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The Right to Research as Guarantor for Sustainability, Innovation and Justice in EU Copyright Law

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THE RIGHT TO RESEARCH AS GUARANTOR FOR SUSTAINABILITY, INNOVATION AND JUSTICE IN EU COPYRIGHT LAW

*Christophe Geiger*¹ & *Bernd Justin Jütte*²

ABSTRACT

Research is essential for scientific, cultural, and social advancement and will be crucial for the economic and societal recovery in a post-pandemic world. Restrictions to access and use of information contained in copyright-protected expression however can constitute significant hindrances to conducting research efficiently, especially since modern research methods rely on accessing, storing and processing large amounts of digitized data. Over the last decade, copyright in the European Union (EU) has undergone a process of constitutionalization, which saw a growing importance of fundamental rights arguments in policy- and law-making, as well as in the jurisprudence of the Court of Justice of the European Union. However, research, as an activity that is indispensable to achieve the aims and objectives of the Union to enable technological, scientific, and cultural progress and work towards a sustainable future, has insufficiently featured in this constitutional discourse. The digital environment and its tremendous potential to enable new forms of research has accentuated the urgency of addressing the issue from a constitutional perspective under the heading of “digital constitutionalism”. It is therefore argued that a ‘right to research’ derived from international and European human and fundamental rights law can play an important role in the future to remove copyright barriers to research activities and to inform reforms towards more sustainable and research friendly copyright laws in the EU. Although a ‘right to research’ is not expressly included in any of the relevant human rights and fundamental rights instruments, it is so implicitly: in fact, the seeds of a right to research are already contained in a variety of fundamental rights at European and international level and in the aims and objectives of the Union’s constitutional order. Based on the relevant fundamental rights, this paper tries to identify the substance of the right to research, arguing that there is a constitutional imperative to create a paradigmatic shift in European union copyright law towards a copyright system that can help to achieve the programmatic goals of the Union such as sustainable development, innovation and justice that are the core of a regulated market economy. In order to help positioning research as a core priority of the European Union,

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this paper further proposes the introduction of a specific right to research in the Charter of fundamental Rights of the EU as a precondition for the protection of the moral and material interests of creators, thus mirroring the international human rights justifications of copyright protection.

Keywords: copyright, fundamental rights, right to research, sustainability, innovation.

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INTRODUCTION

A European post-pandemic recovery requires immense efforts. Europe is running out of natural resources, and is plagued not only by a pandemic that seems to foreshadow future and possibly greater threats to humanity, but also more structural challenges of a political, economic and environmental nature in an ageing continent. Research will be key to addressing existing and yet unknown challenges, and the European Union (EU) has recognized this in its 2020 post-COVID-19 recovery plan the Commission earmarked significant funds “as support for investment in activities that are essential for strengthening sustainable growth in the

Union including direct financial investment in enterprises, measures for research and innovation in response to the COVID-19 crisis”.³ This chapter will argue that a right to research as a constitutional imperative can support the EU in this crucial endeavour. Copyright serves as an example how a right to research can change the normative focus of intellectual property law to function as a booster and enabler for innovation and sustainable growth.

Copyright and research are not antithetical to each other, quite the opposite. Modern copyright was designed to incentivize creativity, to protect the moral and material interests of creators⁴ and “[t]o promote the progress of science and useful arts”.⁵ Research is central to fulfilling these objectives, and is essential to rediscover, systematize and analyze existing works and information to generate new insights and knowledge. Research is also key to achieve the EU’s internal market and the main objectives of the European Union, which aim to “work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment” and “[i]t shall promote scientific and technological advance.”⁶

Access to copyright protected works is an absolute precondition for creativity and scientific and technological innovation. It is at the core of copyright’s bargain and its social function: rights are *inter alia* granted because new creativity induces progress and collective wealth.⁷ Authors are -to a large extent- protected because the works they create benefit society. Over the last decades, however, copyright's main paradigm in the EU has

³ Regulation (EU) 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L433 I/23, rec. 7. More than 50% of the funds made available under the recovery instrument (“Next Generation EU”) combined with the EU’s Multiannual Financial Framework 2021-2027 will be made available directly or indirectly to research that will enable Europe to become greener, more digital and more resilient, see EU, Recovery Plan for Europe, available under: https://ec.europa.eu/info/strategy/recovery-plan-europe_en.

⁴ Comp. UDHR, arts. 27(2); ICESCR, art. 15(c).

⁵ U.S. Const. Article I, Section 8, Clause 8.

⁶ TEU, art. 3(3).

⁷ Cf. See Christophe Geiger, ‘Taking the right to culture seriously: time to rethink copyright law’ in Christophe Geiger (ed), *Intellectual Property and Access to Science and Culture: Convergence or Conflict?*, CEIPI/ICTSD publication series on “Global Perspectives and Challenges for the Intellectual Property System” (CEIPI/ICTSD 2016), 84; Christophe Geiger, ‘Copyright as an Access Right, Securing Cultural Participation through the Protection of Creators’ Interests’ in Rebecca Giblin and Kim G. Weatherall (eds), *What if we could reimagine copyright?* (ANU Press 2016); Christophe Geiger, ‘The Social Function of Intellectual Property Rights, Or how Ethics can Influence the Shape and Use of IP law’ in Graeme B. Dinwoodie (ed), *Methods and Perspectives in Intellectual Property* (Edward Elgar 2013). See on the importance of access to data for research purposes and copyright’s impact: Martin Senftleben, ‘Study on Copyright and Related Rights and Access and Reuse of Data. Study for DG RTD 2022 (forthcoming).

shifted towards a rather restrictive legal framework that prioritizes “a high level of protection” for rightholders over a research-conducive legal framework.⁸ While innovation and sustainability has been a constant theme in policy discussions,⁹ the process of research and its inevitable reliance on scientific, literary and artistic works and research data has not played any significant role in copyright reforms in the EU, except maybe for the recent introduction of text-and-data mining (TDM) exceptions to copyright, which are however limited in scope and effectiveness.¹⁰ Recent developments on the contrary did not reflect the complicated interplay between research, or science in general, and copyright.¹¹ On the one hand, research results, in published form or as databases, attract copyright protection; on the other hand, conducting research is only possible by accessing and using existing research or data. Especially collaborative cross-border research requires the exchange and shared access to research findings and research outputs. Copyright law, if not well-designed, can constitute a hindrance to the effective execution of research and to harnessing the opportunities of digital technologies for research.¹²

⁸ See only Bernd Justin Jütte, *Reconstructing European Copyright Law for the Digital Single Market: Between Old Paradigms and Digital Challenges* (Nomos, Hart, Bloomsbury 2017), 116-117 ; Christophe Geiger, ‘The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information’ [2010] IPQ 1; Reto M. Hilty, ‘The Expansion of Copyright Law and its Social Justification’ in Christopher Heath, Kung-Chung Liu (eds), *Copyright Law and the Information Society in Asia* (Hart Publishing 2007). See for a global perspective post-TRIPs Laurence R. Helfer, ‘Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking’ 29 [2004] Yale J Int’l L. 1.

⁹ See only recently in Commission, Communication on the Global Approach to Research and Innovation, Brussels, 18.05.2021, COM(2021) 252 final: “We need to cooperate across borders on a scale never seen before to develop innovative solutions to deliver just green and digital transitions in line with the sustainable development goals and to promote Europe’s resilience, prosperity, competitiveness, and economic and social well-being.” (footnote omitted).

¹⁰ For a discussion, see below. In general, and critically on the TDM-exception: Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko, ‘Text and Data Mining in the Proposed Copyright Reform: Making the EU Ready for an Age of Big Data?’ [2018] 814; ‘Text and Data Mining: Articles 3 and 4 of the Directive 2019/790/EU’ in Conception Saiz García and Raquel Evangelio Llorca (eds), *Propiedad intelectual y mercado único digital europeo* (Tirant lo blanch 2019).

¹¹ See for example Reto M. Hilty, ‘Copyright law and scientific research’ in Paul Torremans (ed), *Copyright Law, A Handbook of Contemporary Research* (Edward Elgar Publishing 2007); Reto Hilty, ‘Das Urheberrecht und der Wissenschaftler’ [2006] GRUR Int. 179; Reto M. Hilty, ‘Five Lessons about Copyright in the Information Society: Reaction of the Scientific Community to Over-Protection and what Policy Makers Should Learn’, [2016] Journal of the Copyright Society of the USA 53, 103; Alexander Peukert, ‘Das Verhältnis von Urheberrecht und Wissenschaft’ [2012] JIPITEC 142; and Jerome H. Reichman and Ruth L. Okediji, ‘When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale’ [2012] Minnesota Law Review 1362.

¹² Reichmann and Okediji (n 9), 1365 ff.

At the same time, copyright has undergone a process of ‘constitutionalization’ which saw fundamental rights playing an ever-increasing role in the interpretation and application of copyright law.¹³ This has led to an increasing recognition of a multitude of competing values in the context of law-making and interpretation of existing laws and contributed to the emergence of an ethical framework for innovation based on fundamental rights in the intellectual property context¹⁴.

