Secondary Publishing Rights in the Netherlands

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Remarks
This in-depth analysis explores the introduction and parliamentary history of secondary publishing rights (SPRs) in the Netherlands. Authored for the Knowledge Rights 21 Right2Pub project, which translates this into Italian.

Right2Pub advocates for the adoption of an SPR at the legislative level in Italy. The project raises awareness among the national research community about the importance of retaining rights, and highlights the limitations of current legislation, which fails to directly grant authors such rights.

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Secondary Publishing Rights in the Netherlands

Did you know that a single amendment in the Netherlands copyright act has revolutionised access to academic research? The Taverne Amendment, introduced in 2015, grants authors a powerful right to share their publicly funded work openly, even after publication. This article explores the fascinating story behind this groundbreaking legislation and its impact on open access publishing.

The Taverne amendment, a version of secondary publishing rights, empowers academic creators to control how their works are available beyond their initial publication. These rights are foundational to green open access. It creates the possibility for academics to self-archive their scholarly publications by publishing a copy of their work in an institutional or other open access repository.

This article explores the development of secondary publishing rights in the Netherlands, by delving into the parliamentary history of the right, its introduction of copyright contract law and explores this right that enables the creation of open access materials. The article then discusses the adoption of the right by the universities of the Netherlands, how it dealt with the uncertainties that stem from the right and how the universities of the Netherlands overcame and reacted to these challenges. The article concludes with an open access advocates’ perspective on the introduction.

Netherlands’ Copyright contract law

In the parliamentary history of the Netherlands’, secondary publishing rights stems from a need to strengthen the position of the author with regards to the power of the publishers, and a push for increasing open access publishing.

The need to balance the position of the creator with the exploitants of their work when contracting with publishers is a reaction from a decrease in government spending for the cultural sector in the first decade of the 21st century. Budget cuts led to a worsening of the economic position of creatives. The coalition agreement (‘Regeerakkoord’) under the fourth government of prime minister Jan-Peter Balkenende in 2008 introduced the idea of developing a copyright contract law to remedy this [1], following the advice of the Commission ‘Cultuurprofijt’. [2]

This copyright contract law has been realised as a chapter within the Netherlands copyright act. [3] It includes articles on appropriate and proportionate remuneration, reclaiming copyright in cases of non uses, and a means to resolve disputes between creator and publisher. These articles notably have a retroactive effect, they also apply to contracts concluded before the act became in force in 2015.[4]

3 Chapter 1a The exploitation contract (our translation), via https://wetten.overheid.nl/jci13.c:BWBR0001886&hoofdstuk=la&z=2022-10-01&g=2022-10-01
The rights created by the chapter are non-waivable and inalienable. None of the articles within the chapter on the exploitation contract allow for contractual overrides.[5] Meaning that these rights remain with the creator even after economic rights have been transferred to a publisher. The articles are applicable regardless of what is contracted, but only in cases that the exploitation is directed to the Netherlands, or the Netherlands is the choice of law of the contract. Since the rights are inalienable it could be argued that these rights are more similar to moral rights than to economic rights.

There is a caveat though. The Netherlands can recognise an organisation – like an university – as the creator of works vested with copyright.[6] This provision, called employer’s copyright, automatically recognises the organisation as the author, including shortening of the copyright term. When this applies the chapter on contract law does not apply. Meaning that whenever an institution would argue that they are the creator of the article of the academic, then the institution cannot apply the rights of the copyright contract law.

This caveat creates a tension between discourses on the retention of copyright by universities and secondary publishing rights in the Netherlands. Both strategies are means to rebalance the position when the university claims to be the creator of the work it can no longer use secondary publishing rights. At the same time there is a discussion whether the Netherlands universities should claim authorship of academic publication to retain the rights over academic publications as a way to strengthen the negotiation position against academic publishers.

Additionally, the chapter on copyright contract law does not apply to open licences (such as creative commons licences and open source licences). According to the Ministry of Education, Culture and Science, an open licence does not constitute an exploitation contract and therefore falls outside of the scope of copyright contract law.[7] This makes sense, since the nature of open licences are that they are irrevocable and do not require remuneration before use.[8] They also already allow additional publications after the primary publication, so there is no need to have these rights.

In a case where an academic author transfers their copyrights of an article to a publisher which subsequently published the work under a Creative Commons licence, the rights conveyed in the copyright contract law only apply to the contract that transfers copyrights, not the open licence that is used to make the work available.

