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Conceptualizing A "Right to Research" and Its Implications for Copyright Law: An International and European Perspective

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SYMPOSIUM

CONCEPTUALIZING A “RIGHT TO RESEARCH” AND ITS IMPLICATIONS FOR COPYRIGHT LAW: AN INTERNATIONAL AND EUROPEAN PERSPECTIVE

CHRISTOPHE GEIGER* & BERND JUSTIN JÜTTE**

Copyright, at international, European, and national levels, does not provide a legal framework that prioritizes enabling and incentivizing research using protected works and information to the extent necessary and desirable in a digital, data-driven society in order to build a sustainable ecosystem for innovation and creativity. While small progress has been made, for example with the recent introduction of specific exceptions for research purposes and for text and data mining in certain national legislations as well as in the European Union law, a horizontal approach towards a more research-friendly copyright ecosystem has so far failed to evolve. By revisiting international and European human and fundamental rights instruments as well as the aims and objectives of the European Union, it is possible to distill research as a constitutional and ethical imperative. Conceptualizing a fundamental “Right to Research” and integrating it into a constitutional dialogue provides a convincing argument to rethink copyright towards a research-oriented normative system.

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INTRODUCTION

Whether a global pandemic, regional food shortages and famines, or escalating political conflicts and outright wars, the global problems of the present and the future require a rethinking of the way modern societies manage scarce resources, distribute wealth, and engage with each other. Solutions to present and future challenges necessitate innovative and sustainable approaches, which will require investment in research, but, more importantly, will require free places and spaces to think, develop, and innovate. Freedom to research is key to ensure that future generations can exercise and enjoy the same, or at least similar, opportunities that recent and present generations have enjoyed over the last decades. In other words, ensuring that coming generations can live in dignity and prosperity requires significant efforts at multiple levels to ensure that current societies move toward a more sustainable way of living and benefitting from this planet's resources.

To face the challenges of the present in earnest and with seriousness is an obligation owed to future generations. Solutions for these challenges require investment in research, as well as the removal of its barriers. Many modern research activities, especially research that involves large amounts of data, require access to information, its processing, storage, and analysis.¹ Restricting access to data can create

1. See, e.g., ORG. FOR ECON. CO-OP. & DEV., OECD PRINCIPLES AND GUIDELINES FOR ACCESS TO RESEARCH DATA FROM PUBLIC FUNDING 9 (2007), <https://www.oecd.org/sti/inno/38500813.pdf> ("The power of computers and the

insurmountable barriers to research, especially in the form of property rights over data.² Therefore, conceptualizing a “Right to Research” as a right for individuals, but also as an intergenerational right that creates obligations, is a necessary foundation for a more sustainable future. While such a right can be conceived very broadly, this article illustrates the necessity of such a right to research in copyright law. However, a right to research fully developed in this specific context will inevitably also create implications for other intellectual property rights and expose the tensions between intellectual property law, policy, and human rights,³ but also other fields of the law, such as competition law.

Internet has created new fields of application for not only the results of research, but the *sources* of research: the base material of *research data*. Moreover, research data, in digital form, are increasingly being used in research endeavours beyond the original project for which they were gathered, in other research fields and in industry.”). See generally Abhishek Nagaraj et al., *Improving Data Access Democratizes and Diversifies Science*, 117 PROC. NAT’L ACAD. SCI. 23490 (2020) (underlining the effects of improving access to data to diversify and democratize science); MARTIN SENFTLEBEN, STUDY ON COPYRIGHT AND RELATED RIGHTS AND ACCESS AND REUSE OF DATA (2022) (describing the importance of access to data).

2. For policy considerations on a right for data producers in the EU, see, for example, *Commission Staff Working Document on the Free Flow of Data and Emerging Issues of the European Data Economy*, at 33–36, SWD (2017) 2 final (Jan. 10, 2017), and *Europe 2020: A European Strategy for Smart, Sustainable and Inclusive Growth*, at 5, COM (2010) 2020 final (Mar. 3, 2010) [hereinafter *Europe 2020*]. See also Ivan Stepanov, *Introducing a Property Right Over Data in the EU: The Data Producer’s Right—An Evaluation*, 34 INT’L REV. L., COMPUT. & TECH. 65 (2020), for a critical analysis on such a right. Moreover, events such as the COVID-19 pandemic can make access to information difficult and underline the importance of research-friendly access policies. See generally Marilena Vecco et al., *The Impact of the COVID-19 Pandemic on Creative Industries, Cultural Institutions, Education and Research*, WORLD INTELL. PROP. ORG. (2022), <https://www.wipo.int/meetings/en/2022/info-session-impact-covid-19-copyright-ecosystems.html>.

3. See generally Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 974–76 (2007) [hereinafter Helfer, *Human Rights Framework*] (asserting that intellectual property provisions of human rights law leave critical questions unanswered); LAURENCE R. HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE 503–22 (2011) (analyzing the intersection of human rights and intellectual property from multiple perspectives); RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY (Christophe Geiger ed., 2015); INTELLECTUAL PROPERTY LAW AND HUMAN RIGHTS (Paul L.C. Torremans ed., 4th ed. 2020). See also Ruth L. Okediji, *Does Intellectual Property Need Human Rights?*, 51 INT’L L. & POL. 1 (2018) (arguing that the human rights framework weakens the capacity to use intellectual property law to promote human welfare).

The purpose of copyright is to incentivize creativity that drives cultural and social progress.⁴ This is sometimes difficult to reconcile with copyright's exclusivity paradigm that allows rightsholders to control access to and reuse of copyrighted works by several means, such as a set of exclusive (veto) rights, technological barriers, and other automated protection measures.⁵ Exclusivity as copyright's main paradigm⁶ has resulted in broad interpretations of exclusive rights,⁷ extensions of copyright terms,⁸ and, especially in Europe, a narrow

4. See Christophe Geiger, *Copyright as an Access Right: Securing Cultural Participation Through the Protection of Creators' Interests*, in WHAT IF WE COULD REIMAGINE COPYRIGHT? 73, 74–76 (Rebecca Giblin & Kimberlee Weatherall eds., 2017) [hereinafter Geiger, *Copyright as an Access Right*] (arguing that copyright should be viewed as an “access right” to assure that cultural goods are still available for future innovations); Christophe Geiger, *Copyright and Free Access to Information: For a Fair Balance of Interests in a Globalised World*, 28 EUR. INTELL. PROP. REV. 366, 367 (2006) [hereinafter Geiger, *Copyright and Free Access*] (examining the balancing of interests within copyright and analyzing whether copyright prevents free access to information); Jenny Lynn Sheridan, *Copyright's Knowledge Principle*, 17 VAND. J. ENT. & TECH. L. 39, 49–55 (2014) (contending that the intent of copyright is to promote the progress of knowledge). See also Ruth L. Okediji, *The Limits of International Copyright Exceptions for Developing Countries*, 21 VAND. J. ENT. & TECH. L. 689, 724–35 (2019) (arguing for a rethinking of copyright exceptions at the international level to foster human development).

5. See Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 61–62 (2002) (stating that copyright owners have obtained protective legislation that extends the term of copyright and interferes with the development and dissemination of consumer-friendly copying technologies).

6. See Nicolas Suzor, *Access, Progress, and Fairness: Rethinking Exclusivity in Copyright*, 15 VAND. J. ENT. & TECH. L. 297, 302 (2013).

7. For the EU, see, for example, Case C-5/08, *Infopaq Int'l A/S v. Danske Dagblades Forening (Infopaq I)*, ECLI:EU:2009:465, ¶¶ 30–51 (July 16, 2009), for the interpretation of the reproduction right in the EU by the Court of Justice of the European Union (CJEU), and see generally João Pedro Quintais, *Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public*, 21 J. WORLD INTELL. PROP. 385 (2018), for a critical summary of the constantly expanding construction of the right to communication to the public.