Against the background of copyright’s constitutionalization, a missing piece to shape extant European copyright law into a legal framework that is permissive and enabling, rather than restrictive of research, is a constitutionally backed right to perform and share research. The digital environment and its tremendous potential to enable new forms of research has further accentuated the urgency of addressing the issue from a constitutional perspective under the heading of what has been framed “digital constitutionalism”¹⁵. It is possible to construct the substance of a ‘right to research’ out of existing fundamental rights and general founding principles of EU law.¹⁶ Such a right can play a vital role in balancing the interests in copyright law and to serve as an enabler of European and global innovation, sustainability and well-being.¹⁷ In this spirit, the essence of a

¹³ See Christophe Geiger, ‘„Constitutionalising“ Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union’ [2006] 37 IIC 371; Christophe Geiger, ‘Reconceptualizing the Constitutional Dimension of Intellectual Property - An Update’ in Paul Torremans (ed), *Intellectual Property and Human Rights* (4th edn, Kluwer Law International 2020), and Christophe Geiger and Elena Izyumenko, ‘The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!’ 51 [2020] IIC 282.

¹⁴ On the influence of fundamental rights on IP law, see Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015).

¹⁵ Christophe Geiger and Bernd Justin Jütte “Digital Constitutionalism and Copyright Reform: Securing Access to through Fundamental Rights in the Online World”, *The Digital Constitutionalist*, 24 January 2022 (<http://digi-con.org/digital-constitutionalism-and-copyright-reform-securing-access-through-fundamental-rights-in-the-online-world/>). More generally on the doctrinal movement of digital constitutionalism and its implications Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet, A Road Towards Digital Constitutionalism?* (London, Bloomsbury/ Hart Publishing, 2021); Giovanni de Gregorio, *Digital Constitutionalism in Europe*, Cambridge, CUP 2022.

¹⁶ For a conceptualization of the Right to Research, see Christophe Geiger and Bernd Justin Jütte, ‘Conceptualizing the Right to Research and its Implications for Copyright Law, An International and European perspective’ [2022] 38 Am. U. Int’l L. Rev. (forthcoming).

¹⁷ Cf. Report on the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions: Statement by the Committee on Economic, Social and Cultural Rights on Human Rights and Intellectual Property, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., Annex XIII, 1 4, U.N. Doc. E/2002/22-E/C.12/2001/17 (2001); see also Philippe Cullet, ‘Human Rights and Intellectual Property Protection in the TRIPS Era’ [2007] *Human Rights Quarterly* 403, 415. See also the EU’s action plan on intellectual property, recovery and resilience, which also stresses the importance to provide better access to IP-assets to promote critical research: Commission, Making the most of the EU’s innovative potential An intellectual property action plan to support the EU’s recovery and resilience, Brussels, 25.11.2020,

right to research can be seen as a concrete expression of a right that shapes and helps to interpret copyright law for the purpose of enabling access to and dissemination of necessary information, and thereby support efforts to create an environment that fosters sustainability and innovation in a variety of research contexts.

This argues for a right to research as a constitutional imperative to enable copyright to support European efforts for a post-pandemic recovery. First, it highlights the interdependence of research and copyright policies in the EU (2.), before illustrating how copyright can constitute barriers to different research activities. (3.). The main argument is based on the constitutional foundations of a right to research (4.) as found in international human rights law, European fundamental rights law and the constitutional Treaties of the EU. It then briefly sketches the contours of a right to research (5.) and concludes with a critical outlook (6.)

I. CONVERGING GOALS OF COPYRIGHT AND EUROPEAN OBJECTIVES AND RESEARCH POLICIES

Title XIX of the Treaty of the Functioning of the European Union (TFEU)¹⁸ on “Research and technological development and space” states that the EU pursues the establishment of a “European research area in which researchers, *scientific knowledge* and technology circulate freely”.¹⁹ Title XIX gives concrete expression to Article 3 Treaty on European Union (TEU)²⁰ which, in its third paragraph, states that the EU “shall promote scientific and technological advance.” This latter aim must be read in the context of Article 3 TEU and Article 4 TFEU, which set out the general goals and aspirations of the Union. In the systematic structure of Article 3 TEU, paragraph three is dedicated to the internal market, which is based on, amongst others, the principles of “sustainable development [...] and a high level of protection and improvement of the quality of the environment.” In this context, the notion of sustainability is understood to promote economic development and competitiveness while at the same time promoting the protection and preservation of nature and society.²¹ Article 4(3) TFEU

COM(2020) 760 final, see especially under 4. See in general on intellectual property and sustainability, the contributions in Ole-Andreas Rognstad and Inger B. Ørstavik (eds), *Intellectual Property and Sustainable Markets* (Edward Elgar 2021); on copyright in particular: Sileshi Bedasie Hirko, *Rethinking Copyright for Sustainable Human Development. Higher Education and Access to Knowledge* (Routledge 2022).

¹⁸ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

¹⁹ Emphasis added.

²⁰ Consolidated version of the Treaty on European Union [2012] OJ C 326/13.

²¹ See for an interpretation of the notion of ‘sustainability’, Sander R.W. van Hees, ‘Sustainable Development in the EU: Redefining and Operationalizing the Concept’, [2014] 10 Utrecht Law Review 62.

grants the EU competence to act in the areas of “research, technological development and space.”²²

The Treaties do not show a direct link between copyright, or intellectual property for that purpose, and their aspirational goals set out in Article 3 TEU and Article 4 TFEU. However, secondary legislation on copyright reflects some of these aspirations. The two central European directives on copyright, the Directive on copyright and related rights in the information society (InfoSoc Directive)²³ and the Directive on copyright and related rights in the Digital Single Market (CDSM Directive)²⁴ are primarily aimed at removing barriers within the internal market and to avoid the distortion of competition between Member States by creating a harmonized legal framework for copyright in the information society²⁵ and the Digital Single Market,²⁶ respectively. But these instruments are also supposed to be enablers and stimulators of “innovation, creativity, investment”²⁷ and the CDSM Directive recognizes that “[i]n the fields of research, innovation, education and preservation of cultural heritage, digital technologies permit new types of uses that are not clearly covered by the existing Union rules on exceptions and limitations.”²⁸ Twenty years earlier, the InfoSoc Directive had already noted that harmonized rules on copyright can “foster substantial investment in creativity and innovation, [...] and lead in turn to growth and increased competitiveness of European industry, [...] across a wide range of industrial and cultural sectors.”²⁹ The CDSM Directive states in its recitals that promoting research through copyright is effected by mitigating a “high level of protection”³⁰ for rightholders and with exceptions and limitations to rightholders’ exclusive rights. With regard to text and data

²² The EU’s competence in research has been mainly exercised to develop programmes that promote researcher mobility, foster cooperation between researchers and, in general, to establish a European Research Area (ERA). The only substantive reference to copyright in primary EU law can be found in Title II of Part Three on the free movement of goods. According to Article 36 TFEU, limitations to the free movement of goods can be made for the purposes of protection commercial and industrial property, which is commonly understood to include the protection of intellectual property, and which has readily been accepted by the CJEU as an available restriction to the free movement of services as overriding reasons in the public interest (AG Kokott, Joined Cases C-403/08 and C-429/08, *Football Association Premier League and Others*, EU:C:2011:43, para. 179, and the CJEU in the same proceedings (EU:C:2011:631) at para. 94 with further references.). The treaty contains general and specific competence norms for intellectual property in arts. 114 and 118 TFEU.

²³ Council Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10 (InfoSoc Directive).

²⁴ Council Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92 (CDSM Directive).

²⁵ InfoSoc Directive, see rec. 1.

²⁶ CDSM Directive, see rec. 1.

²⁷ CDSM Directive, rec. 2, in the cited context the directive refers only to “new content”.

²⁸ CDSM Directive, rec. 5.

²⁹ InfoSoc Directive, rec. 4.

³⁰ CDSM Directive, rec. 2 and 3, see already InfoSoc Directive, rec. 4.

mining technologies, the link to research and copyright is made more explicit. Recital 8 of the CDSM Directive states in this regard that “new technologies enable the automated computational analysis of information in digital form, such as text, sounds, images or data, generally known as text and data mining. Text and data mining makes the processing of large amounts of information with a view to gaining new knowledge and discovering new trends possible. [...] *there is widespread acknowledgment that text and data mining can, in particular, benefit the research community and, in so doing, support innovation*”³¹. Because the balance between these cornerstones of copyright, not only in relation to research activities, has often been criticized,³² it merits examining in more detail how copyright can serve to create and maintain a legal framework conducive to research, and to what extent these opportunities are addressed in the EU’s research and copyright policies. By demonstrating a commitment to facilitating research through copyright law, backed by a supporting fundamental right to research, the EU could lead the way to a post-pandemic economic recovery and towards a sustainable and just future in Europe and globally.

A. Research in EU policy

Research plays an important and very prominent role in the law and policy of the EU. The sheer magnitude and diversity of EU research funding and various programs for the mobility of researchers at all levels underline the dedication of the EU to enable and promote research as an activity that is essential in realizing the political goals of the Union.

The EU’s research policy has its basis in Articles 179-190 TFEU, which are however silent on intellectual property. Rather it sets the aim to establish a European Research Area in which researchers move and scientific knowledge and technology circulates freely, and which encourages competitiveness and promotes “all the research activities deemed necessary by virtue of other Chapters of the Treaties”.³³ While primary law is by nature vague, it is instrumental to examine some of the measures adopted under Title XIX TFEU, and for the purposes of this contribution focus on

³¹ Emphasis added.

³² See only Jane C. Ginsburg, ‘Essay – How Copyright Got a Bad Name For Itself’ [2003] 26 Colum. J.L. & Arts 61; Christophe Geiger, ‘The future of copyright in Europe: striking a fair balance between protection and access to information’ [2010] I.P.Q. 1; Caterina Sganga ‘A decade of fair balance doctrine, and how to fix it: copyright versus fundamental rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online’ [2019] 41 EIPR 683; Martin Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International 2004) 34 ff; Bernd Justin Jütte, ‘Finding the Balance in Copyright Law: Internal and External Control Through Fundamental Rights’ in Torremans (n 11); see further FNs 47 and 52.

