

Towards effective institutional policies to promote open access in educational resources

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Abstract

Nowadays Universities have different technological tools and LMS platforms to support on line teaching, which are known as Virtual Campus. In these digital environments teachers upload and share educational contents related to their own teaching and researching whose main target groups are the students. Virtual Campus area becoming institutional repositories of educational content delimited to the University environment and managed by their on line teaching and ICT services.

At the same time, Universities are legally obliged to have institutional open access repositories with all their digital content, which are commonly managed by the library and archive services. Our main challenge in this context is to guarantee the intellectual property rights and the law on open access to public-funded science. That leads to launch and implement a knowledge management policy and to design and develop the technical tools to tackle with this new policy. What we present here is an overview of the existing and related initiatives in the framework of the national and international law and some proposals of the University of La Laguna to promote good practices to open access knowledge. First of all we have identified and catalogued all our digital resources, we have designed legal and technical training actions for researches, teachers and administrative staff and we have designed an institutional repository for teaching content, well catalogued and ready to be shared with other University repositories.

Secondly, we have planned a technical procedure to guarantee the personal identification of authors and the date in which materials and contents are uploaded in virtual campus, compatible with the role of private publishers; we are designing the university open access policy and we are trying to know and control the scientific exchange in social networks in the framework of the university policy and the Spanish law.

Keywords: Open education, Virtual Campus, Open Access Knowledge, Intellectual property laws, Open Science

Introduction

This paper is based on the work carried out by Dr. Luis Fajardo in the University of La Laguna, in which he presented a number of considerations that implied the implementation of technological and organizational measures under the direction of Dr. Carina González in the Department of Innovation and Educational Technology and under the supervision of Dr. Dulce Cairós, the ULL Secretary General. The aim of this cooperation is to generate a proposal for a knowledge management policy which includes the Open Access university policy as one of its fundamental parts. This work will soon conclude with the formulation of the proposal to be adopted by the governing body of the ULL. So what we present here is not the decision of the university, but the proposition elaborated by this group. Nevertheless, it shows the content, the principles and tools for the university knowledge management policy in the framework of the conditioning guidelines that define the theses policies in Spain.

Initial legal status

The Spanish Law

The management model of the intellectual property has been changing as a consequence of the new technologies. The University, as a defender of the creation of knowledge, must play a leading role in this evolution and so has it being done, as the response to the international challenge represented by the European Higher Education Area and the European Research Area. All this process has taken place under important legislative reforms which are the legal basis of the new policy.

Spanish Law has not been unfamiliar to this evolution. It has experimented important changes during the last ten years and not without tensions and difficulties between laws coming from two ideologically different governments. Let's see the most important changes in our law:

I. The obligation of the public universities to have institutional repositories (owned or shared).

They were expected to be preferably free access, with open standards and they should permit access to works of intellectual properties from anyone who apply for and not only from the Administration involved. The terms in which works can be public may be similar to a CC BY-ND-SA licence or more commonly CC BY-NC-ND-SA. Public Universities can organize shared repositories, but private ones are not required to have any. Repositories of the public agents of the Spanish Science, Technology and Innovation System must have a centralized access and must be connected with similar national and international initiatives. Nowadays they are part of the [Recolecta](#) network, which in its turn is part of the European network [OpenAire](#).

1. In 2006 the Intellectual Property Act introduced a mandate to the Government to foster the creation of telematic public interest spaces for everyone (they were not still called

repositories), open access and preferably free and universally available¹ for digital works which were in the public domain, for public ownership works susceptible to be incorporated to that regime and for every work whose author expressly states that (D. A. 3^a Ley 23/2006, 7 July).

2. The Act for the development of the information society (Ley 56/2007, 28 Dec.) compels all Public Administrations to make available to the public their digital production if it does not undermine their normal functioning and efficiency and does not affect public or general interest (D. A. 16^a). It will be done on the internet and for the purposes of copying, studying and redistribution. The works must be distributed by the same way and the author must be quoted (similar to CC BY-ND-SA and CC BY-NC-ND-SA licence).
3. Art. 37.1 and 5 of Science, Technology and Innovation Act (Ley 14/2011, 1 June) compels all public agents of the Science, Technology and Innovation Spanish system to foster open access repositories (owned or shared) for the publications of their research staff, setting up the connection with other national or international similar initiatives, under the support of the Ministry of Science and Innovation.
4. It does not mean that these repositories must be open, but it is a kind of promotion of that type of publication. The universities are the ones which can manage the level of openness in searching competitiveness and excellence. The openness could be referred to researching centres reciprocally.
5. The CRUE (Conference of Spanish Universities' Rectors) has coordinated that legislative mandate through REBUIIN (University Libraries Spanish Network). The interoperability of all repositories is guaranteed by good practices assumed by all University Libraries and they count with the financial support of FECYT (Spanish Foundation for Science and Technology) to create the portal site [Recolecta](#), which is part of [OpenAire](#). The connection follows standard OAI-PMH.