8. In the United States, the term of copyright was extended in 1998 to 70 years *post mortem auctoris*. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998); see generally Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123 (2002) (evaluating the constitutionality of the CTEA). In the EU, Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights, 2006 O.J. (L 372) 12, harmonizes the term of protection for literary and artistic works, which the

interpretation of exceptions and limitations. To counter these tendencies, reconceptualizing copyright in relation to research activities can provide powerful arguments for substantive changes in copyright law that reflect research as a paradigm that complements, or possibly replaces, the exclusivity paradigm.⁹

Therefore, a right to research can create constitutional imperatives for a research-enabling copyright framework to achieve policy goals of sustainability and intergenerational justice. Such a right has its roots in a balanced reading of the relevant international human rights instruments. However, like all intellectual property rights, copyright is territorial in nature and is therefore dressed in national customs and traditions.¹⁰ For that reason, any proposed reform of copyright must have regard to regional (even national) codifications of fundamental rights, even if they tend to be inspired by the universality of human rights.¹¹ For instance, in the European Union (EU), a developed and

directive sets at 70 years after the death of the authors, *id.* arts. 1–2. This extends the term of protection 20 years beyond that required under Article 7 of the Berne Convention. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986). Widespread opposition to a longer term of protection, but also criticism as to the current long term of protection, was revealed by a 2013 Consultation on the Review of EU Copyright Rules. *Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules*, COM (2014).

9. For a critical analysis of the exclusivity paradigm in copyright law, see generally Christophe Geiger, *Promoting Creativity Through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law*, 12 VAND. J. ENT. & TECH. L. 515 (2020).

10. See Okediji, *supra* note 4, at 706 (explaining that transplanting an internationally designed copyright regime to different societies is difficult because societies produce different conceptions of “authorship” and “rights”).

11. See, e.g., Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, ECLI:EU:C:2004:614, ¶ 33 (Oct. 14, 2004) (“It should be recalled in that context that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect.”). The CJEU recognizes the special status of human dignity in the German constitution, *id.* ¶ 34, which is, however, a value shared by all the Member States of the European Union. However, the special status of human dignity in the German constitutional order justifies a derogation from the freedom to provide services.

highly integrated regional constitutional order, it is already possible to trace the contours of a right to research in EU law and policy.¹²

This article aims to conceptualize and sketch a right to research and to position it as an argument and a structural element in a constitutional dialogue that will lead to a rethinking of the balance within copyright law. Currently, copyright rules create barriers to research activities, especially in data-driven, digital societies and economies where access to information for research purposes is essential.¹³ The wide reach of copyright makes lawful access to such information difficult, either because of the gatekeeper function served by the holder of exclusive rights, or because of high transaction costs.

While international human rights instruments suggest a balanced approach to scientific progress and the protection of the rights of authors, modern copyright law does not reflect this delicate equilibrium. Therefore, we suggest that copyright law must be adapted to take into account that research is among the rationales for providing copyright protection.

For that purpose, it is necessary, even indispensable, to consider the constitutional foundations of European copyright law against the background of international human rights obligations and commitments of the EU and its Member States. From these sources, we set out to distill the essence of a European right to research and demonstrate, to the extent possible, how copyright should or must be (re)interpreted and normatively adapted to reflect the rights of researchers and society at large to access and use information that is hidden behind the walls of copyright's exclusive rights.

First, we lay out the relevant international and European human rights and fundamental rights framework that contains, as we argue, the elements of a right to research. We will briefly examine fundamental rights in the EU as part of a more complex normative and policy framework. Having laid the foundation for our analysis, we discuss in detail the fundamental rights that contain elements that, taken together and developed further, form our concept of a right to research. We then argue why and how this "new" individual right can

12. Geiger, *supra* note 9, at 542 (discussing how some EU Member States have achieved limitation-based remuneration rights through statutory licenses).

13. *Cf.* SENFTLEBEN, *supra* note 1, at 15 (identifying a variety of copyright barriers in EU copyright law).

and should be integrated into existing fundamental rights instruments. In a final step, we demonstrate how a fundamental right to research should be relied on to argue for changes in existing copyright rules to create a robust and innovation-friendly copyright framework that serves to tackle the challenges of the present and future towards a more sustainable European and global society, before summarizing and concluding.

I. THE FUNDAMENTAL AND HUMAN RIGHTS FOUNDATIONS FOR THE RIGHT TO RESEARCH

A right to research that secures access to works protected by copyright for research purposes is not expressly contained in international human rights documents or the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. In this section, we highlight the relevant provisions of international human rights law that refer to the protection of authors in a specific systematic context. This analysis suggests that the international human rights framework does not mandate restrictive national copyright laws that hinder research activities. Furthermore, we examine the European fundamental rights system and demonstrate that the elements and contours of a right to research are already present therein. Read together, several provisions of this European fundamental rights system provide a solid foundation for a right to research that can, even must, inspire a research-friendly reform of copyright's central elements. Moreover, we posit that identifying and expressing the existence of a right to research, which we subsequently develop, is a constitutional imperative against the background of the aims and objectives of the EU. We also argue that for this right, which exists in a variety of isolated provisions, to take full effect, the right requires express recognition and pronouncement as an independent right in the relevant human rights instruments, or at least as a right that is expressly integrated into existing constitutional guarantees.

A. A FUNDAMENTAL RIGHT TO RESEARCH ROOTED IN INTERNATIONAL HUMAN RIGHTS LAW

International human rights law contains important indications as to how the interests of authors should systematically interact with access to the benefits of science, artistic creation, or any other creative

activity for that purpose.¹⁴ In this section, we examine the relevant international human rights instruments which contain references and guidance for the interaction between the rights of authors and the rights of users of protected works. We will illustrate that the international human rights framework does not constitute a barrier to a more research-friendly copyright system, but instead suggests a balanced approach that protects authors only for specific purposes linked with the development of science and culture, which is closely connected to research. In fact, we argue that international human rights already include the seeds of a research-oriented copyright system.

1. *Freedom of Expression and Information*

The right to freedom of expression has an extremely broad scope, at the international as well as the European level. While its protection is fairly well developed in relation to journalism and media,¹⁵ as well as political participation,¹⁶ its relevance for research outside of these

14. See Geiger, *supra* note 9, at 525–26 (describing the function-oriented point of view where exploitation rights and copyright limitations have the same goal of promoting creativity).

15. In annual reports to the UN General Assembly and in statements delivered to the UN Human Rights Council, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression regularly comments on the situation of journalists in a variety of contexts. See, e.g., Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/HRC/20/17 (June 4, 2012); Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/HRC/14/23 (Apr. 20, 2010); Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/HRC/11/4 (Apr. 30, 2009).

16. See, e.g., Off. of the U.N. High Comm'r for Hum. Rts., *Draft Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs*, U.N. Doc. A/HRC/39/28 (July 20, 2018) (providing a set of orientations for States on the effective implementation of the right to participate in public affairs).

categories¹⁷ remains largely underexplored.¹⁸ The UN Human Rights Committee's 2022 General Comment No. 34 mentions "researchers" only once in relation to treason laws.¹⁹ It is incompatible with Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR) to invoke laws "to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information," or to include within the scope of such laws information "relating to the commercial sector, banking and scientific progress."²⁰ A 2013 report of the UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion on the right to access to information also fails to mention research activities as a privileged area in which freedom of expression should receive special consideration.²¹

Researchers and research activities enjoy some privileges, in the form of an elevated level of protection as compared to "ordinary" people. The General Comment privileges researchers only in relation to the dissemination of information.²² However, access to certain information is also necessary to safeguard efficient and unobstructed research. The General Comment discusses a right to access

17. In fact, it can be argued that journalists are a category of researchers, as media services perform research activities when collecting information which they use themselves and when using this information to inform the public.

18. Only one of the relevant Special Rapporteur reports dealt expressly with academic freedom. See David Kaye, *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 49, U.N. Doc. A/75/261 (July 28, 2020) (referring to intellectual property as a potential limitation for academics to cooperate globally).

19. Hum. Rts. Comm., *General Comment No. 34, Article 19: Freedom of Opinion and Expression*, ¶ 30, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) [hereinafter *General Comment No. 34*] (referencing International Covenant on Civil and Political Rights, art. 19(3), Dec. 16, 1966, 999 U.N.T.S. 14668 (entered into force Mar. 23, 1976) [hereinafter ICCPR]) (warning that laws "relating to national security" should be in strict compliance with Article 19(3) of the ICCPR, which determines the conditions under which restrictions to Article 19 are permitted).