³³ TFEU, art. 179.

the more recent developments with relevance to copyright and research activities.

In 2011, the European Council envisaged the completion of the European Research Area in 2014, which included ensuring that “information about publicly financed R&D should be better disseminated, whilst respecting intellectual property rights, notably through the establishment of an inventory of EU-funded R&D”.³⁴ Since the Horizon 2020 funding program in 2014, open access is mandatory for publications that result from funding under research grants awarded under this program, and which has been continued under the 2020-24 Horizon Europe funding program.³⁵ The ‘Open Science’ approach³⁶ is supported by the European Open Science Cloud (OSC)³⁷ and the Open Research Europe (ORE) publishing platform.³⁸

References to ‘Open Science’ can also be found in the 2015 Digital Single Market Strategy under the section “Building a Data economy”.³⁹ According to the Commission, realizing the potential of digital and data technologies requires the removal of technical and legislative barriers, including addressing the fragmentation of copyright rules which constitutes a barrier for the use of “new applications of technologies (e.g. text and data mining)”.⁴⁰

The 2021 Digital Europe Programme, which objective is to “accelerate the digital transformation of the European economy, industry and society”⁴¹ among five specific objectives which will “foster better exploitation of the industrial potential of policies on innovation, research and technological

³⁴ EUCO 2/1/11 Rev of 8 March 2011

³⁵ The open access requirement also extends to other outputs that emerge from publicly funded research.

³⁶ European Commission, Directorate-General for Research and Innovation, *Horizon Europe, open science: early knowledge and data sharing, and open collaboration*, Publications Office, 2021, <https://data.europa.eu/doi/10.2777/79699>.

³⁷ “The European Open Science Cloud aims to build infrastructures to provide seamless access to FAIR data and interoperable services for the scientific community” (<https://ec.europa.eu/research/openscience/index.cfm?pg=open-science-cloud>) See also: Commission, A European strategy for data, Brussels, 19.2.2020, COM(2020) 66 final, Appendix under 10; see also Commission, Cloud Initiative - Building a competitive data and knowledge economy in Europe, Brussels, 19.4.2016, and Commission Staff Working Document - Implementation Roadmap for the EOSC, Brussels, 14.3.2018, SWD(2018) 83 final.

³⁸ European Commission, Open Research Europe, accessible at: <https://open-research-europe.ec.europa.eu>.

³⁹ Commission, A Digital Single Market Strategy for Europe, Brussels, 6.5.2015, COM(2015) 192 final, under 4.1.

⁴⁰ *Ibid.*, 7.

⁴¹ Regulation (EU) 2021/694 establishing the Digital Europe Programme and repealing Decision (EU) 2015/2240 [2021] OJ L 166/1, art. 3.

development”.⁴² The Programme also refers to the Paris Agreement, adopted under the United Nations Framework Convention on Climate Change and the United Nations Sustainable Development Goals. At the same time, recital 64 states that “[t]he Programme should be implemented in a manner that fully respects the Union and international framework of intellectual property protection and enforcement. The effective protection of intellectual property plays a key role in innovation and is, therefore, necessary for the effective implementation of the Programme.”⁴³ However, The Programme also encourages open source-solutions with the aim to improve the sustainability of funded projects.⁴⁴ Intellectual property and sustainable development seem therefore to be considered by the Commission to go hand in hand.

Research is also a key aspect in a number of recent policy initiatives, amongst them the proposed Data Act and, albeit more implicitly, the proposed Artificial Intelligence Regulation.⁴⁵ In the explanatory memorandum accompanying the proposed draft text of the Data Act, the Commission states that “[d]ata is a core component of the digital economy, and an essential resource to secure the green and digital transitions” and “crucial to unlock [the potential of data-driven innovation] by providing opportunities for the reuse of data, as well as by removing barriers to the development of the European data economy in compliance with European rules and fully respecting European values”.⁴⁶ The Data Act is an element of the “European Data Strategy” which itself serves to implement the EU ambitious plan to shape its digital future.⁴⁷ Data, as a part of digital solutions that are “powerful enablers for the sustainability transition“, the Commission argues, will help to transform the European economy across a number of sectors, including enabling a “a fully integrated life-cycle approach“.⁴⁸ Digital solutions including artificial intelligence are an important element in the EU’s wider digital strategy and a “contribution to promoting technology that works for people” with trusted mechanisms and services for the re-use, sharing and pooling of data that are essential for the development of data-driven AI models of high quality.⁴⁹ Research seems to be very high on the policy agenda of the EU. Therefore, it seems rather

⁴² Ibid, art. 9, see also rec. 16.

⁴³ Ibid rec. 61.

⁴⁴ Ibid rec. 54.

⁴⁵ Commission, Proposal for Proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), Brussels, 21.4.2021, COM(2021) 206 final.

⁴⁶ Commission, Proposal for a Regulation on harmonised rules on fair access to and use of data (Data Act), Brussels, 23.02.2022, COM(2022) 68 final, p. 1.

⁴⁷ Commission, Communication “Shaping Europe’s digital future”, Brussels, 19.02.2020, COM(2020) 67 final.

⁴⁸ Ibid, p. 11.

⁴⁹ Commission (n 37), p. 5.

surprising that EU copyright policy has ignored research concerns to a large extent.

B. Research in EU Copyright Policy

Historically, research has not played an important role in European copyright policy, as opposed to its role in broader EU policy. This has translated in a neglect of research as a rationale for substantive copyright rules although research is considered as a driving force for innovation.⁵⁰ While both main copyright directives contain research exceptions, their recitals do not emphasize sufficiently the relation between research and copyright.⁵¹ Similarly quiet on research matters was the 1995 Green Paper on Copyright and Related Rights in the Information Society,⁵² and the 2008 Green Paper Copyright in the Knowledge Economy added little more than a stocktaking of the law as it was then.⁵³ The resulting Communication on Copyright in the Knowledge Economy became more concrete as it stated rather firmly: “In order to avoid needless duplication of research, published results of publicly-funded research should be available to the entire scientific community and even to the public. This is because all research builds on previous research. In these circumstances, open-access publishing and open repositories for published articles offer solutions.” It imagined a centralized European licensing solution for libraries and universities to grant its users access and other research-relevant rights for digital material.⁵⁴ While promoting access is laudable, a licensing approach is not sufficient to create a copyright regime conducive to research, but rather serves to circumvent or sidestep the problems created and the barriers for research erected by a largely defunct balance within copyright normative system. In general, EU copyright policy has, so far, failed to put research centre-stage.

II. COPYRIGHT BARRIERS TO RESEARCH

The results of scientific research are traditionally published in physical books and journals. Deposited in libraries, these works are free to access to whoever has physical access to a collection containing the works that an individual researcher might seek. The information, the results or findings of

⁵⁰ See above CDSM Directive, rec. 8.

⁵¹ One curious ‘exception’ is rec. 48 InfoSoc Directive which states in relation to technological protection measures that their “protection should not hinder research into cryptography”, the relative absence of research-rhetoric can be interpreted as an expression of normative preferences (on other areas) of the EU legislator.

⁵² Commission, Green Paper of 27 July 1995 on Copyright and Related Rights in the Information Society, Brussels, 19.7.1995, COM(95) 382 final.

⁵³ Commission, Green Paper - Copyright in the Knowledge Economy, Brussels, 16.7.2008, COM(2008) 466 final; the Green Paper notably recognized the shift in access behaviors of researchers.

⁵⁴ Commission, Copyright in the Knowledge Economy, Brussels, 19.10.2009, COM(2009) 532 final, p. 7.

research are not protected, merely their concrete expression in a specific work is.⁵⁵ Here lies a fundamental problem that restricts access to research outcomes. Scientific outputs, expressed in writing or otherwise, are treated in the same way as other works, such as musical or literary works protected by copyright, which term and scope of protection have consistently increased, globally not least as a result of decolonization.⁵⁶ The resulting monopolization of research outputs, exacerbated by the digitization of scientific journals and their inclusion in databases, has made access to relevant information costly and resulted in what some scholars have called an “information famine”.⁵⁷ Research is however not restricted to access to scientific outputs in the form of books and journal articles. In general, but particularly in a data-driven economy, researchers require access to a wide array of works and information. To give just one example, a researcher with a specialization on a specific artform will require access to creative works of this artform to be able to study and analyze them. It might also be essential for this researcher to process and convert creative artworks into machine-readable data. Similarly, every creator and artist needs to be able to conduct research on the state of the art in his particular field or to collect and possibly archive information that informs and forms the basis for their creativity. Without access to copyrighted works, there cannot be creativity⁵⁸. Research is therefore a key enabler of cultural and scientific development but also the precondition of copyright protection⁵⁹.

As a vast body of literature documents that copyright in the EU has developed a systematic imbalance⁶⁰ which tends to favour broad exclusive rights and which, as a result, protects research outputs and research-relevant data but also more generally creative works without sufficiently regulating their access for research purposes through efficient and workable exceptions and limitations.⁶¹ The constant expansion of exclusive rights, partially

⁵⁵ Highlighting this point: Peukert (n 9), 143.

⁵⁶ See in more detail Sara Bannerman, *International Copyright and Access to Knowledge* (Cambridge University Press 2016), Chapter 3, with reference to the drafting process of the Universal Copyright Convention, during which a distinction between scientific and other works was considered.

⁵⁷ *Ibid.*, 44.

⁵⁸ See further Geiger (n 5).

