

Open Access to Legal Scholarship

Daniel Hürlimann, Assistant Professor of Information Law, University of St.Gallen

One of the subcommittees of the ABA Commission on the Future of Legal Education focuses on the role legal education can play in addressing the justice gap¹. A simple way to address the justice gap is by providing free access to legal information including legal scholarship. This paper gives an overview of the beginnings of the Law Open Access movement in the US and recent developments in Europe and Switzerland. Finally, the question of financing is addressed and alternatives to APC financing are presented.

Back in 2005, Dan Hunter wrote²:

“The problem is that individual decisions by law schools, in asking their law reviews to be self-supporting, and by law reviews, in looking to commercial databases like Westlaw and Lexis for revenues, lead to the socially corrosive result that law review editors seek to stop free access to the work they publish. This result is not only socially retrograde but also directly against the various values shared by the people involved in law review publishing. Legal scholarship is written by authors who have no direct commercial interest in their writing, and who instead of seeking narrow, paid dissemination of their work, would much rather have the widest possible (unpaying) audience.”

Three years later, the directors of the law libraries at 12 US Universities signed the Durham Statement on Open Access to Legal Scholarship. The Durham Statement “calls for all law schools to stop publishing their journals in print format and to rely instead on electronic publication coupled with a commitment to keep the electronic versions available in stable, open, digital formats”³.

There are many OA law journals in the US, but unfortunately most of them are not registered in the Directory of Open Access Journals (DOAJ). According to doaj.org, the country with the highest number of Law OA journals is Brazil (73 journals), followed by Indonesia (36 journals) and Russia, Poland, Italy (10 journals each).

In September 2018, a group of 10 European research funders, with the support of the European Commission and the European Research Council (ERC), launched Plan S to make full and immediate Open Access to research publications a reality. “By 2020 scientific publications that result from research funded by public grants provided by participating national and European research councils and funding bodies, must be

¹ ABA Commission on the Future of Legal Education (<https://perma.cc/CHR6-RBR4>).

² Dan Hunter, Walled Gardens, Washington & Lee Law Review, Vol. 62, 2005 (<https://perma.cc/6LYY-5XAT>).

³ Durham Statement on Open Access to Legal Scholarship (<https://perma.cc/R7ZM-KFY9>).

published in compliant Open Access Journals or on compliant Open Access Platforms.”⁴ Later, private foundations such as the Gates Foundation and the Wellcome Trust also endorsed the principles of Plan S⁵. The Swiss National Science Foundation (SNSF) decided already in 2017, that all publications produced in SNSF-funded projects must be published Open Access by 2020⁶.

Of course, the rules of the research funders apply only to the projects or persons they fund. At the same time, however, it can be observed that the universities themselves are increasingly demanding for Open Access publications.

The Association of Swiss Universities has drawn up a Swiss National Strategy on Open Access on behalf of the government⁷. According to this strategy, 100% of publicly financed publications must be published Open Access by 2024⁸. This target applies to all disciplines, including law.

It is therefore foreseeable that much will change in Switzerland and Europe in the next years. Because these rules do not only apply to third-party funded projects, much will also change in legal publishing.

It is obvious that publishing costs money, regardless of whether the articles and books are still printed or not. With Open Access publishing, the question arises as to how these costs are paid when readers no longer have to pay for access.

In many disciplines, above all in the natural sciences and in medicine, it is already standard practice that Open Access is financed by Article Processing Charges (APCs). It is therefore possible that this type of financing will also be introduced in humanities and law. In my view, however, this is not a good solution. Already today it can be observed that APCs are often very high and still rise. In disciplines where APCs are not yet standard, other methods of financing should be introduced. An interesting possibility is the financing of publication platforms through libraries, a good example of which is the Open Library for Humanities (www.openlibhums.org). Another possibility to create a financially sustainable way to Open Access monographs through a global co-operated model where libraries use their existing acquisition budgets to enable Open Access monographs. This model is successfully implemented by Knowledge Unlatched (www.knowledgeunlatched.org).

⁴ What is cOALition S? (<https://perma.cc/29S3-HOBW>).

⁵ Richard Van Noorden, Wellcome and Gates join bold European open-access plan (<https://perma.cc/T49T-J2TY>).

⁶ SNSF, As of 2020: 100% Open Access to SNSF-funded research (<https://perma.cc/G6KU-DC9W>).

⁷ Swiss National Strategy on Open Access (<https://perma.cc/4ZVE-9KPG>).

⁸ Swiss National Strategy on Open Access (<https://perma.cc/4ZVE-9KPG>), p. 3.