5 Article 25h(1) Copyright Act, via https://wetten.overheid.nl/jci1.3:c:BWBR0001886&hoofdstuk=Ia&artikel=25h&z=2022-10-01&g=2022-10-01
6 Auteurswet, articles 7 and 8. via https://wetten.overheid.nl/jci1.3:c:BWBR0001886&hoofdstuk=Ia&paragraaf=2&artikel=7&z=2022-10-01&g=2022-10-01
The parliamentary discussion on the chapter on the exploitation contract was in preparation since 2011, and voted in 2014.[9] An initial proposal [10] to the parliament for the new chapter in the act in 2012 did not mention academic publications or secondary publishing. This changed during parallel discussions on open access in the parliament.

In April 2013 a couple of members of parliament held an expert session on publishing academic articles on the internet. The meeting was organised by members of the conservative liberal party “People’s Party for Freedom and Democracy” or VVD, Anne-Wil Lucas-Smeerdijk and Joost Taverne. During the expert meeting they understood that large publishers were able to forbid online publication, thereby limiting the dissemination of academic knowledge. Which in the Netherlands is mostly publicly funded. They also understood that open access publications were already being demanded by respected universities like Harvard. Therefore they felt confident to ask in a subsequent committee meeting on the science budget [11] with the Ministry of Education, Culture and Science Bussemaker and state secretary Dekker to look into possible legislation to improve open access publishing in the Netherlands, addressing this concern raised by the members of parliament.

The question to the ministry was answered later in 2013 by state secretary Dekker.[12] Dekker stated that the situation at that time was confusing to authors, readers and publishers and that they wanted to remedy this. His proposal was to closely collaborate with countries with a similar perspective. The undersecretary stated that he would explore requiring national funds for science to provide reports on open access publishing and most importantly to urge the universities and funders to negotiate new contracts with publishers with gold and hybrid open access in mind.[13] The undersecretary did not mention Green Open Access.[14] If the policy direction did not lead to sufficient open access publishing in 2016, the ministry would look into developing legislation to make open access publications mandatory in the Netherlands’ Higher Education and Research Act. Eventually this perspective would contribute to the development Plan-S.[15]

At this stage of the parliamentary process the proposal did not include secondary publishing rights. It was only at the very end of the parliamentary preparation on the authors contract law that these two roads came together. Member of the parliament for the VVD – Taverne – proposed an amendment [16] to the copyright contract law proposal

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10 Ibid.
13 Current deals can be found at https://www.openaccess.nl/nl/in-nederland/uitgeversdeals
15 “Plan S is an initiative for Open Access publishing that was launched in September 2018. The plan is supported by cOAlition S, an international consortium of research funding and performing organisations. Plan S requires that, from 2021, scientific publications that result from research funded by public grants must be published in compliant Open Access journals or platforms.” See https://www.coalition-s.org/
that became the Netherlands implementation of a secondary publishing right. The amendment went further than the policy direction of Undersecretary Dekker. A large majority of the parliament voted in favour of the proposed copyright contract law and the amendment on February 12th 2015. The proposed law was discussed in the senate 30th of June and accepted without the need to vote. Discussion about the law by the senate did not mention the amendment.[17] The law was published on the same day.[18]

Taverne Amendment

Due to this sudden introduction of the secondary publishing right, the term 'secondary publishing right' itself is mostly unknown outside law scholars in the Netherlands. Instead, in common parlance the right has been named the 'Taverne amendement' after the member of parliament who introduced it. Curiously, when looking at the parliamentary history the only reason given for the amendment is a 'growing need to publish scientific works as open access' (our translation).

The resulting article in the copyright contract law created an inalienable non-waivable right for creators of short works of science whose works are (partially) funded by public funds. They can share their work for free with the public after a reasonable period after its initial publication. The right does not distinguish between versions of the publication. It can be argued that it applies to all types of publications (e.g. preprint, Author Accepted Manuscript, Version of Record, etc.).

"The creator of a short scientific work for which the research has been fully or partially funded with Netherlands' public funds has the right to make that work available to the public free of charge after a reasonable period after its first publication, provided that the source of the first disclosure is clearly stated.”
(our translation of article 25fa Netherlands Copyright Act)

In the background documentation of the amendment, Taverne explained that the right is heavily inspired by article 38(4) of the German Copyright Act at that time.[19] The main difference being that the Netherlands’ implementation is broader and less precise. It does not indicate a minimum amount of public funding, no type of publication (e.g. periodical, conference papers, etc), no specific period and no specific version of the article (pre-print, accepted version, version of record, etc.).

Additionally, the term “short work” was derived from the Netherlands exception for the illustration for teaching or scientific research,[20] an implementation of articles 5.3(a) of the Information Society Directives.[21] This article contains a good faith principle for determining the length of the reproduced work.

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20 Article 16 of the Netherlands Copyright Act
By being less precise the legislator has left more room for interpretation and discussion which led to some delay in the adoption of the article, but also to closer collaboration between the universities trying to use the right.