20. ICCPR, *supra* note 19, art. 19(3).

21. Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/68/362 (Sept. 4, 2013).

22. *General Comment No. 34, supra* note 19, ¶ 30.

information held by public bodies, which derives directly from Article 19(2) of the ICCPR.²³ In combination with Article 25 of the ICCPR, which grants certain participatory rights in democratic processes, the press and other media enjoy a right to access information on public affairs, inform critical debate, and enable citizen engagement.²⁴ Not as a right but rather as a recommendation, the General Comment suggests that Governments should make information in the public interest available in the public domain.²⁵ This could be understood to require that information of public interest should not enjoy copyright protection in the first place and that intellectual property law should not be used to grant a monopolistic position that restricts access to or suppresses information. In the absence of open accessibility, mechanisms facilitating access to information should be put in place.²⁶

Missing from the current interpretation is a right to access information for research purposes held and controlled by private parties. Privileges similar to those enjoyed by journalists would help to lay a stronger human rights foundation for researchers to access and work with information. The necessity to extend such privileges arises from the growing urgency at the global level to support research activities that are indispensable to sustainably develop solutions that are necessary to realize other fundamental rights and goals of the international community.

2. *The Right to Share in Scientific Advancement and its Benefits and the Authors' Moral and Material Interests*

The "right to science,"²⁷ referring to "the right to share in scientific advancement and its benefits," dates back to the 1948 Universal Declaration of Human Rights (UDHR)²⁸ and has been re-elaborated in the 1966 International Covenant on Economic, Social and Cultural

23. *Id.* ¶ 18 (citing ICCPR, *supra* note 19, art. 19(2)).

24. *Id.* (citing ICCPR, *supra* note 19, art. 25).

25. *Id.* ¶ 19.

26. *See id.*

27. For an overview of the "right to science," see generally Anna-Maria Hubert, *The Human Right to Science and Its Relationship to International Environmental Law*, 31 EUR. J. INT'L L. 625, 628–29 (2020); AURORA PLOMER, PATENTS, HUMAN RIGHTS AND ACCESS TO SCIENCE, 54–117 (2015).

28. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

Rights (ICESCR).²⁹ However, it has only attracted increased scholarly attention over the last three decades,³⁰ and its realization is lagging behind its ambitious scope.³¹ The right to share in the benefits of scientific advancement is rooted in the idea that science and its discoveries can advance humanity and create benefits for society and individual wellbeing.³² However, its precise scope has remained obscure and has been neglected by academic commentators for a long time.³³ A proper debate on the contours of this right only began after

29. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 14531 [hereinafter ICESCR].

30. See, e.g., Audrey R. Chapman, *Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Application*, 8 J. HUM. RTS. 1 (2009); Klaus D. Beiter et al., *Yearning to Belong: Finding a “Home” for the Right to Academic Freedoms in the U.N. Human Rights Covenants*, 11 INTERCULTURAL HUM. RTS. L. REV. 107 (2016) [hereinafter Beiter et al., *Yearning to Belong*]; Klaus D. Beiter, *Where Have All the Academic Freedoms Gone? And What Is ‘Adequate for Science’? The Right to Enjoy the Benefits of Scientific Progress and Its Applications*, 52 ISR. L. REV. 233 (2019) [hereinafter Beiter, *Where Have All the Academic Freedoms Gone?*]; Sebastian Porsdam Mann et al., “*Sleeping Beauty*”: *The Right to Science as a Global Ethical Discourse*, 42 HUM. RTS. Q. 332 (2020); Effy Vayena & John Tasioulas, “*We the Scientists*”: *A Human Right to Citizen Science*, 28 PHIL. & TECH. 479 (2015); see also Helfer, *Human Rights Framework*, *supra* note 3, at 975–77, 987–1020 (providing an intellectual property perspective); Hans Morten Haugen, *General Comment No. 17 on “Authors’ Rights,”* 10 J. WORLD INTEL. PROP. 53 (2007) (on the right of authors); Christophe Geiger, *Introduction, in INTELLECTUAL PROPERTY AND ACCESS TO SCIENCE AND CULTURE: CONVERGENCE OR CONFLICT?* 9, 11 (Christophe Geiger ed., 2016) (on the interface with intellectual property).

31. Cf. Porsdam Mann et al., *supra* note 30, at 340 (quoting *Right to Science*, AM. ASS’N FOR THE ADVANCEMENT OF SCI., <https://www.aaas.org/article15>) (“To date, however, . . . ‘governments have largely ignored their Article 15 obligations and neither the human rights nor the scientific communities have brought their skills and influential voices to bear on the promotion and application of this right in practice.’”).

32. Cf. Chapman, *supra* note 30, at 2 (“Traditionally science has been viewed as an area of study or research dedicated to seeking knowledge or truth about the world. More recently, science . . . has been identified as an instrument to stimulate economic growth or to promote other national goals.”); Jeffrey H. Toney et al., *Science and Human Rights: A Bridge Toward Humanity*, 32 HUM. RTS. Q. 1008, 1009–10 (2010) (providing examples of how researchers have applied scientific methods to solve certain human rights problems).

33. Cf. Chapman, *supra* note 30, at 1 (stating that the majority of human rights advocates, governments, and international human rights bodies appear to be oblivious to the existence of the right to science); Porsdam Mann et al., *supra* note 30, at 344 (conducting a systematic review of the extant literature on the right to science).

the 2005 General Comment No. 17 on “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”³⁴ and the 2009 Venice Statement on “The Right to Enjoy the Benefits of Scientific Progress and its Applications.”³⁵

The UDHR states in the first paragraph of Article 27 that “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”³⁶ The second paragraph continues by providing that “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”³⁷ The two statements can be read to be contradictory, the first guaranteeing free access to productions of the cultural, scientific, and artistic domain, and the second guaranteeing the authors of these productions rewards in terms of protection and remuneration for their efforts, and effective control over their use.³⁸ This seeming contradiction stems from a contemporary understanding of intellectual property rights as exclusive rights that grant monopolistic positions in relation to cultural and scientific outputs.³⁹ Instead, intellectual property rights can also be seen as a “balanced framework” that reconciles copyright’s natural law and utilitarian foundations.⁴⁰

34. Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 17, 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 (article 15, paragraph 1 (c), of the Covenant)*, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006) [hereinafter *General Comment No. 17*].

35. U.N. Educ., Sci., & Cultural Org. [UNESCO], *The Right to Enjoy the Benefits of Scientific Progress and its Applications*, ¶ 10 (July 16–17, 2009) [hereinafter *Venice Statement*].

36. UDHR, *supra* note 28, art. 27 ¶ 1.

37. *Id.* ¶ 2.

38. *See id.* ¶¶ 1–2.

39. *See, e.g.*, Suzor, *supra* note 6, at 322–24 (“Fundamentally, the incentives-access paradigm assumes that creative culture is zero sum: any benefit granted to users necessarily comes at the expense of authors and producers and, therefore, also at the expense of new creative expression.”).

40. Christophe Geiger, *Reconceptualizing the Constitutional Dimension of Intellectual Property—An Update*, in INTELLECTUAL PROPERTY LAW AND HUMAN RIGHTS, *supra* note 3, at 117, 130–33.

The ICESCR includes a similar commitment made by its signatories to guarantee three separate rights. Deconstructing the first paragraph of Article 27 of the UDHR, the ICESCR first recognizes the right “[t]o take part in cultural life,”⁴¹ second, the right “[t]o enjoy the benefits of scientific progress and its applications,”⁴² and third, the right “[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”⁴³ These broad notions are complemented with more concrete instructions for the State parties to realize these rights.⁴⁴ While still very general, these instructions set out aims that must be achieved at a national level and, implicitly, at an international level. According to the second, third, and fourth paragraphs, State parties must ensure that they are taking the necessary steps to conserve, develop and diffuse culture and science,⁴⁵ that they “respect the freedom indispensable for scientific research and creative activity,”⁴⁶ and that they recognize, encourage, and develop international contacts and co-operation in science and culture.⁴⁷

Intellectual property is regularly cited as a potential hindrance to the realization of the “right to science.”⁴⁸ The proliferation of restrictive intellectual property norms, most prominently by the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),⁴⁹ has contributed to a perception of intellectual property

41. ICESCR, *supra* note 29, art. 15(1)(a).

42. *Id.* art. 15(1)(b).