II. The obligation of researchers to publish their works openly if they have had funding coming from the General State Budget

6. Art. 37, 2 and 3 of the Science Act establishes that all publications resulting from mainly publicly funded research must have a digital copy of their final version, once they have been accepted to be published in periodical or serial research publications and a period of distraint of a maximum of 12 months may be accepted. This digital copy may be incorporated to well-known repositories of its area or to open access institutional repositories.

7. Art. 37.4 of the Science Act indicates that this electronic version may be used by Public Administrations in their evaluation proceedings. In the end this will lead to encourage institutional repositories as the technological and organizational support of many new scientific journals of Universities and scientific areas. According to that we can mention the quality label for scientific collections CEA-APQ (Calidad en Edición Académica – Academic Publishing Quality), promoted by UNE and endorsed by ANECA and FECYT. All of that allows that some of the content of the institutional repository, the one which have a coincidence with journals with that label, must be recognized as evaluable merit. The Spanish Law doesn't seem to be ready to enforce that the evaluation of peer review works must be done with the module developed under the leadership of OpenScholars, although there is not any legal prohibition to use it.

¹ Interoperable in terms of Act 11/2007 for the electronic access by the citizens of the public services

III. The right to the financial exploitation of every intellectual property resulting from the staff's work in the performance of his or her duties belongs to the University.

8. This rule was introduced by the Universities Law (Ley Orgánica 6/2001), the Science Law (Ley 14/2011) and it has been also introduced by the Sustainable Economy Law (Ley 2/2011, arts. 53 y 54), where we can see their most clear and overwhelming expression².

The practice up to that date was to consider that the copyright belonged to the researcher, as it occurs in many European countries, even though art. 51 of our Intellectual Property Law states that the employer keep the royalties, in the absence of written agreement to the contrary.

IV. The obligation to publish openly all creations performed in the Universities.

9. Wherever the research was financed by public budget or not, if the creation is generated in the framework of a public university, and it is just because it involves a Public Administration and we have to implement D. A. 16^a of the Law on the Information Society. That Law compelled Public Administrations to make available all their digital content, including the production of University staff.

V. The claim for payment sent to the Universities by a copyright collecting society (CEDRO) for the use of creations and works with teaching purposes.

10. The copyright collecting societies and CEDRO (the one which have an impact in the university activities) didn't gather the digital exploitations rights from the authors, so they couldn't claim in this regard. When they began to do that a number of problems came up. This is the background information:

- ❖ The intellectual patrimony of Universities is the biggest patrimony which has not been incorporated to public domain by the running of the period to exercise the exploitation of intellectual property rights.
- ❖ To defend all its patrimony the Universities have joined the society that manages this intellectual patrimony (Centro Español de Derechos Reprográficos, CEDRO), in an early stage just to transfer the creations published by their publication services, which are just a little part of the intellectual patrimony of the Spanish universities. Spanish legislation is very clear in relation to royalties derived from works and creations of the university's researchers and teachers in the performance of their duties⁴.

² **“Artículo 54. Titularidad y carácter patrimonial de los resultados de la actividad investigadora y del derecho a solicitar los correspondientes títulos de propiedad industrial e intelectual para su protección**
1. Los resultados de las actividades de investigación, desarrollo e innovación a las que se refiere el artículo anterior, así como el derecho a solicitar los títulos de propiedad industrial adecuados para su protección jurídica pertenecerán a las entidades cuyos investigadores los hayan obtenido en el ejercicio de las funciones que les son propias.
2. Los derechos de explotación relativos a la propiedad intelectual corresponderán a las entidades en que el autor haya desarrollado una relación de servicios, en los términos y con el alcance previsto en la legislación sobre propiedad intelectual”.