⁵⁹ See more detailed Christophe Geiger and Bernd Justin Jütte (n 14).

⁶⁰ See only Christophe Geiger, ‘Copyright and free access to information: for a fair balance of interests in a globalised world’, [2006] 28 EIPR 366; Patricia Akester, ‘The new challenges of striking the right balance between copyright protection and access to knowledge, information and culture’, [2010] 32 EIPR 372; Bernd Justin Jütte, ‘Forcing Flexibility with Fundamental Rights: Questioning the Dominance of Exclusive Rights’ in Tatiana-Eleni Synodinou et al. (eds), *EU Internet Law in the Digital Era* (Springer 2019).

⁶¹ See with further references Tito Rendas, *Exceptions in EU Copyright Law: In Search of a Balance Between Flexibility and Legal Certainty* (Kluwer Law International 2021), 55-58; Christophe Geiger and Franciska Schönherr, ‘Limitations to Copyright in the Digital Age’ in Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law*

through the generation of new rights, including *sui generis* rights such as the database right,⁶² has further expanded the subject matter that falls within the realm of copyright exclusivity, and thereby limited the free availability and use of research-relevant data and information. It should be noted in this context that free availability of research does not necessarily mean availability for free. Exceptions and limitations in the EU can foresee that a remuneration is paid to the creator whose work is used; limitations can take the form of statutory licences.⁶³ Remuneration rights thus increase the policy space available to the legislator for creating access mechanisms to foster research and innovation. The difference between statutory exceptions and limitations on the one hand, and exclusive rights on the other cannot to be understated since the blocking effect a refusal to licence is overcome through statutory intervention and the price of the statutory licence can be subjected to regulatory control.⁶⁴

Three examples briefly illustrate the tendency of the European legislator to tilt the balance in favour of rightholders without sufficiently addressing the needs of researchers and thus the sustainability dimension of copyright law.

(Edward Elgar 2014), 110; Martin R.F. Senftleben, ‘Overprotection and Protection Overlaps in Intellectual Property Law – The Need for Horizontal Fair Use Defences’ in Annette Kur and Vytautas Mizaras (eds), *The Structure of Intellectual Property Law: Can One Size Fit All?* (Edward Elgar 2011), 136; P. Bernt Hugenholtz and Martin R.F. Senftleben, ‘Fair Use in Europe’, Institute for Information Law Research Paper No. 2012-33 (Amsterdam, November 2011). See for a global approach Tanya Aplin and Linonel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (Cambridge University Press 2020). See only the different critical contributions in P. Bernt Hugenholtz (ed) *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Kluwer Law International 2018).

⁶² Although the recent ruling in CJEU, Case C-762/19, *CV-Online Latvia*, EU:C:2021:434 possibly relaxed the strict scope of protection by altering the applicable infringement test for non-original databases (see para. 46 of the Judgment), a more pronounced fundamental right to research would be beneficial in interpreting the test in favour of researchers, cf. Estelle Derclaye and Martin Husovec, ‘Sui Generis Database Protection 2.0: Judicial and Legislative Reforms’ [2022] 44 EIPR 323.

⁶³ See Christophe Geiger and Oleksandr Bulayenko, ‘Creating Statutory Remuneration Rights in Copyright law: What Policy Options under the International Framework?’ in Axel Metzger and Henning Grosse Ruse-Khan (eds), *Intellectual Property Ordering Beyond Borders*, (Cambridge University Press [forthcoming] 2022); Christophe Geiger and Oleksandr Bulayenko, ‘Scope and enforcement tools to ensure remuneration, General Report for the ALAI Congress 2015’ in Silke von Lewinski (ed), *Remuneration for the use of works, Exclusivity vs. Other Approaches* (De Gruyter 2017).

⁶⁴ See on this issue, in the context of creative reuse, Christophe Geiger, ‘Statutory Licenses as Enabler of Creative Uses’, in Kung-Chung Liu and Reto M. Hilty (eds), *Remuneration of Copyright Owners, Regulatory Challenges of New Business Models*, (Springer 2017)

A. General Research Exceptions & Limitations in EU Copyright Law

The InfoSoc Directive includes in its list of optional limitations and exceptions an exception especially dedicated to teaching and research. Pursuant to Article 5(3)(a), Member States may implement into their national laws and exception that permits the “use [of protected works and subject matter] for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved”.⁶⁵ The exception is limited to non-commercial research and subject to a proportionality assessment.⁶⁶

The varying models in which the research exception has been implemented continue to constitute barriers for cross-border research collaboration and the sharing of essential data and information.⁶⁷ The disharmonized state of the general research exception makes cross-border research projects more difficult as it impedes the exchange and sharing of data and information, particular in digital contexts. The norm’s restriction to non-commercial research significantly narrows its scope of application and relegates commercial research, and possibly public-private partnerships, to the licensing market. What is more likely, the unavailability of a national research exception to many researchers or enterprises, which are by their nature profit-oriented, prevents the unhindered use of available information, which is however contained in a form that attracts copyright protection.⁶⁸

More critically, the vague nature of the exceptions and similarly vague implementations at national levels do not provide sufficient legal certainty for researchers. The signalling function of an exception, which is to indicate which act in relation to works and other subject matter protected by copyright will not result in potential claims for copyright infringement, cannot be fulfilled by ambiguous or too narrow formulations. As a result,

⁶⁵ Similar exceptions can be found in art. 10(1)(d) Council Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28 and arts. 6(2)b and 9(b) Council Directive 96/9/EC on the legal protection of databases [1996] OJ L 77/20.

⁶⁶ Francisco Javier Cabrera Blázquez, Maja Cappello, Gilles Fontaine, Sophie Valais, IRIS Plus. *Exceptions and limitations to copyright* (European Audiovisual Observatory 2017), available at: <https://rm.coe.int/iris-plus-2017-1-exceptions-and-limitations-to-copyright/168078348b>, 24-25. See also InfoSoc Directive, rec. 42.

⁶⁷ Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, Brussels, 14.09.2016, COM(2016) 593 final, p. 6, see also Senftleben (n 5), 21.

⁶⁸ See on the general conflict between copyright and research and its likely effects: Benjamin Raue, ‘Das Urheberrecht der digitalen Wissen(schaft)sgesellschaft’ [2017] GRUR Int. 11, 12.

the research exception cannot fulfil a function that would correspond to the *raison d'être* of copyright which is to a large extent to incentivize and encourage research, creativity, and innovation.

B. Text and Data Mining

The new TDM exceptions in Articles 3 and 4 CDSM Directive were drafted “in particular, [to] benefit the research community and, in so doing, support innovation.”⁶⁹ They were specifically aimed at removing legal uncertainty as TDM requires performing acts that are protected by copyright in relation to original works and the *sui generis* database right. For that purpose, the CDSM Directive introduces a new exception under Article 3 that permits TDM activities, however reserves this exception for scientific research performed by research organisations and cultural heritage institutions.⁷⁰ TDM for other purposes and outside institutions covered by Article 3 is subject to stricter conditions and potential reservations,⁷¹ which effectively limits the generally positive effects of the new TDM exceptions.⁷²

There are two main criticisms that can be levelled against both new provisions and the context in which they appear in the directive. First, both Articles are subject to significant limitations. Article 3 only benefits “research organisations and cultural heritage institutions”. “Research organisations” in this context refers to universities or research institutes or in general institutions that do not operate for profit, or which pursue a public interest mission. Such institutions can also not be controlled by undertakings to the effect that research results are enjoyed on a preferential basis.⁷³ This significantly limits the scope of the substantively more permissive Article 3.⁷⁴ Journalists, who are researching about important matters of public interests and thus play a crucial role for democracy, are for example not included. Article 4 on the other side is not limited to certain

⁶⁹ CDSM Directive, rec. 8.

⁷⁰ CDSM Directive, art. 3.

⁷¹ The length of storage of text and data mined under Article 4(2) is shorter than under Article 3(2) and the use of freely available information can be reserved unilaterally by the relevant rightholder under Article 4(3).

⁷² CDSM Directive, art. 4(3), cf. Benjamin Raue, ‘Rechtssicherheit für datengestützte Forschung’ [2019] ZUM 684, 693 and Benjamin Raue, ‘Die Freistellung von Datenanalysen durch die neuen Text und Data Mining-Schranken’ [2021] ZUM 793, 802.

⁷³ Cf. art. 2(1) CDSM Directive.

⁷⁴ For a critique see P. Bernt Hugenholtz ‘The New Copyright Directive: Text and Data Mining (Articles 3 and 4)’ (*Kluwer Copyright Blog*), accessed on 14 June 2022 24 July 2019; Rosanna Ducato & Alain Strowel, ‘Ensuring Text and Data Mining: Remaining Issues with the EU Copyright Exceptions and Possible Ways Out’ [2021] 43 EIPR 322; Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko, ‘Text and Data Mining in the Proposed Copyright Reform: Making the EU Ready for an Age of Big Data?’ [2018] 48 IIC 814; Geiger and Bulayenko (n 8); Martin Senftleben, ‘Compliance of National TDM Rules with International Copyright Law – An Overrated Nonissue?’, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4134651

institutions, but sets specific restrictions on the storage of reproductions for the use for the purposes of TDM,⁷⁵ and TDM activities are only exempted when the use has not been reserved by the rightholder who can “opt out” of the provisions.⁷⁶ Second, Article 7(2) extends the application of Article 5(5) InfoSoc Directive, which imports the three-step-test into Title II of the CDSM Directive, and also subjects the exceptions to the regime for the relevant provision on the protection of technological protection measures of Article 6(4) InfoSoc Directive. This means that Article 3 and 4 CDSM Directive have to be interpreted strictly in the light of the three-step test, but also that technological protection measures cannot be unilaterally circumvented but require cooperation with rightholders. Both additional limitations will effectively limit the effectiveness of the two exceptions for TDM.