43. *Id.* art. 15(1)(c). *See generally* Beiter et al., *Yearning to Belong*, *supra* note 30, at 163–69 (discussing how Article 15 of the ICESCR protects “cultural rights”).

44. ICESCR, *supra* note 29, art. 15(1).

45. *Id.* art. 15(2).

46. *Id.* art. 15(3).

47. *Id.* art. 15(4).

48. *See, e.g.*, Chapman, *supra* note 30, at 28–29 (suggesting that intellectual property regimes constitute a potential barrier to the encouragement and development of international contacts and cooperation in the scientific field in conflict with Article 15(4) of ICESCR); Vayena & Tasioulas, *supra* note 30, at 483–84 (discussing how the expansion of intellectual property entitlements has adversely impacted the rights of individuals to share in the public good of scientific knowledge).

49. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]. *See* Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *The Right to Enjoy the Benefits*

as a monopolistic system.⁵⁰

To ensure the realization of these rights, to respect them, and to recognize the benefits of international cooperation, one must regard the other fundamental rights included in both instruments. This might be one of the reasons why the “right to science” has largely been neglected until recently. There are, indeed, other fundamental rights that are indispensable for building a framework for various facets of the “right to science.”⁵¹ These rights include the freedom of thought,⁵² expression,⁵³ association,⁵⁴ to move freely across borders,⁵⁵ and the right to academic freedom.⁵⁶ Limitations on these rights, and others,

of Scientific Progress and its Applications, ¶ 56, U.N. Doc. A/HRC/20/26 (May 14, 2012) (“Concern has been widely expressed about the conflict between the right to science and intellectual property rights, in particular since the adoption of the [TRIPS Agreement]. Bilateral and/or regional trade and investment agreements containing ‘TRIPS plus’ provisions or restricting TRIPS flexibilities can also pose problems. The potential of intellectual property regimes to obstruct new technological solutions to critical human problems such as food, water, health, chemical safety, energy and climate change requires attention.”).

50. However, it has been stressed that the TRIPS Agreement itself contains express objectives that make intellectual property protection subject to the condition that they “contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of the producers and users of technological knowledge,” TRIPS Agreement, *supra* note 49, art. 7, and that WTO members can adopt measures to “protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development,” *id.* art. 8(1). See Christophe Geiger & Luc Desautettes-Barbero, *The Revitalisation of the Object and Purpose of the TRIPS Agreement: The Plain Packaging Reports and the Awakening of the TRIPS Flexibility Clauses*, in *GLOBAL INTELLECTUAL PROPERTY PROTECTION AND NEW CONSTITUTIONALISM: HEDGING EXCLUSIVE RIGHTS*, 267 (Jonathan Griffiths & Tuomas Mylly eds., 2021). Abuses of intellectual property rights may be addressed by “[a]ppropriate measures” to ensure the “international transfer of technology.” TRIPS Agreement, *supra* note 49, art. 8(2); *cf.* Myra Tawfik, *International Copyright Law, Access to Knowledge, and Social Justice*, in *MOBILITIES, KNOWLEDGE, AND SOCIAL JUSTICE* 300, 315 (Suzan Ilcan ed., 2013) (suggesting that Articles 7–8 of the TRIPS Agreement implicitly recognize that the private interests of rightsholders are not absolute).

51. See Shaheed, *supra* note 49, ¶ 18 (linking the right to science with the right to participate in cultural life and other human rights).

52. UDHR, *supra* note 28, art. 18.

53. ICCPR, *supra* note 19, art. 19(2).

54. *Id.* art. 23; UDHR, *supra* note 28, art. 20.

55. ICCPR, *supra* note 19, art. 12; UDHR, *supra* note 28, art. 13.

56. This right is not formally included in either the UDHR or the ICESCR, or

would effectively constitute limitations on the rights listed in Article 27 of the UDHR and Article 15(1) of the ICESCR.⁵⁷ However, the right to benefit from the progress of science and technology is also a condition for the realization and enjoyment of these other rights.⁵⁸

In both instruments, the two rights are separated in different paragraphs or subparagraphs, but they appear in a specific context.⁵⁹ This gives reason to argue that both rights are systematically linked and therefore interrelated and complementary,⁶⁰ which is to say that neither of them is absolute nor that they necessarily limit each other. Therefore, the realization of both rights creates tensions that Article 15 of the ICESCR or Article 27 of the UDHR have not resolved.⁶¹

any other international human rights instrument for that purpose. However, there exists a growing body of literature that conceptualizes this right. *E.g.*, Beiter, *Where Have All the Academic Freedoms Gone?*, *supra* note 30; Beiter et al., *Yearning to Belong*, *supra* note 30.

57. Chapman, *supra* note 30, at 17.

58. See Porsdam Mann et al., *supra* note 30, at 346–47; Peter K. Yu, *Challenges to the Development of a Human Rights Framework for Intellectual Property*, in INTELLECTUAL PROPERTY LAW AND HUMAN RIGHTS, *supra* note 3, at 89, 116.

59. On the drafting history for Article 27 of the UDHR, see Aurora Plomer, *The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science*, 35 HUM. RTS. Q. 143, 160–75 (2013). Reviewing the negotiating positions of the different state parties, Plomer concludes that the rights granted to individuals under Article 27(2) are meant to protect “personal, creative abilities, and capacities of individual human beings,” *id.* at 175, and can therefore “only be claimed by, individual human beings rather than entities such as commercial organizations or limited companies,” *id.* This also means that these rights are not necessarily protected by intellectual property rights, and that the guarantee under Article 27(2) is not “coextensive” with the protection provided by intellectual property. More importantly, the individual rights granted under the provisions “should not cut across the public good of facilitating access to knowledge, culture, and science, whether for liberal, utilitarian, or communitarian reasons,” *id.*, and that “national and international [intellectual property] and patent laws may certainly, and indeed, should be deployed to the service of human rights,” *id.* See also Porsdam Mann et al., *supra* note 30, at 335–39 (discussing the drafting history of Article 27 of the UDHR and Article 15 of the ICESCR).

60. See, e.g., Christophe Geiger, *Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY, *supra* note 3, at 661; see also Chapman, *supra* note 30, at 5 (tracing the development of the negotiations that led to the ultimate text of Article 25 of the UDHR and Article 15(1) of the ICESCR).

61. See Porsdam Mann et al., *supra* note 30, at 339 (“[B]y raising both the right to ‘benefit from the advances of science’ and the right to ‘material and moral

Most commentators have lamented the failure to resolve this conflict with concrete guidance.⁶² We will examine both rights in turn to extract their respective essences and relate them to copyright.

a. The Right to Share in Scientific Advancement and its Benefits

While Article 27 of the UDHR exhausts itself in “juxtaposing” a collective right of participation and enjoyment with an individual right to protection of moral and material interests, Article 15 of the ICESCR provides more detailed (though still rather abstract) instructions on how this imminent normative conflict should be resolved.⁶³ Furthermore, considering Article 15 in its context, the reading of other provisions of the ICESCR promotes an interpretation of Article 15(b) that suggests that the results of scientific advancement should be shared among the people of the world.⁶⁴ Article 2(1) of the ICESCR obliges signatories to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in

interests’ resulting from one’s work to the level of human rights, the drafters set up a tension that must be resolved if [A]rticle 15 is to be made effective.”). See also HELFER & AUSTIN, *supra* note 3, at 234–35 (describing the efforts made to determine the scope of ICESCR Article 15(1)); Venice Statement, *supra* note 35, ¶ 10 (recognizing that the right to enjoy the benefits of scientific progress under UDHR Article 27 and ICESCR Article 15(1)(b) may create tensions with the intellectual property regime).