- ❖ The University of La Laguna has made important efforts in order to ensure the enforcement of the intellectual property laws.
 - a. The virtual campus of the ULL has a “terms and conditions” document with information concerning intellectual property rights (<https://campusvirtual.ull.es/static/terminos-y-condiciones-de-uso/>), which is visible in the virtual campus.
 - b. CRUE (Conference of Spanish Universities Rectors) distributed a Protocol for the publication of materials, which was incorporated to the virtual campus in 2012. This document is visible from the menu “help and support”. https://campusvirtual.ull.es/static/protocolo_publicacion_materiales_cv.pdf. Since 2012 to accept the terms and conditions is required to have access to every virtual space of the virtual campus.
 - c. Since 2005, our Virtual Teaching Unit (UDV) assesses practices used in the virtual campus, identifying good practices and reporting their results. (<http://udv.ull.es/portal/category/observatorio-de-innovacion-educativa/>).
 - d. UDV includes in its training programme some courses on open access licences, some workshops have been organized and when some content has been suspected to infringe intellectual property rights, teachers and other people involved have been warned.

Universities have tried to reformulate the claims in more concrete terms: to pay just for the use of protected content and not using a charge for every student. CEDRO sued several universities, but some agreements were reached before higher courts reached a final decision, so no general or theoretic judicial pronouncement has been obtained.

VI. A new restrictive regulation related to teaching, which is likely contrary to European and Spanish Law, has been adopted and institutes a new charge for teaching usage.

11. Until this new regulation (Ley 21/2014), there was no obligation to pay a fair compensation for the teaching usage of a creation. But now, and since 5 November 2015, Universities must pay a charge for teaching usage, except otherwise provided in a written agreement with the right holder.

1. It must be reminded that the exception or limitation for the sole purpose of illustration for teaching has been stated by art. 5.3 of Directive 2001/29/CE of the European Parliament and of the Council, of 22 May 2001³, on the harmonisation of certain aspects of copyright and related rights in the information society, as well as by art. 10. 2 of Berne Convention for the Protection of Literary and Artistic Works, which refers to a fair practice. To consider that the fair practice is up to 10% maximum likely infringes the

³ Which also subordinates the protection of the intellectual property to the protection of the national patrimony and access to public documents (art. 9).

international treaties to which Spain is part, the European law⁴ and the Spanish Constitution⁵.

2. The new art. 32 of the Spanish Intellectual Property Law, related to the exception to the author's right in the cases of citations, reviews and illustration for teaching purposes or scientific research, states that: *"En defecto de previo acuerdo específico al respecto entre el titular del derecho de propiedad intelectual y el centro universitario u organismo de investigación, y salvo que dicho centro u organismo sea titular de los correspondientes derechos de propiedad intelectual sobre las obras reproducidas, distribuidas y comunicadas públicamente de forma parcial según el apartado b), los autores y editores de éstas tendrán un derecho irrenunciable a percibir de los centros usuarios una remuneración equitativa, que se hará efectiva a través de las entidades de gestión"*. What the part in bold-type means is that all the collective management societies (CEDRO in our case) have been entitled to the right to collect a canon, not for their repertory, but in a general manner, for every author, regardless whether they are associated to the collective society or not.
3. In addition to that, CEDRO proposes to collect a fixed fee or flat rate (what they call CORSA index⁶), based on its lack of knowledge of the works used and the authors affected. If the works and creations were identified, the authors could reclaim from CEDRO their rights and that would lead to a diminishment in CEDRO's annual accounts.
4. The worse of it all is that in this time of budget cuts Universities have been forced to face very important allegedly payment obligations, which are not only unfair but also have an effect in terms of lack of full integration into the European Higher Education Area and the European Research Area, in the framework of the open access policies which constitutes nowadays a legal requirement for all the Public Administrations.

⁴ The weighing of these rights in conflict, author's right and the right to education, is favourable to the second one, allowing to provide (35) "for certain exceptions or limitations for cases such as educational and scientific purposes" with no compensation. Nevertheless it is true that "(36) The Member States may provide for fair compensation for right holders also when applying the optional provisions on exceptions or limitations which do not require such compensation". But even in those cases "when determining [...] such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the right holders resulting from the act in question. In cases where right holders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. [...] In certain situations where the prejudice to the right holder would be minimal, no obligation for payment may arise". Respect for other national situations is due to the characteristics of these norms, which tend to uniformity, and not to allow the modification of the domestic law, obviating the harmonising purpose of the Directive: the limitations list (32) "takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations". In the Spanish case, our law has been modified against national tradition and European values.

