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Paweł Kamocki

THE FRENCH DO IT TOO: *LE DROIT D'EXPLOITATION SECONDAIRE*

WHO WAS FIRST?: SOURCES AND TIMELINE

GERMANY

- §38(4) UrhG
 - Introduced by a Gesetz vom 1. Oktober 2013
 - Entered into force: 1 January 2014

FRANCE

- Article L. 533-4 du Code de la recherche
 - Introduced by a *loi du 7 October 2016 (République numérique)*

- FYI: **ITALY**: decreto-legge 8 agosto 2013, legge 7 ottobre 2013, n. 112
 - Research funding organisations are to make sure that publicly funded (@ ≥50%) scientific articles are made available in Open Access
-

REMARK: PUBLISHING IN FRANCE

GERMANY

- Copyright always belongs to the author (or his/her heirs)
- Copyright cannot be transferred
- Publisher only holds a license (non-exclusive, unless otherwise agreed)

FRANCE

- Copyright in scientific contributions may belong *ab initio* to the publisher (e.g. encyclopaedias, commentaries)
- Copyright can (and often is) transferred to the publisher in a contract
- Authors are (sometimes...?) paid by the publisher

GERMANY

- scientific **contributions**
(*wissenschaftliche Beiträge*)
- publicly funded $\geq 50\%$ (**German** public funding)
- in periodicals appearing at least **twice per year**

FRANCE

- scientific **writings** (*écrits scientifiques*)
- publicly funded $\geq 50\%$ (**French** public funding OR **EU** funding)
 - Q: what if the publisher commissions the article and pays the author?
- in periodicals appearing at least **once per year** (conference proceedings!)
- MAY also apply to underlying research data but it's *very* unclear

GERMANY

- making available to the public
- of the accepted version of the manuscript (*preprint*)
- even after granting the publisher an exclusive license

FRANCE

- making available *online*
- of the final version of the manuscript (*preprint*)
- in an **open format** (PDF, ODT, RTF, TXT, but not: DOC, PAGES)
- even after granting the publisher a license / transferring copyright

GERMANY

- **≥12 months** after publication
- no **commercial purpose** (incl. on a commercial website)
- obligation to **cite the source**

FRANCE

- after the publisher makes the article available for free online
- OR **≥6 months** after publication (BUT **≥12 months for SSH**)
- no **commercial publishing** (no competition with the publisher)

ZVR IN CROSS-BORDER SITUATIONS: WHAT WE KNOW

- The truth: we don't know
- Depends on the talents of one's attorney (favours the publisher...)
- It's not EU law, so the CJEU won't help



MARCEL MOCHET / AFP

ZVR IN CROSS-BORDER SITUATIONS: POSSIBLE OPTIONS

- German researcher / French publisher:
 - German funding, so German ZVR can be applied by a German judge (Bruch, Pflüger)
 - no ZVR at all? (Schulze — before the French ZVR was adopted)
 - publication on French soil, so French ZVR likely to be applied *IFF* the article is EU-funded (German funding is irrelevant for the French ZVR) (Kamocki)
 - In practice, French publishers may apply French ZVR to everyone
 - French researcher / German publisher:
 - publication on German soil, BUT no German funding, so no ZVR at all (Azzi, Bernault)
 - French (or EU) funding, so French ZVR can be applied by a French judge (Kamocki)
 - in practice, German publishers may apply German ZVR to everyone
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