The construction of the TDM exception perfectly illustrates the effects of copyright law on research activities and the overprotection of specific types of subject matter. The process of TDM in itself is not interested in, and does not require, in most cases, an appreciation of the expression, i.e. the object of protection. Instead, TDM extracts, as a preliminary step, information. To harvest or to mine such information, the reproduction of expression is indispensable. The new TDM exceptions permit this with significant limitations. However, much remains to be desired and calls for a more open exception for TDM have been made.⁷⁷ Also, the limited scope of the exception will potentially reduce the ability of the EU to lead in the field of artificial intelligence-based research, as TDM is a precondition of any machine learning process and automated analysis of data.⁷⁸ Interestingly, the

⁷⁵ art. 4(2) CDSM Directive.

⁷⁶ art. 4(3) CDSM Directive; see especially on the opt-out: Luisa Gatti, ‘The European solution for text and data mining: a focus on the opt-out system provided by article 4 of the DSM Directive’ [2021] 43 EIPR 765.

⁷⁷ See for example Christophe Geiger, ‘The Missing Goal-Scorers in the Artificial Intelligence Team: Of Big Data, the Fundamental Right to Research and the failed Text and Data Mining Limitations in the CDSM Directive’ in Martin Senftleben and others (eds), *Intellectual Property and Sports, Essays in Honor of Bernt Hugenholtz* (Kluwer Law International 2021); Sean Flynn, Christophe Geiger and J.P. Quintais, ‘Implementing User Rights for Research in the Field of Artificial Intelligence: A Call for International Action’ [2020] EIPR 393.

⁷⁸ Idem. See also Rosanna Ducato and Alain Strowel, ‘Limitations to text and Data Mining and Consumer Empowerment: Making the Case for a Right to ‘Machine Legibility’ [2019] 50 IIC 649; see also Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko, ‘Crafting a Text and Data Mining Exception for Machine Learning and Big Data in the Digital Single Market’ in Xavier Seuba, Christophe Geiger and Julien Pénin (eds), *Intellectual Property and Digital Trade in the Age of Artificial Intelligence and Big Data*, CEIPI/ ICTSD Series on “Global Perspectives and Challenges for the Intellectual Property System”, (CEIPI/ ICTSD 2018); Begona Gonzales Otero, ‘Machine Learning Models Under the Copyright Microscope: Is EU Copyright Fit for Purpose?’ [2021] GRUR Int. 1043, according to whom the potential dysfunctional effects of copyright and *sui generis*

policies at EU level on artificial intelligence seemed so far to have largely ignored any of these copyright aspects.⁷⁹

C. The Database Right

The EU *sui generis* right for non-original databases, which provides protection for databases that do not reflect originality “through the selection or arrangement of the data which it contains”,⁸⁰ but which have been created with substantial quantitative or qualitative investment,⁸¹ constitutes another barrier for research, especially in relation to text-and data mining. By its very nature and scope, the right protects unoriginal information and a ‘container’ that attracts exclusive rights. This is problematic for research activities and collides with the original function of copyright. The right enables the creators of databases that contain unprotected information to exercise their exclusive rights to prevent the use of this information to validate existing and conduct new research. Although the right is supported by an exception,⁸² and the TDM exception under Article 3 CDSM Directive also applies, these exceptions are limited to non-commercial purposes or can be restricted through technological means in the case of Article 4 CDSM Directive.⁸³

Furthermore, the limitations to the scope of the *sui generis* right, for example as proposed by Article 35 of the proposal for the Data Act,⁸⁴ make this a right particularly unwieldy one. While, in most cases, compilations of data which collection requires significant investment will be protected by the exclusive right for non-original databases, similar collections containing data “obtained from or generated by the use of a product or related service” are excluded from the scope. Both types of data are useful for research as they contain information from which new insights can be gained. Discriminating between the two types of data might make sense in the light of the object and purpose of the proposed Data Act, but not in relation to research activities. As a result, the proposed Data act has been heavily criticized. In its Opinion on the proposed Data Act, the European Copyright

database protection over other elements of an ML system such as training data and the works the data derive from requires further research (at 1055).

⁷⁹ See in this sense Geiger note 74.

⁸⁰ CJEU, Case C-604/10, *Football Dataco and Others*, EU:C:2012:115, para. 38.

⁸¹ Cf. Database Directive, art. 7(1).

⁸² Database Directive, art. 9(b).

⁸³ Moreover, the applicable research exception for non-original databases can contractually be excluded, cf. art. 15 Database Directive, which only applies to certain other exceptions, see also European Commission,

Study in support of the evaluation of Directive 96/9/EC on the legal protection of databases, available at: <https://digital-strategy.ec.europa.eu/en/library/study-support-evaluation-database-directive>, 15-16; see also Derclaye and Husovec (n 61).

⁸⁴ Commission, Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act), Brussels, 23.02.2022, COM(2022) 68 final.

Society states: “Robust access and use guarantees for scientific research are missing. The facilitation of research does not lie at the heart of the proposed new legislation.”⁸⁵

III. FOUNDATIONS AND RATIONALE FOR A RIGHT TO RESEARCH

A ‘right to research’ as such does not exist explicitly in any of the international or European human right documents. However, it is implicitly included within international legal instruments and the two main European human rights instruments, as well as the objectives of the EU treaties, the roots out of which a right to research can be grown.

A. International foundations of a right to research

The tension between copyright and research is contained at the very foundation of international human rights law. The Universal Declaration of Human Rights (UDHR),⁸⁶ on the one side, guarantees “the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits” while also requiring that authors receive protection for the “moral and material interests resulting from any scientific, literary or artistic production.” Similarly, Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸⁷ contains a commitment from the signatories of the covenant to “respect the freedom indispensable for scientific research and creative activity.”⁸⁸ In the same provision, two separate rights are expressed: on the one hand, everyone should have the right to “enjoy the benefits of scientific progress and its applications”, on the other hand all persons should “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”⁸⁹

⁸⁵ European Copyright Society, ‘Opinion of the European Copyright Society on selected aspects of the proposed Data Act (12 May 2022), available at <https://europeancopyrightsocietydotorg.files.wordpress.com/2022/05/opinion-of-the-ecs-on-selected-aspects-of-the-data-act-1.pdf>.

⁸⁶ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

⁸⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 UNGA Res 2200 A (XXI) (ICESCR), UNTS vol. 993, p. 3.

⁸⁸ ICESCR, art. 15(3), see also art. 27(1) UDHR, see for an overview of other sources: Anna-Maria Hubert, ‘The Human Right to Science and Its Relationship to International Environmental Law’ [2020] 31 EJIL 625,628-629, on the evolution of both provisions see Aurora Plomer, *Patents, Human Rights and Access to Science* (Edward Elgar 2015), Chapters 3 and 4.

⁸⁹ ICESCR, art. 15(1)(b) and (c). See in general on the provision: Klaus D. Beiter, Terrence Karran and Kwado Appiagyei-Atua, ‘Yearning to Belong: Dining a “Home” for the Right to Academic Freedom in the U.N. Human Rights Covenants’ [2016] 11 Intercultural Hum. L. Rev. 107, 163ff.; as well as the chapters in: Christophe Geiger (ed.), *Intellectual Property and Access to Science and Culture: Convergence or Conflict?*, CEIPI/ ICTSD

However, it has been argued that these seemingly separate statements are complementary and therefore systematically linked.⁹⁰ A similar expression of aims is contained in the Revised Recommendation on Science and Scientific Researchers which calls on Member States to “encourage and facilitate access to knowledge, including open access” while at the same time proclaiming that “that the scientific and technological results of scientific researchers [should] enjoy appropriate legal protection of their intellectual property, and in particular the protection afforded by patent and copyright law.”⁹¹ It has been suggested that modern intellectual property laws provide a level protection that goes beyond that required by Article 15 ICESCR, but that this provision could be of assistance in finding a new balance.⁹² It becomes apparent, however, that international human rights instruments do not support a narrow reading of the rights of authors, but make the protection granted under copyright law if not conditional on, then at least complementary to the enjoyment of, and this can only mean access to, the expression and information of works protected by copyright.⁹³

B. A right to research rooted in European fundamental rights instruments

While the international human rights framework informs the interpretation of the rights and obligations arising under the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights,⁹⁴ the latter two, metaphorically, constitute the soil from which the roots of a right to research can develop.

1. Freedom of Expression

The right to freedom of expression is a broad right to communicate information in terms of substance and form.⁹⁵ It includes the rights to passively receive and to actively impart information.⁹⁶ The ECtHR has

publication series on “Global Perspectives and Challenges for the Intellectual Property System” (CEIPI/ICTSD 2016).

⁹⁰ See for example Christophe Geiger, ‘Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles’, in Christophe Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015).

⁹¹ UNESCO, (39th Session) 2017 Revised Recommendation on Science and Scientific Researchers (ANNEX II).

⁹² Amrei Müller, ‘Remarks on the Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications (Article 15(1)(b) ICESCR)’ [2010] Hum. Rts. L. Rev. 765, 775.

⁹³ Geiger argues that this function of copyright law constitutes an expression of the social function of the right to property, see Geiger (n 5), 86

⁹⁴ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

⁹⁵ Cf. only Lorna Woods, Art 11 in Steve Peers and others, *The EU Charter of Fundamental Rights. A Commentary* (2nd edn. Hart 2021), para. 11.39 ff.