⁵ Art. 33 CE recognizes the right to private property, but the right to education is recognized in art. 23, which is in a more protected chapter of our Constitution: the second one is considered as a fundamental right while the first one is just a constitutional right, with a not so intense scope of protection.

⁶ This index is legally questionable, according to judicial criterion: STS 371/2011, 6 June, which establishes that the application of such index must be made from the evidence obtained and the medium percentage of the reproduction with regard to the part of the creation used without authorisation.

5. The interpretation of the exception for illustration for teaching and scientific research is questionable, especially the criteria to which it is referred (the reproduction must be limited to a maximum of a chapter of a book, a paper in a scientific journal or equivalent work of equivalent extension in an assimilated publication, or an extension up to 10% of the complete work), which must be considered as illustrative criterion but never the only possible exercise of the “fair practice”. This is not the interpretation used and divulged by the collective management societies of intellectual property rights, especially by CEDRO in the Spanish case, but we think that it is the appropriate one. This is the scenario in which CEDRO sued the University of La Laguna (and some other Universities) as a preparatory step to propose a framework agreement between CEDRO-VEGAP and CRUE with two main objectives: to reach an agreement in order to state the obligation of the universities to pay canon for the teaching usage of works protected by royalties and to force the Universities to design a tool to measure the usage made by the university community of the works and creations incorporated to the virtual campus.

VII. The conflict between CEDRO and the University of La Laguna

12. On 30 July 2015, just before the summer closure of the University, CEDRO presented a complaint to the University of La Laguna in which CEDRO accused ULL of scanning protected works and making them available in the virtual campus at least during the academic years 2013-14 and 2014-15”, so University was violating the exclusive intellectual property rights. CEDRO added that the configuration of the virtual campus allowed that verification because no password was needed, the content was open.

There was no indication or evidence of the infraction, there was no identification of the victims, the authors whose royalties have been violated, nor the scanned works and its incorporation to the repertory represented by CEDRO, there was no quantification of the damages. CEDRO claimed 5 euros per full time student, which is not connected with the effective utilization of the protected content (S. AN 10 de April 2015 and SSTS de 24 November 2014, 26 September and 19 March 2013).

VIII. Initially proposed action points.

a) Policy measures:

1. To avoid the enforcement of new art. 32 Intellectual Law Act (currently it must consist of the defence of the right to illustration for teaching purposes with no fair

compensation)⁷ which is difficult to reconcile with the obligation to public openly, according to the Spanish Science Law (Ley 14/2011)⁸.

2. Public denunciation of the situation.
3. To promote reflexive debate, taking part in events such as the current one.

b) Organizational measures:

1. To elaborate and to approve a knowledge management policy which make clear the terms for publishing and the ways in which the exploitation of the intellectual property rights can be done. Coordination with other Universities and Research Centres must be guaranteed. In the national level there is a tool, named MELIBEA project (similar to SHERPA/ROMEO), which is a kind of open access repository of different editors and institutions. All the university intellectual patrimony must be incorporated to the institutional repository and the University must define the scope of the decision of the authors, facilitating a number of licences and actuation protocols to allow the publication outside the University.

2. To rescue the transferred intellectual patrimony, where appropriate.

c) Strengthen the ICT services which support the knowledge management policy

1. Open repositories. ULL counts on its own repository (<http://riull.ull.es/>). It is incorporated to Recolecta. However, the structure was not developed enough to make a distinction related to the level of access.

2. Unified management of the intellectual property, connecting the library services with the virtual campus.

3. Technical improvements: measures to foster or improve the supply of the repository. For instance, the creation of a platform to edit documents or the connection with editors and supply platforms (Etherpad and similar), peer-review from the repository (Open Peer Review Module for Repositories, which will be presented in Madrid at the end of this month) or the integration of social networks; measures to foster the utilization of well-structured texts; creation of contributory teaching books and materials, which can develop with the contribution of several persons so they can be easily updated.

d) Agreements with other Universities

⁷ According to Adelphi Charter, whose first and fifth proposals are: “Harmonise Exceptions Across Europe. Copyright regulates the flow of consumer as well as knowledge goods in the single market. For European citizens and industry alike, the harmonisation of exceptions is a necessary step in order to facilitate cross-border trade, and create equality and clarity before the law”; and “Support for Education and Research: Information and communication technologies offer new collaborative ways to develop and share educational and research materials. Copyright exceptions that facilitate new technology-based research and education will propel science and learning, and therefore the knowledge economy, exponentially forward”.