62. See HELFER & AUSTIN, *supra* note 3, at 238 (stating that the Venice Statement offers no concrete guidance as to how the tensions are to be negotiated in the contemporary realpolitik of international and domestic legal regimes); Helfer, *Human Rights Framework*, *supra* note 3, at 976 (“Without elaboration, however, these textual provisions provide only a faint outline of how to develop human rights-compliant mechanisms to promote creativity and innovation. They also invite governments and activists on both sides of the intellectual property divide to use the rhetoric of human rights to bolster arguments for or against revising intellectual property protection standards in treaties and in national laws. Without greater normative clarity, however, such ‘rights talk’ risks creating a legal environment in which every claim (and therefore no claim) enjoys the distinctive protections that attach to human rights.”); Haugen, *supra* note 30, at 66 (asserting that *General Comment No. 17* does not help distinguish between scientific, literary, and artistic production that might qualify for human rights protection in accordance with ICESCR Article 15(1)(c), and intellectual efforts that qualify for intellectual property protection, but are outside of the human rights realm).

63. See ICESCR, *supra* note 29, art. 15(2)–(4).

64. *Id.* art. 15(b).

the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”⁶⁵ The parties to the Covenant agree to provide each other, in order to achieve the rights set out therein, with technical assistance.⁶⁶ This agreement for assistance—in the form of sharing expertise, knowledge, processes, and equipment—necessarily requires the sharing of information, much of which will be protected by copyright.

In terms of its substance, the aforementioned right refers to “scientific advancement” and its “benefits,” which both define and potentially qualify the right. However, neither “scientific advancement” nor “benefits” have been authoritatively defined. A traditional post-war understanding of scientific advancement, which has influenced the drafting of both provisions, conceptualizes science as a progressive undertaking, distinguishing it from arts and culture through an objective and determinative nature.⁶⁷ In this understanding, the notion is characterized by “a collective enterprise of researchers in successive generations” which produce “methods of science . . . that are used to create scientific theories, which are then tested and evaluated enabling them to become the basis for more new knowledge.”⁶⁸ This notion is fundamentally noneconomic, as opposed to a technological understanding of the term, which, as a more recent phenomenon, conceptualizes science as a profit-oriented enterprise.⁶⁹ Depending on the understanding of “science,” the benefits to be shared—arguably including scientific results and other information that generate further benefits with certainty—must include such scientific findings and other technological advancements that are produced by academic research but should also be understood to include research in specific areas such as health, agriculture, and areas that generally pertain to rights foreseen in the ICESCR.

65. *Id.* art. 2(1). *Cf.* Chapman, *supra* note 30, at 4 (listing other provisions of ICESCR that identify the need for international assistance to achieve the rights enumerated in the Covenant).

66. ICESCR, *supra* note 29, art. 23. The rights referred to include the right to be free from hunger, *id.* art. 11(2), the right to “improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge,” *id.*, and “enjoyment of the highest attainable standard of physical and mental health,” *id.* art. 12(1).

67. *See* Chapman, *supra* note 30, at 6.

68. *Id.* at 7.

69. *See id.* at 8–9.

The notion of “benefits,” read together with that of scientific advancements, supports a broad understanding of the term. Eventually, whether discoveries of a scientific or technological nature have been made by profit-oriented enterprises or publicly funded research institutions is not relevant to the improvement of living conditions, human health, and the eradication of hunger in the world. It is unclear, however, whether the sharing of benefits relates to the concrete outcomes of scientific progress, or whether it also has a participatory dimension.⁷⁰ The latter option would mean that not only would the fruits of scientific progress have to be shared among the people of the world, but that science would also have to be a globally cooperative and inclusive process, including the sharing of scientific resources and information.

The “right to science” also has a participatory dimension, if examined through a wider human rights lens. Access to science, to research findings and studies, particularly in digital form, is necessary for participatory decision-making and participation in democratic processes in general. Intellectual property and copyright, by their very nature, constitute a barrier to the realization of this facet of the right to *access* science.⁷¹ Such a broad reading is supported by Article 15(2) through (4) of the ICESCR, which requires the contracting parties to take the necessary steps “to achieve the full realization of this right” including “those necessary for the conservation, the development and the diffusion of science and culture”;⁷² “to respect the freedom indispensable for scientific research and creative activity”;⁷³ and to “recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.”⁷⁴ To realize and guarantee these freedoms, it is necessary to share and communicate information.

70. *See id.* at 9–10.

71. *Cf.* Porsdam Mann et al., *supra* note 30, at 342–44 (examining the right to open-access science and its implications for human rights); Chapman, *supra* note 30, 15–16 (identifying challenges to achieving public access to science and technology). *See generally* Laurence R. Helfer, *Mapping the Interface Between Human Rights and Intellectual Property*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY, *supra* note 3, at 6, 12 (discussing the conflict between intellectual property and human rights).

72. ICESCR, *supra* note 29, art. 15(2).

73. *Id.* art. 15(3).

74. *Id.* art. 15(4); *cf.* Chapman, *supra* note 30, at 16–17.

While the right to share in scientific advancement and its benefits is not absolute, it is essential for its realization to enable researchers to inform themselves and to collect and process information—in other words, to research. The Venice Statement clearly states that intellectual property should neither hinder the advancement of science, nor the enjoyment of the benefits of science.⁷⁵

b. The Author's Right to Protection of the Moral and Material Interests Resulting from any Scientific, Literary, or Artistic Production

One potential limitation to the broad right of Article 15(b) of the ICESCR is its neighbor in Article 15(c).⁷⁶ The potentially limiting effect of this provision is better expressed in the Revised Recommendation on Science and Scientific Researchers.⁷⁷ The Recommendation recognizes the “significant value of science as a common good” and “that open communication of the results, hypotheses and opinions—as suggested by the phrase ‘academic freedom,’—lies at the very heart of the scientific process.”⁷⁸ It calls on Member States to “encourage and facilitate access to knowledge, including open access,” while at the same time demanding “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.”⁷⁹

In its 2001 Statement on Human Rights and Intellectual Property, the UN Committee on Economic, Social and Cultural Rights stated with concern that the protection provided for intellectual property at the national level is not necessarily congruent with that required under Article 15(1)(c) of the ICESCR.⁸⁰ The Committee, however, stressed

75. See Venice Statement, *supra* note 35, ¶ 10; see also HELFER & AUSTIN, *supra* note 3, at 136–37; *cf.* Chapman, *supra* note 30, at 14.

76. See ICESCR, *supra* note 29, art. 15(b)–(c).

77. UNESCO, 39th General Conference Records, Annex II, at 117, 39/C RESOLUTIONS (Nov. 14, 2017).

78. *Id.*

79. *Id.* ¶¶ 36–37, at 123.

80. Comm. on Econ., Soc. & Cultural Rts., Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, ¶¶ 17–19, U.N. Doc. E/C.12/2001/15 (Dec. 14, 2001) [hereinafter Human Rights and Intellectual Property 2001]; see Yu, *supra* note 58, at 90–91; *cf.*

“that any intellectual property regime that makes it more difficult for a State party to comply with its core obligations in relation to health, food, education, especially, or any other right set out in the Covenant, is inconsistent with the legally binding obligations of the State party.”⁸¹ According to the Committee, State parties should ensure that their intellectual property systems do not stand in the way of, but rather facilitate international cultural and scientific cooperation,⁸² and that State parties should strive to achieve a balance between the “concurrent” requirements of Article 15(1)(a) and (b) on the one side, and 15(1)(c) on the other.⁸³ The then Special Rapporteur in the field of cultural rights, Farida Shaheed, even stated that “[t]he rights of authors protected by human rights instruments are not to be equated with ‘intellectual property rights,’” but that both could be limited to ensure the protection of other rights.⁸⁴ Referring to the Venice Statement, she highlighted intellectual property’s social function and that monopolies granted under intellectual property laws should be managed responsibly.⁸⁵

In General Comment No. 17, the Committee established five core obligations that State parties incur “to ensure the satisfaction of minimum essential [level]” of protection required under Article

Chapman, *supra* note 30, at 28 (explaining that states’ obligations under the TRIPS Agreement conflict with the terms of Article 15).

81. Human Rights and Intellectual Property 2001, *supra* note 80, ¶ 12.

82. *Id.* ¶ 15.

83. *Id.* ¶ 17.