⁹⁶ For a more detailed analysis of the scope of Article 11 EU Charter see Christophe Geiger and Bernd Justin Jütte ‘Platform Liability Under Art. 17 of the Copyright in the Digital

given particular importance to the medium of expression in relation to artistic expression, in which context the Court has repeatedly underlined the importance of the internet for exercising the right to freedom of expression. So has the CJEU when it recently stated that “the internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information. In the light of their accessibility and their capacity to store and communicate vast amounts of information, internet sites, and in particular online content-sharing platforms, play an important role in enhancing the public’s access to news and facilitating the dissemination of information in general, with user-generated expressive activity on the internet providing an unprecedented platform for the exercise of freedom of expression”.⁹⁷

The CJEU has further ruled that in some cases, access to unpublished information protected by copyright can be permitted in an interpretation of Article 5(3)(c) InfoSoc Directive, which constitutes an exception for the purposes of reporting of current events. In coming to this conclusion, the Court considered the wording of the applicable exception, which permits reproductions for that particular purpose “to the extent justified by the informatory purpose“, thereby implicitly stating that the higher the informatorily purpose, the more severe other rights can be limited.⁹⁸

In general, the right is subject to limitations which are necessary in a democratic society. In *Ashby Donald v France*,⁹⁹ the Strasbourg Court has, in principle, conceded that in some cases copyright, itself protected under Article 17(2) of the EU Charter and Article 1 of the First Protocol to the ECHR, can be limited to give effect to freedom of expression. While in *Ashby Donald*, the commercial use of the photographs of fashion shows did not justify trumping the proprietary interests of fashion designers, the use of works and other subject protected by copyright for research purposes should be subject to a different balancing test, arguably with a different outcome.¹⁰⁰

Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match’ [2021] 70 GRUR Int. 517, 523-525.

⁹⁷ CJEU, Case C-401/19, *Poland v Parliament and Council*, EU:C:2022:297, para. 46; See also ECtHR (Chamber) *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012), see also the CJEU, Case C-160/15, *GS Media*, EU:C:2016:644, para 45 and Joined Cases C-682/18 and C-683/18, *YouTube and Cyando*, EU:C:2021:503, para. 65.

⁹⁸ CJEU, Case C-469/17, *Funke Medien NRW*, EU:C:2019:623, para. 74.

⁹⁹ ECtHR (5th section) *Ashby Donald and other v France* App no 36769/08 (ECtHR, 10 January 2013).

¹⁰⁰ See Christophe Geiger and Elena Izyumenko, ‘Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression’ [2014] 42 IIC 316, 321-322; Bernd Justin Jütte, ‘The Beginning of a (Happy?) Relationship: Copyright and Freedom of Expression in Europe’ [2016] 38 EIPR 11, 15; Christophe Geiger and Elena Izyumenko, ‘Towards a European “Fair Use” Grounded in Freedom of Expression’ [2019] 35 Am. U. Int’l L. Rev. 1 39.

Certain restrictions of speech must be tolerated in a democratic society, and so should intellectual property rights be limited in a research and innovation society. Freedom of expression as such, is no absolute bulwark against the commercial and non-commercial use of protected ‘information’.

2. Freedom of Arts & Sciences

The freedom of the arts and sciences as it is encapsulated in Article 13 EU Charter does not have a nominal equivalent in the ECHR. It has its roots in the right to freedom of expression, it is considered *lex specialis* in relation to Article 11 EU Charter,¹⁰¹ and can be limited under the conditions set out in Article 10 ECHR.¹⁰² Its rationale is to create a free market of ideas for individual and collective betterment.¹⁰³ This idea of an unimpeded marketplace of ideas is also reflected in the EU’s aim to establish its European Research Area, in which knowledge circulates freely.¹⁰⁴ In this context the ‘freedom of knowledge’ is also referred to as the ‘fifth freedom’.¹⁰⁵ Because of its importance for innovation and its key function as safeguard for scientific freedom and societal development, the scope of protection is particularly strong.¹⁰⁶

In relation to research, the CJEU has allowed for restrictions to protect human dignity. In *Brüstle*, this led the Court to adopt a broad notion of the term embryo, uses of which for commercial purposes are prohibited under the Directive on the legal protection of biotechnological inventions.¹⁰⁷ The limitation to research in this case was already included in secondary legislation. An important distinction is made between the use of embryos for scientific research, which is not prohibited by the directive, and the patentability of biotechnological inventions.¹⁰⁸ The Court distinguishes the possibility to research on a specific matter and the valorisation of research results originating from such research.

In *Pelham*, Advocate General Szpunar discussed the inherent limitation to artistic creativity by copyright law. According to the AG “freedom of the arts cannot guarantee the possibility of free use of whatever is wanted for

¹⁰¹ Jarrass, Artikel 13, in Hans D. Jarrass, *Charta der Grundrechte der Europäischen Union. Kommentar* (4th edn. C.H.Beck 2021), para. 4.

¹⁰² Explanation on Article 13; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007X1214%2801%29>

¹⁰³ Debbie Sayers, Art 13 in Peers and others (n 93), para. 13.38

¹⁰⁴ See Article 179(1) TFEU and comp. also Commission, Better Careers and More Mobility: A European Partnership for Researchers, Brussels, 23.5.2008, (COM (2008) 317 final.

¹⁰⁵ Ibid, p. 2

¹⁰⁶ Cf. Ruffert, Artikel 13, para 7, in: Christian Callies and Matthias Ruffert (eds), *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta Kommentar* (6th edn. C.H.Beck 2022).

¹⁰⁷ CJEU, Case C-34/10, *Oliver Brüstle v Greenpeace eV*, EU:C:2011:669, para. 34.

¹⁰⁸ Ibid para. 39.

creative purposes.”¹⁰⁹ Artists are not free from “the constraints of everyday life”¹¹⁰ and cannot reproduce, without prior authorization, and outside existing exceptions and limitations, extant works or other protected subject matter. This is of course a debatable finding with regard to freedom of artistic creativity, as creative reuses of copyright protected material nowadays certainly contributes to a vibrant creative environment, particular in the digital world¹¹¹. Arguably, the use, by way of reproduction, of ‘prior art’ might not be a condition *sine qua non* for the creation of every new art, whereas the generation of new research might very well depend on the use, through access and direct reproduction, of existing research results in form of written articles or datasets.

The publication of research results also falls within the scope of Article 13, as such is the nature of scientific research.¹¹² The right to publish is more likely to be understood as a robust defence against the prevention of publication for reasons of public policy or security, or possibly in relation to third-party funded research. Nevertheless, copyright and other intellectual property rights should be construed in such way as to give consideration to the freedom of arts and sciences.¹¹³ Interpretation of copyright rules with regard to this fundamental right should also consider the dissemination dimension of research, which requires the sharing of information with the purpose that other can engage with the results of scientific research. This overlaps with the external dimension of the right to freedom of expression, highlighting the derivative nature of the right under Article 13 EU Charter. But it also stresses the importance of this particular communicative element.

3. Right to Education

The right to education under Article 14 EU Charter encompasses the right to a basic free education and access to further and continuous education as well as certain organizational freedoms for specific institutions.¹¹⁴ Although primary education must be free, the right does not guarantee access to learning materials; however, their cost cannot have the

¹⁰⁹ AG Szpunar, Case C-476/17, *Pelham and Others*, EU:C:2018:1002, para. 96.

¹¹⁰ *Ibid* para. 92.

¹¹¹ More generally on this issue see Christophe Geiger, ‘Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?’ [2018] 8 413; ‘Fair Use’ through Fundamental Rights in Europe, When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations’ in Shyamkrishna Balganesh, Ng-Loy Wee Ng-Loy and Haochen Sun (eds), *The Cambridge Handbook of Copyright Limitations and Exceptions* (Cambridge University Press 2021).

¹¹² Jarras, Artikel 13, para. 8, in Jarras (n 99).

¹¹³ Ruffert, Artikel 13, para 8, in Callies/Ruffert (n 104).

¹¹⁴ Jarras, Artikel 13, paras. 1-2, in Jarras (n 99).

effect of undermining the basic guarantee of a free general education.¹¹⁵ Arguably, the right to education should prevent that excessive pricing of educational material renders educational activities inefficient or burdensome to the extent that the realization of the right itself is jeopardized.

The right to education links to Article 13 in so far as the teaching of research results is concerned; it thereby forms part of academic freedom. In this context, the taught substance must be the result of research conducted by the lecturer, which also includes the communication of the research of other researchers.¹¹⁶ Such activities therefore fall within the scope of Article 13(2) EU Charter. Similarly, students can rely on Article 13 EU Charter as long as they engage in scientific research, otherwise Article 14(1) is applicable.¹¹⁷

In connecting both prongs of the right to education, it could be deduced for the construction of a right to research that the use of works and other subject matter by researchers should not be made impossible due to restrictive access pricing. Understanding education essentially as the engagement with prior works to develop a well-founded understanding of a subject area as a pre-condition to research creates a strong link between the right to education and research activities. Unfortunately, the new exception for cross-border digital education suffers from similar deficits as the TDM exceptions.¹¹⁸

*C. A right to research rooted in the objectives of the EU treaties:
Sustainability, scientific advancement and social market economy*

Article 3 TEU defines the aims of the Union. Prime amongst them is the promotion of peace, its values and the well-being of its people.¹¹⁹ The third paragraph calls for the establishment of an internal market, which is to “work for *sustainable development* of Europe based on balanced economic growth and price stability, a highly competitive *social market economy*, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall

¹¹⁵ Kingreen, Artikel 14, para. 3, in Callies/Ruffert (n 104).