It should be noted that, next to the authors contract law not being applicable to open licences, the secondary publishing right does not allow for republication with an open licence (e.g. an Creative Commons licence). The Netherlands’ implementation of a Secondary Publication Rights can therefore be seen as a means to achieve full Green Open Access. In practice it serves as a backstop when other variants of open access (i.e. gold or diamond) cannot be achieved.

The universities of the Netherlands studied the new right and developed a campaign to introduce the right into their policies and procedures: ‘You Share, we take care’.

You share, we take care

To protect academics from potential resistance by publishers, universities collaboratively launched the ‘You share, we take care’ campaign.[22] This started with a pilot from February 2019 and lasted until August 2019.[23] The collaboration and its principles are still active today. These include agreements on practices, and giving substance to ambitious words in the article of the act.

Under this initiative, all member universities agreed to collectively bear any legal fees incurred by a challenged university. This proactive strategy has effectively averted conflicts with publishers since its inception. In a sector agreement [24] ‘Education’ of 2018 the ministry of Culture, Education and Science agreed to mediate between publishers and universities if a chosen reasonable period led to disagreements.[25] Providing additional confidence to the universities to adopt and keep to this position.

The member universities collaboratively developed definitions for those words that needed further interpretation, notably on the embargo period, the type of publication and the version of that publication.

Most importantly, the universities have adopted a unified stance on the duration of this "reasonable period," which was unilaterally interpreted by the institutions as six months after the first publication. It was agreed that this applied to all academic subjects. The humanities and social sciences especially appreciated the adopted embargo period, which they perceived as relatively short.[26] A uniform embargo period for all subject matters created simplicity both for the publishers and academics, it also anticipates the increasing multi-disciplinary research publications.

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22 You share, we take care! (n.d.). https://www.openaccess.nl/en/in-the-netherlands/you-share-we-take-care


25 Ibid. p. 9

Additionally the universities also stated, after seeking legal advice, that the type of publication that would be available after this period would be the Version of Record (VoR), this again simplified the process, because academics don’t have to deliver a specific version to the institution’s repository. The librarians could copy the VoR from the publication of the academic. This also means that the moment of publication of the article in the journal is used as the start of the embargo. So ‘first publication’ is the date on which the published version first becomes available online, not other versions like the preprint.

Finally, a short academic work was interpreted as journal articles, conference papers and individual chapters in ‘edited collections’. The used definition expressly excluded monographs and chapters of monographs.[27] A legal commentary by professors of copyright law from 2019 argues that the maximum length could be about 8,000 words as is common practice for the copyright exception for illustration for teaching or scientific research, given accepted norms from article 5(3)(a) Infosoc.[28]

The campaign was made available to all academics, both authors and co-authors, that had/have an employment contract with a public university in the Netherlands. The university libraries agreed to only facilitate the publication through their own repositories. Here the inclusion of a researcher as co-author is sufficient evidence that their contribution is of substantial value to the final product and thus that they would fall under the Taverne amendment.

The pilot programme had an opt-in scheme, some 600 academics chose to participate. This showed that there was broad support for using the right to make academic materials available. However, an evaluation of the campaign showed some reluctance by academics to participate, fearing push back from the publishers and damage to their reputation in case they could not publish due to this pushback.[29] Additionally, some critical feedback by publishers was received. This was mainly direct to the version of the publication, but did not lead to legal difficulties.

After the pilot the public universities chose for wider adoption of the Taverne Amendment and started offering opt-in programmes to all of their staff.

From opt-in to opt-out policies

Secondary Publishing Rights are a right vested with the author rather than connected to the work, to the rights holder, or the university. This means that authors typically need to delegate this right to the university libraries, which undertakes the actual main secondary publication in designated library repositories. The author itself could still republish the work on other platforms, for example on their own websites or other places that allow open access publications.

This delegation manifested in two primary models [30]: the piloted opt-in system where academics actively ask the university library to enact this right for them, or an opt-out policy where the university mandates secondary publication and academics retain the option to opt-out of the university’s policy to mandate the secondary publication right from the academic.

The latter of these, the opt-out policy, was suggested in a 2020 evaluation of the author's contract law.[31] Nearly all of the universities have now adopted this method, following the lead of the University of Leiden.[32]

This mandate is created by adopting procedural regulations for university employees that facilitates the opt-out secondary publishing right.[33] These regulations largely stem from a template document developed by the University collaboration that was customised by each university. It creates the assumption of a tacit licence for the university library to execute the secondary publishing right on behalf of the academic.

In return staff members gain the right to request not to participate for each individual short work, providing that they have compelling reasons to do so. The Director of the University Library then balances the reasonableness of this request against the grounds of the regulations.[34] There are no public numbers available on how many times scholars have chosen not to participate with these opt-in policies. Anecdotally the author understands that only about 1 to 5 scholars per university have used this possibility, most authors that are reluctant will participate after receiving additional information from the university library.