84. Shaheed, *supra* note 49, ¶ 57. For more information on the report, see generally Farida Shaheed, *Introductory Remarks by the Special Rapporteur, in INTELLECTUAL PROPERTY AND ACCESS TO SCIENCE AND CULTURE: CONVERGENCE OR CONFLICT?*, *supra* note 30, at 19; Mylène Bidault, *Intellectual Property Policies and the Right to Science and Culture: The Work of the Special Rapporteur in Context, in INTELLECTUAL PROPERTY AND ACCESS TO SCIENCE AND CULTURE: CONVERGENCE OR CONFLICT?*, *supra* note 30, at 21; Lea Shaver, *Intellectual Property and the Right to Science and Culture: The Reports of the Special Rapporteur in the Field of Cultural Rights, in INTELLECTUAL PROPERTY AND ACCESS TO SCIENCE AND CULTURE: CONVERGENCE OR CONFLICT?*, *supra* note 30, at 30.

85. Shaheed, *supra* note 49, ¶ 57. Paragraph 10 of the Venice Statement, *supra* note 35, states that “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.”

15(1)(c) of the ICESCR.⁸⁶ The relevant core obligations are that State parties are required to “protect the rights of authors to be recognized as the creators of their scientific, literary and artistic productions and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, their productions that would be prejudicial to their honour or reputation,” and to “respect and protect the basic material interests of authors resulting from their scientific, literary or artistic productions, which are necessary to enable those authors to enjoy an adequate standard of living,” and in general to “strike an adequate balance between the effective protection of the moral and material interests of authors and States parties’ obligations in relation to the rights to food, health and education, as well as the rights to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right recognized in the Covenant.”⁸⁷

It is notable in the Comment that the moral rights of authors precede the guarantee that authors must be able to enjoy an adequate standard of living.⁸⁸ Modern copyright laws—certainly those in developed countries where systematic structure and standards of protection exist—go beyond these minimum requirements, which casts doubt on the appropriateness of the balance struck by national legislators.⁸⁹ Some scholars suggest that modern intellectual property laws provide a level of protection that goes beyond that required by Article 15 of the ICESCR, but that this provision could be of assistance in finding a new balance.⁹⁰ It becomes apparent, however, that international human rights instruments do not support a narrow reading of the right of authors. Rather, these instruments make the protection granted under copyright law conditional on, or at least complementary to, the enjoyment, which can only mean access to the expression and

86. *General Comment No. 17, supra* note 34, ¶ 39 (basing these core obligations on the standards established in Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, ¶ 10, U.N. Doc. E/1991/23 (Dec. 14, 1990)).

87. *Id.* ¶ 39(a)–(e).

88. *See id.*

89. *See* 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)*, 10 HUM. RTS. L. REV. 765, 775 (2010).

90. *Id.*

information of works protected by copyright.⁹¹

Enabling citizens to enjoy the benefits of science, or even to enable citizens to participate actively in science, requires access to relevant information in the same way that participation in democratic processes requires access to information in order to form and develop opinions. Access to science and its products can also have spill-over effects into other areas of civic engagement and can create convective effects.⁹² Therefore, access to science is a precondition not only for scientific production but also for diffusing scientific production to create an impact and enable civic participation in science and other fields of civic engagement and decision-making.⁹³ Ensuring access also requires the provision of proper infrastructure on a non-discriminatory basis, which in some parts of the world includes the provision of basic information technology infrastructure.⁹⁴

The rights of authors to moral and material benefits must therefore be interpreted in relation to other fundamental rights and be listed as preconditions for the exercise of these rights. Their function is to enable cultural and scientific productions as incentives, on the one side. On the other side, in order to fulfill their function as rights-in-context, they must be constructed to “enable rather than constrain cultural participation and access to scientific progress.”⁹⁵ This secondary nature of the right expressed in Article 27 of the UDHR and Article 15 of the ICESCR is also expressed by the UN Special Rapporteur in the field of cultural rights, Farida Shaheed, in her 2012 Report when she stated: “The right to have access to scientific

91. See Christophe Geiger, *Taking the Right to Culture Seriously: Time to Rethink Copyright Law*, in INTELLECTUAL PROPERTY AND ACCESS TO SCIENCE AND CULTURE: CONVERGENCE OR CONFLICT?, *supra* note 30, at 84, 86 (arguing that this function of copyright law constitutes an expression of the social function of the right to property and is reflective of the human rights, historical, and philosophical foundations of intellectual property law).

92. See Vayena & Tasioulas, *supra* note 30, at 484.

93. See Porsdam Mann et al., *supra* note 30, 343–44; see also Hans Morten Haugen, *Human Rights and Technology—A Conflictual Relationship? Assessing Private Research and the Right to Adequate Food*, 7 J. HUM. RTS. 224, 232 (2008) (“The right to enjoy the benefits of scientific progress is related to how the direct and indirect results of science are made available to everyone.”).

94. Shaheed, *supra* note 49, ¶¶ 29, 36–37.

95. Paul L.C. Torremans, *Article 17(2) Right to Property*, in THE EU CHARTER OF FUNDAMENTAL RIGHTS 489, ¶ 17(2).25 (Peers et al. eds., 2d ed. 2021).

knowledge is pivotal for the realization of the right to science.”⁹⁶

B. THE CONSTITUTIONAL FRAMEWORK FOR THE RIGHT TO RESEARCH IN THE EU

For the purpose of this article, European copyright law is a case study. The EU’s constitutional microcosm is unique in that it provides a rich tradition in human rights discourse and practice. More importantly, the intersection of human or fundamental rights and ordinary law is more pronounced in law and policy than in any other jurisdiction. European copyright law has been shaped significantly, certainly over the last decade, by fundamental rights⁹⁷ and research plays an important part in the EU’s policy agenda.⁹⁸ Given that

96. Shaheed, *supra* note 49, ¶ 27.

97. See generally Christophe Geiger, “Constitutionalising” *Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 INT’L REV. INTEL. PROP. & COMPETITION L. 371 (2006). In the EU, fundamental rights, as part of the EU’s constitutional normative system, have exercised growing influence on the harmonization and interpretation of intellectual property, most notably under the influence of the European judiciary. See generally Jonathan Griffiths, *Constitutionalising or Harmonising? The Court of Justice, The Right to Property and European Copyright Law*, 38 EUR. L. REV. 65, 77 (2013); Bernd Justin Jütte, *The Beginning of a (Happy?) Relationship: Copyright and Freedom of Expression in Europe*, 38 EUR. INTEL. PROP. REV. 11 (2016) [hereinafter Jütte, *Beginning*]; Christophe Geiger & 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 INT’L REV. INTEL. PROP. & COMPETITION L. 282, 283 (2020) [hereinafter Geiger & Izyumenko, *Progress*]. From the interpretation of copyright norms by the CJEU—for example Case C-277/10, *Luksan v. van der Let*, ECLI:EU:C:2012:65, (Feb. 9, 2012), Case C-201/13, *Deckmyn v. Vandersteen*, ECLI:EU:C:2014:2132, (Sept. 3, 2014), and Case C-160/15, *GS Media BV v. Sanoma Media Neth. BV*, ECLI:EU:C:2016:644, (Sept. 8, 2016)—EU copyright norms were recently directly challenged before the CJEU in Case C-401/19, *Poland v. Parliament*, ECLI:EU:C:2022:297, (Apr. 26, 2022). For a fundamental rights-based analysis, see generally Christophe Geiger & Bernd Justin Jütte, *Towards a Virtuous Legal Framework for Content Moderation by Digital Platforms in the EU? The Commission’s Guidance on Article 17 CDSM Directive in the Light of the YouTube/Cyando Judgment and the AG’s Opinion in C-401/19*, 43 EUR. INTEL. PROP. REV. 625, 627 (2021) [hereinafter Geiger & Jütte, *Towards a Virtuous Legal Framework*]; Christophe Geiger & Bernd Justin Jütte, *Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match*, 70 GRUR INT’L: J. EUR. & INT’L INTEL. PROP. L. 517, 519 (2021) [hereinafter Geiger & Jütte, *Platform Liability*].