¹¹⁶ Jarrass, Artikel 13, para. 9, in Jarrass (n 99).

¹¹⁷ Jarrass, Artikel 14, para. 10, in Jarrass (n 99)

¹¹⁸ See Bernd Justin Jütte, ‘Uneducating copyright: Member States can choose between “full legal certainty” and patchworked licensing schemes for digital and cross-border teaching’ [2019] 41 EIPR 669, instead of creating a clear and simple education exception, the EU legislator opted for an optional carve-out, which Member States can implement in relation to certain type of publications and uses; see on their diverging implementation which raises similar systemic problems: Giulia Priora, Bernd Justin Jütte and Péter Mezei, ‘Copyright and Digital Teaching Exceptions in the EU: Legislative Developments and Implementation Models of Art. 5 CDSM Directive’ [2022] 53 IIC 543.

¹¹⁹ TEU, art. 3(1).

promote *scientific and technological advance*.”¹²⁰ These aims take shape through other, more concrete provisions of the Treaties and the EU’s policies.¹²¹

Although Article 3 TEU is a binding norm, it does not entail a concrete obligation for the EU to act, neither does it create competence.¹²² These objectives “merely lay down a programme” which is to be implemented by the institutions and the Member States.¹²³ Together, the aims set out in the provision should guide the EU’s action, including the passing of legislation.

Their abstract nature has made these rights difficult to define, and the CJEU has not yet had the opportunity to inform the understanding of aims such as sustainability and technological advancement. At international level, sustainability is commonly defined as “meeting the needs of the present whilst ensuring future generations can meet their own needs.”¹²⁴ The European Commission has, however, given shape to some of these aims. As part of the Europe 2020 strategy it has defined “sustainable growth”, as one of its three priorities, as the need to “[promote] a more resource efficient, greener and more competitive economy”.¹²⁵ In its 2016 Communication “Next steps for a sustainable future”, the Commission elaborates that sustainability is based on commitment “to development that meets the needs of the present without compromising the ability of future generations to meet their own needs. A life of dignity for all within the planet’s limits that reconciles economic prosperity and efficiency, peaceful societies, social inclusion and environmental responsibility is at the essence of sustainable development.”¹²⁶ Here it also becomes apparent that sustainability is a broader notion, or objective, that penetrates a multitude of policy areas including “youth unemployment to ageing populations, climate change, pollution, sustainable energy and migration.” More importantly for the

¹²⁰ Emphasis added.

¹²¹ Rudolf Streinz, Artikel 3 EUV, in Rudolf Streinz, EUV/AEUV (3rd edn, Beck 2018), para 1.

¹²² Cf. AG Sharpston, *Opinion 2/15*, EU:C:2016:992, para. 495.

¹²³ CJEU, Case- C-149/96, *Portugal v Council*, EU:C:1999:574, para. 86.

¹²⁴ The so-called Bundtland-definition, based on the homonymous 1987 UN Commioosio (World Commission on Environment and Development (WCED), *Our Common Future*, 1987, Chapter 2, para. 1.). See for a critical discussion and arguing for a wider, more detailed notion of sustainability, van Hees (n 19), 75. The author proposes the following definition: “Sustainable development means stimulating and encouraging economic development (e.g. more jobs, creativity, entrepreneurship and revenue), whilst protecting and improving important aspects (at the global and European level) of nature and society (inter alia natural assets, public health and fundamental rights) for the benefit of present and future generations.”

¹²⁵ Commission, Europe 2020. A strategy for smart, sustainable and inclusive growth, Brussels 3.3.2020, COM(2010) 2020 final, p. 5.

¹²⁶ Commission, Next steps for a sustainable European future. European action for sustainability, Brussels, 22.11.2016, COM(2016) 739 final, p. 1

purpose of this chapter, the Commission also states firmly that “[for] these challenges to become opportunities for new businesses and new jobs, *a strong engagement in research and innovation is needed.*”¹²⁷ The EU’s research policy has already been described briefly above,¹²⁸ and as we have seen, there are strong intersections between sustainable development and research and innovation in a variety of EU documents, also including social elements.¹²⁹

The definition of sustainability and its development in a variety of policy areas, but also its inclusion in the EU’s foreign trade policy, show the way forward to conceive sustainability also as a theme in copyright law. Regular references to research and innovation as requirements and drivers of a sustainable European society necessarily will have to be understood as a mission to examine current intellectual property law, and copyright for that purpose, in the light of the EU’s aims.

From the definition of sustainable development as "meeting the needs of the present whilst ensuring future generations can meet their own needs", we can extract a need to develop a legal framework that safeguards sustainable copyright protection: Copyright protection should foster creative activities and remunerate creators (needs of the present) while making sure that the protection does not prevent access to works as a guaranty of future creativity and that copyright provides enough breathing spaces to allow research and follow-on innovation (needs of the future generations).

While this is a first attempt to develop the idea of a "sustainable copyright", the direction of a development towards a reshaping of copyright norms must be one towards an enabling framework. We posit here that a right to research, anchored in the European fundamental rights canon, could serve to reflect and represent the aims of the Union and provide imperative arguments for a paradigmatic shift in copyright law and policy.

IV. IMPLEMENTING A RIGHT TO RESEARCH TO REMOVE COPYRIGHT BARRIERS

A right to research, to fulfil its essential function, must necessarily possess two dimensions. One that permits access to, and the collection and analysis of information; and information must be understood to include

¹²⁷ Ibid, emphasis added.

¹²⁸ See under 2.1.

¹²⁹ See for example Commission, Energy 2020. A strategy for competitive, sustainable and secure energy, Brussels, 10.11.2010, COM(2010)final, p. 15: “EU researchers and companies need to increase their efforts to remain at the forefront of the booming international market for energy technology and, where it is mutually beneficial, they should step up cooperation with third countries in specific technologies.”, and Commission, State of the Energy Union 2015, Brussels, 18.11.2015 COM(2015) 572 final, p. 13: “Research, innovation (R&I) and competitiveness are paramount to accelerate the EU energy transition and to reap its benefits in terms of jobs and growth that the Energy union can bring.”

information that is contained in works or other subject matter protected by copyright, thus access to copyrighted works and their storage for further research. And another that allows for the relatively uninhibited sharing of research results by the producer of the relevant information (and expression).

The difference to freedom of expression is the purpose-infused special nature of a right to research, in that it carries over the broad scope and of the freedom of arts and sciences into a new ‘container’ right. Broadly construed, the right to education and the freedom of the sciences should be understood to permit researchers to access the information contained in protected subject matter for research purposes. Providing for access rights,¹³⁰ sometimes necessarily in relation to works protected by copyright, such as scientific articles or databases, will often be indispensable to confirm and validate research results.

With a specific subject-matter scope, the right to research would be instrumental in providing arguments and interpretation aids to shape, within specific fields of application, copyright law to be more permissive of sharing research results and to enable researchers to access indispensable information. Such a right to research could indirectly be introduced as a more express limitation to the right to property, or through qualifications in other existing fundamental rights in an effort to recalibrate the relation between existing fundamental rights and with a view to highlight the social and utilitarian function of intellectual property.¹³¹ The new right to research, as a partial expression of existing fundamental rights, but with its own place amongst the catalogue of constitutional guarantees in the European legal order, could therefore also be anchored as an individual norm in the EU Charter, and possibly in the ECHR.

Substantively, a right to research, as we have demonstrated above, is already partially present in EU law, either in existing fundamental rights, or concretely expressed in the norms of copyright law. Of course, a right to research would not be limited in its application to copyright law, although it could be limited in scope to function as a counterweight to the proprietary interests of owners of intellectual property. In any case, for the purposes of this contribution, it is sufficient to frame the right in relation to copyright law.

¹³⁰ In that sense see Geiger (n 4).

¹³¹ See with for three potential solutions Christophe Geiger, ‘Building an Ethical Framework for Intellectual Property in the EU: Time to Revise the Charter of Fundamental Rights’ in Gustavo Ghidini and Valeria Falce (eds), *Reforming Intellectual Property law* (Edward Elgar forthcoming 2022).

First the right to research would support, and give additional justification to the ‘access’ function of copyright. Research requires the intellectual or technological ingestion of information, copyright, as a protective right for expression (and investment for related rights) should not stand in the way of research activities that require access to information. Access to information must be facilitated by enabling researchers to gain access to essential information, but arguably also more general to information that serves research purposes. Elements of paracopyright, such as strict licensing terms and technological protection measures also constitute significant barriers, or chilling effects, to research activities and must be reconsidered in the light of this right to research.

Second, researchers must be able to actively share, as an expression of the ‘dissemination’ side of freedom of expression. Restrictive practices of exclusive publishing practices that prevent researchers from disseminating their own research in the form it has been published must also be rethought. A step in the right direction is the right of researchers to disseminate their research after it has been published and an embargo period has passed,¹³² or, in general, open access policies for publicly funded research.

Third, research must be affordable. Not only does this mean that access to works and other subject matter should not be prohibitively expensive. Conversely, the benefits of increased access and dissemination can be balanced with compensation mechanisms that safeguard the viability of academic communication channels. As we argue below, statutory remuneration systems could alleviate some of the concerns, while reducing the real and transaction costs for researchers.¹³³

These are only three, roughly sketched elements of a right to research in relation to copyright. Other facets must be illuminated, and other fundamental rights will also have to be considered in contributing to the shaping of a right to research.¹³⁴ For example, the interest of commercial research must also be considered in the light of the freedom to conduct a business under Article 16 EUCFR. This particular right that has been shaped by the CJEU in its case-law is, as is the right to property, to be viewed “viewed in the light of the social function of the property and

¹³² See for example §35, para 1 UrhG (German Act on Copyright and Related Rights: “Where the author permits the inclusion of the work in a collection which is published periodically, then, in cases of doubt, the publisher or editor acquires an exclusive right of reproduction, distribution and making available to the public. However, the author may otherwise reproduce, distribute and make available to the public the work upon expiry of one year, unless otherwise agreed.”)