Maastricht University is the only public university that has yet to adopt opt-out policies. The University argues that they can inform their staff better on open access publishing when the staff needs to opt-in. Opting in to the Taverne Amendment at the University does not have to be done on a per work basis. The University allows opting in for all future and past works as well. According to the library this method does thus far not lead to less usages of the secondary publication right.

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30 A third model, and opt-in policy via collective bargaining was considered but abandoned due to its long implementation time and political components.
31 Evaluatie Wet Auteurscontractenrecht, van Gompel et al., 2020, p. 58
32 Sharing Published Short Academic Works in Institutional Repositories After Six Months: The Implementation of the Article 25fa (Taverne Amendment) in the Dutch Copyright Act
34 Article 5 of “Open access procedural regulations for short academic works by UG staff members”
Gold open access as a policy goal

The initial reaction to the questions by the members of parliament by undersecretary Dekkers led to a policy goal in 2017 to achieve 100% open access publications by 2024. This push, notably for gold and hybrid open access from the ministry, has been somewhat successful over the years. Many new agreements between publishers and scientific institutions have led in 2022 to about 89% open access publications in the Netherlands.[35] These include all statistics from all public universities of the Netherlands, and include all types of open access, including publications by corresponding authors and co-authors.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total percentage of academic publication open access</th>
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<tbody>
<tr>
<td>2016</td>
<td>42%</td>
</tr>
<tr>
<td>2017</td>
<td>50%</td>
</tr>
<tr>
<td>2018</td>
<td>54%</td>
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<tr>
<td>2019</td>
<td>62%</td>
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<tr>
<td>2020</td>
<td>73%</td>
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<tr>
<td>2021</td>
<td>82%</td>
</tr>
<tr>
<td>2022</td>
<td>89%</td>
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</tbody>
</table>

Table. Percentage open access in the Netherlands [36]

However, diving into the underlying statistics for 2022 we see that only 30% of all open access publications are actually gold open access, a further 20% is green open access and the remaining 39% is marked as hybrid open access.[37] The ‘Universities of the Netherlands’ association foresees that the gold open access will stagnate and green open access will further grow, in light of recent multi-year contracts with publishers.

Additionally the authors of the report expect that the percentage of Green Open Access to grow further now that most universities have strong policies and procedures in place to support their staff in their institutional repositories under the Taverne amendment.

36 Ibid.
37 Hybrid Open Access seems to stagnate and is 39% for at least two years in a row.
The Taverne Amendment turned out as a backstop for a general push for open access publication. If Gold Open Access was not attainable the academic can still opt for Green Open Access via Secondary Publishing Rights. It provides the academics working in the Netherlands, and funded by Netherlands funds to share their academic work, even after rights have been transferred to a publisher.

Reflections and future of the right

Secondary Publishing Rights in the Netherlands have had a large impact on the access to academic knowledge in the Netherlands. The success of Secondary Publishing Rights largely seems to arise from bottom up collaboration from key figures in the Netherland’s parliament and universities. This community slowly expanded upon existing successes and were in that time supported by the Ministry of Culture, Education and Science.

Now that all the public universities of the Netherlands have implemented the technical and organisational structures to work with the Taverne amendment, some universities are actively working on the retroactive effect of the right by working on publishing previously published works. Notably the University of Utrecht started to work back to the moment of implementation of the right in the act, whereas the University of Leiden has stated that the right can be invoked for older works, indiscriminate of the publication year.[38] The Vrije Universiteit Amsterdam is also applying Taverne retroactively.

It is important to note that the introduction of the secondary publication right in itself did not change the availability of green open access. This chapter shows that you need to have the people, policies and practices in place in order for the right to function optimally. Without a last minute amendment by Joost Taverne the Netherlands would not have this green open access back stop that shows that open access can work alongside current policy practices.

Without intense collaboration [39] of the university libraries the right had a very real chance of becoming a dead letter in the law. The introduction of a pilot, new procedures, policy and training of library staff and scholars achieved the current state of the secondary publications.

You can wonder if the Netherlands would have achieved the same goals if it was decided top-down that all short academic works need to be published as green open access. However, that the Netherlands is slowly achieving 100% open access does not mean that there are no future challenges. The academic world is international and many international collaborations also call for an international approach.

The Netherlands is pioneering the way but can still improve the right, for example by removing the embargo period and making this explicit in the act, by allowing the universities to claim authorship and still use the Taverne amendment, and to finally actively work backwards to make all of the Netherlands academic publications available as Green Open Access.

36 See https://www.uu.nl/universiteitsbibliotheek/taverne and https://www.bibliotheek.universiteitleiden.nl/onderzoekers/open-access/achtergronden-en-beleid
37 Notably the project manager of “You Share, We Take Care”, Arjan Schalken.