98. See also Christophe Geiger & Bernd Justin Jütte, *The Right to Research as*

copyright today is to a large extent within the exclusive competence of the EU but has always been approached from a strictly economic perspective through the lens of the internal market, the European legislator has adopted a rule-exception approach to copyright.⁹⁹ This approach was reflected not only in the systemic structure of European copyright legislation but also in the jurisprudence of the Court of Justice of the European Union (CJEU).¹⁰⁰ This strict approach has fortunately evolved in recent years, in particular since the legislator and the CJEU have framed exceptions and limitations to copyright as

Guarantor for Sustainability, Innovation and Justice in EU Copyright Law, in INTELLECTUAL PROPERTY RIGHTS IN THE POST PANDEMIC WORLD: AN INTEGRATED FRAMEWORK OF SUSTAINABILITY, INNOVATION AND GLOBAL JUSTICE (Taina E. Pihlajarinne et al. eds., forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4140627.

99. See Ana Ramalho, *Conceptualising the European Union's Competence in Copyright – What Can the EU Do?*, 45 INT'L REV. INTEL. PROP. & COMPETITION L. 178, 178 (2014); Ana Ramalho, *Copyright Law-Making in the EU: What Lies Under the 'Internal Market' Mask?*, 9 J. INTEL. PROP. L. & PRAC. 208 (2014); ANA RAMALHO, THE COMPETENCE OF THE EUROPEAN UNION IN COPYRIGHT LAWMAKING (2016); Ana Ramalho, *The Competence and Rationale of EU Copyright Harmonization*, in THE ROUTLEDGE HANDBOOK OF EU COPYRIGHT LAW 3 (Eleonora Rosati ed., 2021); see also BERND JUSTIN JÜTTE, RECONSTRUCTING EUROPEAN COPYRIGHT LAW FOR THE DIGITAL SINGLE MARKET: BETWEEN OLD PARADIGMS AND DIGITAL CHALLENGES 535–37 (2017).

100. The CJEU has consistently held that limitations and exceptions to the exclusive rights of copyright must be interpreted narrowly as they are exceptions to the general rule that rightsholders must enjoy “a high level of protection” in relation to their protected subject matter. See Case C-5/08, *Infopaq I*, ECLI:EU:2009:465, ¶¶ 40–43, 56–57 (July 16, 2009); Case C-462/09, *Stichting de ThuisKopie v. Opus Supplies Deutschland GmbH*, ECLI:EU:C:2011:397, ¶¶ 30–32 (Mar. 10, 2011); Joined Cases C-403/08 & C-429/08, *Football Ass'n Premier League v. QC Leisure*, ECLI:EU:C:2011:631, ¶ 108 (Oct. 4, 2011). But see *id.* ¶¶ 161–63 (qualifying that copyright exceptions “must be interpreted strictly, because Article 5(1) of the Copyright Directive is a derogation from the general rule established by that directive that the copyright holder must authorize any reproduction of his protected work” but that “[n]one the less, the interpretation of those conditions must enable the effectiveness of the exception”). See also Case C-145/10, *Painer v. Standard VerlagsGmbH*, ECLI:EU:C:2011:798, ¶¶ 107–09 (Dec. 1, 2011); *Deckmyn*, ECLI:EU:C:2014:2132, ¶¶ 22–23. Here, the CJEU expanded the analysis, leaving room, for the first time in relation to the interpretation of copyright exceptions, for consideration of fundamental rights as part of the balance within copyright, *id.* ¶¶ 26–30. For the most recent judgements, see Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, ECLI:EU:C:2019:623, (July 29, 2019); Case C-476/17, *Pelham GmbH v. Hütter*, ECLI:EU:C:2019:624, (July 29, 2019); and Case C-516/17, *Spiegel Online GmbH v. Beck*, ECLI:EU:C:2019:625, (July 29, 2019).

user rights.¹⁰¹ This makes EU copyright law, *that is*, the rules that harmonize national copyright law in the EU Member States, an ideal laboratory to examine the potential and desirable effects of a right to research on copyright law within a multinational constitutional system. Furthermore, the EU's approach allows reflection on the findings, the resulting proposal to the international level, and how a right to research should shape copyright law for a more sustainable future.

1. Fundamental Rights in the EU's Constitutional Order and their Potential Impact to Secure a Balanced Copyright Framework

The EU's constitutional order consists of the Treaty on European Union (TEU),¹⁰² the Treaty on the Functioning of the European Union (TFEU),¹⁰³ and the Charter of Fundamental Rights of the European Union (EUCFR).¹⁰⁴ While the Treaties define the general aims of the EU, determine its competencies, and set out how these competencies are to be exercised, the Charter represents the canon of fundamental rights as it applies in the Member States of the EU. Since the early days of the EU, fundamental rights have formed an integral part of its constitutional order. This includes international human rights, as the EU has committed itself to "the strict observance and development of international law, including respect for the principles of the United

101. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, art. 17(9), 2019 O.J. (L 130) 92 [hereinafter CDSM Directive], established an enforceable right to benefit from exceptions in relation to uses of protected works and other subject matter. This right should shield such uses from content moderation by way of filtering and blocking performed by platforms falling within the scope of Article 17 of the CDSM Directive. See Geiger & Jütte, *Platform Liability*, *supra* note 97, at 539–40. The CJEU expressly referred to these mandatory exceptions as part of the safeguards against a disproportionate limitation on the right to freedom of expression by the obligations imposed on the relevant online intermediaries as "rights." Poland v. Parliament, ECLI:EU:C:2022:297, ¶ 87.

102. Consolidated Version of the Treaty on European Union, Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU].

103. Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

104. Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 391 [hereinafter EUCFR].

Nations Charter.”¹⁰⁵ Before they were formally codified in the EUCFR, the CJEU gradually developed an EU fundamental rights canon as general principles of EU law which were derived from the common constitutional traditions of the Member States.¹⁰⁶ However, a hierarchy amongst the fundamental rights of the EU Charter does not exist.¹⁰⁷ The rights of the Charter are congruent in scope to those of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)¹⁰⁸ in so far as corresponding rights exist in both documents.¹⁰⁹ This very close relationship is further illustrated by regular references by the CJEU and its Advocates General (AG) to judgments by the European Court of Human Rights (ECtHR).¹¹⁰ While the EU’s commitment to the fundamental rights of the ECHR is clearly expressed in its self-imposed—but yet-to-be-completed—accession to the Convention,¹¹¹ its relation to

105. TEU, *supra* note 102, art. 3(5). This is important as the EU does not have a specific right to science and culture in its constitutional framework that mirrors the international human right provisions. *But see* Peggy Ducoulombier, *The Perspective of the European Court of Human Rights on Intellectual Property and Access to Science and Culture*, in INTELLECTUAL PROPERTY AND ACCESS TO SCIENCE AND CULTURE: CONVERGENCE OR CONFLICT?, *supra* note 30, at 79.

106. Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Comm’n of the Eur. Cmtys.*, ECLI:EU:C:1974:51, ¶ 13 (May 14, 1974). In relation to copyright, see Case C-479/04, *Laserdisken ApS v. Kulturministeriet*, ECLI:EU:C:2006:549, ¶ 61 (Sept. 12, 2006).

107. *But see* Alexander Peukert, *The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY, *supra* note 3, at 132 (arguing that certain fundamental rights, for example the right to freedom of expression under Article 11 of the EUCFR, should enjoy priority over others. In particular, the right to property should not be positioned at the same level as other fundamental rights due to the “unique structure” of property rights and because property rights, and intellectual property rights in particular, only exist as “‘creatures’ of the legislature,” and it is the legislature who defines their scope.).

108. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

109. EUCFR, *supra* note 104, art. 52(3).

110. *See, e.g.*, Case C-476/17, *Pelham GmbH v. Hütter*, ECLI:EU:C:2019:624, ¶ 34 (July 29, 2019).

111. TEU, *supra* note 102, art. 6(2). However, for the CJEU’s rejection of the of a first accession agreement, see generally Opinion 2/13, Request for an Opinion Pursuant to Article 218(11) TFEU, ECLI:EU:C:2014:2454, (Dec. 18, 2014). *See also* Tawhida Ahmed & Israel de Jesús Butler, *The European Union and Human Rights: An International Law Perspective*, 17 EUR. J. INT’L L. 771, 772 (2006) (underlining the different positions on the EU’s obligations under international human rights law).

international human rights is slightly more complicated.¹¹² Nevertheless, it is undisputed that the EU is bound by binding international human rights law, if for no other reason than because of the obligations incurred by its Member States.¹¹³ Insofar as international human rights norms have become part of customary international law, they have become binding on the EU.¹¹⁴ This makes a majority of international human rights norms relevant not only to constructing an internationally inspired right to research but also to shaping such a right at the European level.