¹³³ Partially critically, especially in relation to TDM against the background of German copyright law: Rainer Kuhlen, ‘UrhWissG – das neue Wissenschaftsurheberrecht bleibt regulierungstechnisch unspezifisch problematisch’ [2017] *Information, Wissenschaft & Praxis* 227.

¹³⁴ Geiger and Jütte (n 14)

activities protected thereunder.”¹³⁵ In particular, access to relevant research data in monopolistic or dominated markets must be considered also against the background of competition law.¹³⁶ The development of the right to research out of the constitutional traditions of the Member States of the EU and, to the extent shown above, further demonstrates the possibility to shape this new fundamental right.¹³⁷

CONCLUSION

To achieve the ambitious goals of the EU’s innovation and sustainability agenda, a conducive research environment is an essential part of any strategy. It has become a necessity in the EU’s efforts to recover for the COVID-19 pandemic and to move to a green, digital and resilient future. A data-driven economy in particular needs a robust and research-friendly copyright regime. Incentivizing research through copyright requires rewards on the one hand, but the removal of barriers to research on the other. It is this second aspect that strongly suggests that monopolies over information and even specific expression are counter-productive for a vibrant European research sector.¹³⁸

A right to research embedded in the European constitutional framework would serve to highlight the importance of research for the European policy space even further. Of course, a right to research, in one or the other formulation, included into European human rights documents will not be able to resolve internal conflicts with other fundamental rights.¹³⁹ Such a right can, however, not only function as a counterweight to maximalist, overprotective copyright policies. In addition, a right to research could complement existing fundamental rights to highlight the social function of copyright,¹⁴⁰ and intellectual property in general, to function as an incentive

¹³⁵ CJEU, Case C-4/73, *Nold KG v Commission*, EU:C:1974:51, para. 14; see Michele Everson and Rui Correia Gonçalves, Art 16, in Peers and others (n 93), para. 16.03-04, 16.18-24, stressing the strong non-discrimination element of the right with a view to establish a competitive marketplace.

¹³⁶ CJEU, Case C-418/01, *IMS Health*, EU:C:2004:257.

¹³⁷ Following a similar approach for a right to cybersecurity in the EU: Vagelis Papakonstantinou, ‘Cybersecurity as *praxis* and as *state*: The EU law path towards acknowledgment of a new right to cybersecurity?’ (2022) 44 *Computer Law & Security Review* accessed 14 June 2022 and Brandon L. Garrett, Laurence Helfer and Jayne C. Huckerby, ‘Closing International Law’s Innocence Gap’ [2021] 95 *Southern California Law Review* 311, for a new right at international level.

¹³⁸ Other intellectual property rights exist to obtain exclusivity for functional research outputs (patents) or business and technological information (trade secrets).

¹³⁹ See for the same problem in international human rights documents, Sharon E. Foster, ‘The Conflict between the Human Right to Education and Copyright’ in Torremans (n 11), 376.

¹⁴⁰ The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author,

to create as well as an incentive, and dare one say, a moral obligation to communicate and make available the results of research in the form of classic scientific outputs such as articles and books, but also in forms of datasets to enable verification and replication of research.¹⁴¹

A ‘right to research’ in a European context will also provide good arguments to improve the cross-border efficiency of existing exceptions as they relate to research as part of an effort to create the ERA. Cross-border accessibility of research outputs and research data can enhance European research collaboration, especially in times of (global) crisis. Here also lies a great potential to export a more collaboration-friendly copyright paradigm into developing and under-developed countries, not only through refraining from imposing inflexible copyright norms through bilateral trade and investment agreements,¹⁴² but also by sending a strong signal with a fundamental right to research. Europe can take a leading role in making access to vital information a right as opposed to a privilege.

More concretely, a constitutionally backed right to research would imply that recent trends in EU copyright law would be emphasized. The constitutionalization of copyright law, supplemented by a right to research, would require consolidating, strengthening and broadening existing research exceptions across the fragmented landscape of the EU copyright acquis. It would also require the removal of possibilities for rightholders to apply contractual limitations on the use and re-use of works protected by copyright for research purposes. Finally, a right to research would require that the second part of the three-step test would have to be interpreted in a

General Comment No. 17, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 35th Sess., U.N. Doc. E/C.12/GC/17 (2006), paras. 22-24, see also the Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications which states in para 10: “Fourth, the right to enjoy the benefits of scientific progress and its applications may create tensions with the intellectual property regime, which is a temporary monopoly with a valuable social function that should be managed in accordance with a common responsibility to prevent the unacceptable prioritization of profit for some over benefit for all.” available at https://www.aaas.org/sites/default/files/VeniceStatement_July2009.pdf, see also more recently ECOSOC, General comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights), paras 58-62 in particular on private scientific research and intellectual property.

¹⁴¹ On the idea that IP rights also generate duties for rightholders, in particular to disseminate copyright protected work, see Geiger (n 5)

¹⁴² Cf. Foster (n 137), 369ff, see also Henning Grosse Ruse-Khan, ‘Access to knowledge under the international copyright regime, the WIPO development agenda and the European Communities’ new external trade and IP policy’ in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009); Christophe Geiger, ‘Bilateral Trade and Investment Agreements and the Harmonisation of Copyright Law at International Level: Lessons to be learned from the TTIP’ in Tatiana-Eleni Synodinou (ed), *Pluralism or Universalism in International Copyright Law* (Kluwer Law International 2019), 279.

more research-friendly way.¹⁴³ If the default position is that access to research results and works necessary to conduct research should be facilitated, the normal exploitation of works and other protected subject matter, understood for the purposes of the second ‘step’ of the test, uses without prior authorization would not collide with such ‘normal exploitation’. The reasonable interests of the rightholders, who would still have potentially economic interest in the use of their protected works, could be recognized by introducing statutory remuneration requirements for uses of protected subject matter for research purposes. The infrastructure for such a scheme is present in Europe and could be based on recent changes in EU copyright law.¹⁴⁴

These are only a few examples of the possibilities to rethink existing principles and mechanisms of copyright law in the light of a right to research. Ultimately, the EU will need to set its priorities right if it wants to develop towards a sustainable future. Copyright-based interests can and should not block research activities which are the ultimate guarantee for the EU to fight the present and future crises, to ensure public health¹⁴⁵ and to

¹⁴³ See for example on prior work on the reinterpretation of the three-step test, as it appears, for example, in Article 5(5) InfoSoc Directive: Christophe Geiger, Reto M. Hilty and Jonathan Griffiths, ‘Declaration: A Balanced Interpretation Of The "Three-Step Test" In Copyright Law’ [2008] 39 IIC 707; Christophe Geiger, Daniel J. Gervais and Martin Senftleben, ‘The Three-Step-Test Revisited: How to Use the Test's Flexibility in national Copyright Law’ [2014] 29 Am. U. Int'l L. Rev. 581; specifically in relation to research activities see Senftleben (n 5), 23-27.

¹⁴⁴ See for example the introduction of pan-European licensing mechanisms, albeit limited to musical works for online uses, in the Collective Rights Management Directive (Council Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L 84/72) and the introduction of extended collective licensing in the CDSM Directive (art. 12), although such legal mechanisms, technically not ‘exceptions and limitations’ but a form of exercise of the exclusive right, arguably do not fall under the “three-step test” (see Christophe Geiger, ‘The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society’, [2007] UNESCO e-Copyright Bulletin, 8).

¹⁴⁵ See in this sense the joint publication by WIPO/WTO/ WHO, *Promoting Access to Medical Technologies and Innovation, Intersections between public health, intellectual property and trade*, 2nd ed., Geneva, 2021, p. 9: “A balanced copyright system that supports the interests of rights holders and allows access to copyright-protected works can support R&D activities and enable the development of digital solutions to support diagnostics and treatment. *Text- and data-mining exceptions have been used in initial research into COVID-19, including for tracking and predicting its spread, and are being used in the search for treatments*” (emphasis added). See also the Statement on Copyright and Proposal of a Waiver from Certain Provisions of the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement for the Prevention, Containment and Treatment of COVID-19 (IP/C/W/669), 22 March 2021, endorsed by 250 organizations and prominent researchers calling for the reduction of copyright barriers to COVID-19 prevention, containment and treatment, available at <http://infojustice.org/archives/43020>: “In too many countries, researchers lack the rights they need to use the most advanced research methodologies,

recover and rise again after the pandemic. The opportunity should not be missed to position research at the highest stage of our legal system, and it is to be hoped that future reforms of the EU treaties introduced following the conference on the future of Europe¹⁴⁶ will include the explicit codification of the right to research in the EU Charter on Fundamental Rights.

such as text and data mining, to help find and develop treatments to COVID-19. Indeed, the virus itself was discovered by a text and data mining research project that would not be lawful in many countries”.

¹⁴⁶ See for the final report: 'Conference on the Future of Europe. Report on the final Outcome' (May 2022), highlighting the importance of research for a sustainable future (Recommendation 9) research but the document also leave changes to the EU Charter subject to unanimity voting (Recommendation 21).