⁸ There is a consolidated judicial criterion which considers that free licences are an exception to art. 150 Intellectual Property Act.

All the universities should sign an agreement to avoid the application of art. 32.4 Intellectual Property Law in its current configuration regarding to the payment of the canon for the utilization of other Universities' materials, just by the mere reciprocal authorization in the framework of the interconnection of their institutional repositories.

IX. Could it be possible to reach an agreement with the collective management societies?

Yes, of course, but it must be an agreement according to law, understanding the position of the Universities and in line with their social function.

The current proposal for a settlement shows a number of problems:

- CEDRO is not the only copyright collective management society, so all of them must act together⁹. The Public Administration (public universities) cannot agree with someone who is not entitled to the right in question.

- Suspected fraudulent use of the law, since the proposal does not establish how to determine the usage charges, so it is conceived to perpetuate a flat rate. That is not the legal provision. What law establishes is a mediation procedure and, after six months without any real agreement, the rates will be established by an arbitration committee.

- CEDRO insists on a tariff per student and not for the real utilization (5 euros per student in digital copy and 4,12 euros per student in paper copy, what means around 11 million euros for the group of public universities).

- It does not support the activities of the universities (teaching and researching). It is designed as a levy of intellectual property rights.

- The agreement is not appropriate for ULL because it implies a sort of going along with the allegations made by CEDRO in its claim against the ULL, when none of them was proved. We might have committed some infringement, but it would be far away from the amounts claimed by CEDRO.

The ULL should start a mediation procedure before the Intellectual Property Commission. No judicial procedure can be initiated until mediation has finished. ULL could forward a list of the works and creations used in its virtual campus, so CEDRO can make the adequate liquidation¹⁰.

X. Demands of legal considerations in order to develop the knowledge management policies

⁹ Art. 6 RD 1657/2012, 7 December, on procedure for the payment of the fair compensation for private copy chargeable on public budget.

¹⁰ RD 1023/2015, 13 Nov, on composition, organization and exercise of the Commission on Intellectual Property and Civil and Commercial matters Act (Ley 5/2012, 6 July).

1. A flat rate cannot be imposed just to compensate the legally questionable canon for the teaching usage of the Universities.
2. The institutional repositories, together with the on line bibliographic resources, should be the technological base for the knowledge management through inter-university transfer agreements and for the respect to the intellectual property rights in the university sector.

The technological integration of the repositories through Recolecta and OpenAir projects must be strengthened with legal exchange agreements. So not only open access content could be accessible, but also some other content covered under some protocols of mutual exchange and related to university content initially not open. There must be also economic compensation settlements between universities. And agreements with editor must be explored as well¹¹. The idea is to reach previous settlements with authors and editors and to try to avoid the canon in favour of the copyright collective management societies. All that is possible, but we have to combine the institutional repositories and library services with adequate technological development of the electronic government.

In the ULL all this service integration has been developed in the so called "Q Point". The informatics services are currently working on a way to avoid the incorporation of materials outside the institutional repository and its utilization outside the Q point.

Access to the repository must be monitored by an e-government procedure, so the identity of users must be guaranteed. At the same time the authorship can be ensured and the University promotes the knowledge of its own production.

3. Knowledge management policy must develop an opinion about scientific social networks, giving instructions for their utilization and analysing those similar to SHERPA/ROMEO, in order to classifying them according to the institutional policies.
4. The manner in which we must proceed in our way to Open Access.

According to our circumstances, the reasonable way would be a way in which serial publications can be multiplied, inserting quality criteria, such as Open Peer Review Module for Repositories, which has been developed under Open Scholars with an important participations of CSIC and other Spanish companies and institutions.

5. The creation of knowledge is an administrative work and it must be the result of electronic administrative procedures, as the entry to the institutional repository
6. To link accreditation and evaluation procedures to the incorporation of the materials to be evaluated in the institutional repository

¹¹ Such as the agreement between Max Planck Gesellschaft and Springer, http://openaccess.mpg.de/2151929/Open_Access_Agreement_with_Springer.

