag and the „BW Konsortium", a library consortium comprising all academic libraries in the state of Baden-Wuerttemberg. According to this contract every scholar may apply for a grant covering (almost) all the cost of publication. Most of the works published under this contract are theses. The author neither has to pay for the publication itself nor for publishing under a CC-BY-License.