Article 51 of the EUCFR stipulates that “[t]he provisions of [the] Charter are addressed to the institutions, bodies, offices and agencies of the Union . . . and to the Member States only when they are implementing Union law.”¹¹⁵ As a result, the European legislator is bound by fundamental rights and any legislation that violates fundamental rights without sufficient justification can be challenged

112. TEU, *supra* note 102, art. 3(5) (“In its relations with the wider world, . . . [the EU] shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”). See generally Gráinne de Búrca, *The Road Not Taken: The European Union as a Global Human Rights Actor*, 105 AM. J. INT’L L. 649 (2011) (providing background on the nature and evolution of the EU’s international human rights obligations).

113. See Ahmed & de Jesús Butler, *supra* note 111, at 772; see also Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT’L L. 491, 491 (2008) (suggesting that the EU is bound by certain international obligation because of their *jus cogens* nature). However, the CJEU has subjected international law rules, such as the UN Security Council resolutions, to judicial review under EU law and *jus cogens*. See Joined Cases C-584/10 P, C-593/10 P, & C-595/10 P, Comm’n v. Kadi (*Kadi II*), ECLI:EU:C:2013:518, ¶ 131 (July 18, 2013) (“Such a judicial review is indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned . . . those being shared values of the UN and the European Union.”); see also Israel de Jesús Butler, *The European Union and International Human Rights Law*, OFF. OF THE HIGH COMM’R FOR HUM. RTS. REG’L OFF. FOR EUR. PUBL’N, 1, 7, https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf.

114. See Case C-308/06, Int’l Ass’n of Indep. Tanker Owners v. Sec’y of State for Transp. (*Interanko*), ECLI:EU:C:2008:312, ¶ 51 (June 3, 2008); see also de Jesús Butler, *supra* note 113, at 23.

115. See EUCFR, *supra* note 104, art. 51(1).

in the courts of the Member States and eventually before the CJEU. EU Member States are only bound by the EUCFR whenever they are implementing EU law,¹¹⁶ and national courts in the EU Member states must regard fundamental rights when they apply and interpret national norms that are the result of, or fall within the scope of, EU harmonization.¹¹⁷ However, if at the national level a situation does not fully fall within the scope of harmonization under EU law, Member States remain free to apply and give effect to national fundamental rights as long as the application of national fundamental rights does not compromise the primacy, unity, and effectiveness of EU law.¹¹⁸

This means, however, that as soon as a national law falls within an area of competence of the European Union, it is subject to EU fundamental rights control and can potentially be challenged if doubts exist as to its constitutionality.¹¹⁹ In most cases, the CJEU is simply

116. For example, Member States must transpose directives, which are not directly applicable in the Member States, TFEU, *supra* note 103, art. 288, third sentence, into their national law in full compliance with the fundamental rights of the EU Charter. Therefore, national legislatures must ensure that their transposition of secondary legislation relies on an interpretation that ensures that a fair balance is struck between the various fundamental rights protected under EU law. *See, e.g.*, Case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, ECLI:EU:C:2008:54, ¶ 70 (Jan. 29, 2008); Case C-149/17, *Bastei Lübbe GmbH v. Strotzer*, ECLI:EU:C:2018:841, ¶ 45 (Oct. 18, 2018). *See also* Case C-580/13, *Coty Ger. GmbH v. Stadtsparkasse Magdeburg*, ECLI:EU:C:2015:485, ¶ 34 (Jul. 16, 2015). *See generally* PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS*, 430—31 (2020).

117. Specifically in the field of copyright law, *see, for example*, Case C-70/10, *Scarlet Extended SA v. Société Belge des Auteurs Compositeurs et Éditeurs (SABAM)*, ECLI:EU:C:2011:771, (Nov. 24, 2011); Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, ECLI:EU:C:2012:85, (Feb. 16, 2012); Case C-484/14, *Mc Fadden v. Sony Music Ent. Ger. GmbH*, ECLI:EU:C:2016:689, (Sept. 15, 2016).

118. *See* Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, ECLI:EU:C:2019:623, ¶ 32 (July 29, 2019).

119. The CJEU has been called upon to examine the constitutionality, in light of fundamental rights, of secondary harmonization in the field of copyright law. In this context, the intensity of the CJEU's review varies significantly. *Compare, e.g.*, Case C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*, ECLI:EU:C:2013:28, ¶¶ 31–68 (Jan. 22, 2013) (a thorough and structured review), *with* Case C-277/10, *Luksan v. van der Let*, ECLI:EU:C:2012:65, ¶¶ 68–72 (Feb. 9, 2012) (a slightly less intensive review). In both cases, in the course of a preliminary reference procedure under Article 267 of the TFEU, *supra* note 103, the CJEU was asked to assess the validity of a provision of national law implemented pursuant to

asked to interpret a provision of national law and guide its application in the light of EU law.¹²⁰ In these cases, more often than not, the Court provides the referring national court with more or less precise instructions and then leaves it “for the national court to ascertain” the correct application of national law in the light of EU law, including the EU Charter.¹²¹

Fundamental rights are not absolute; they can be limited to give effect to other fundamental rights as long as their essence is respected.¹²² The concept of “essence” has been described as “a constant reminder that [the EU’s] core values are absolute and, as such, are not subject to balancing.”¹²³ However, any limitation of a fundamental right must respect the principle of proportionality, which is an important tool for assessing the constitutionality of a violation of a fundamental right under the EU Charter.¹²⁴ In the EU legal order,

EU harmonization measures or a provision of EU law directly. A recent important example is the challenge of the new liability regime for so-called online content sharing providers brought by the Republic of Poland, Case C-401/19, *Poland v. Parliament*, ECLI:EU:C:2022:297, (Apr. 26, 2022). This case is special as it constitutes one of the relatively rare cases in which a Member State requests the annulment of a provision of EU law, in this case because the Polish government considers the challenged provision to be in violation of the right to freedom of expression. See generally Geiger & Jütte, *Towards a Virtuous Legal Framework*, *supra* note 97, and Geiger & Jütte, *Platform Liability*, *supra* note 97, for a thorough discussion of the challenge.

120. TFEU, *supra* note 103, art. 267.

121. *Id.*

122. See EUCFR, *supra* note 104, art. 52(1); see also Case C-476/17, *Pelham GmbH v. Hütter*, ECLI:EU:C:2019:624, (July 29, 2019); Case C-476/17, *Pelham GmbH v. Hütter*, ECLI:EU:C:2018:1002, ¶ 98 (Dec. 12, 2018) (Opinion of AG Szpunar); Case C-149/17, *Bastei Lübbe GmbH v. Strotzer*, ECLI:EU:C:2018:400, ¶ 38 (June 6, 2018) (Opinion of AG Szpunar); Case C-580/13, *Coty Ger. GmbH v. Stadtparkasse Magdeburg*, ECLI:EU:C:2015:485, ¶ 97 (July 16, 2015). See, e.g., Koen Lenaerts, *Limits on Limitations: The Essence of Fundamental Rights in the EU*, 20 GER. L.J. 779 (2019); Martin Husovec, *The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter*, 20 GER. L.J. 840, 848 (2019) (discussing the essence of intellectual property and providing further references).

123. Lenaerts, *supra* note 122, at 793.

124. See further on the influence of this principle on EU copyright law Orit Fischman Afori, *Proportionality – A New Mega Standard in European Copyright Law*, 45 INT'L REV. INTELL. PROP. & COMPETITION L. 889 (2014); Jonas Christoffersen, *Human Rights and Balancing: The Principle of Proportionality*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY, *supra* note 3, at 20; Peter Teunissen, *The Balance Puzzle: The ECJ's Method of*

proportionality constitutes an important analytical mechanism to determine the permissibility of limiting certain rights and interests, including fundamental rights.¹²⁵ The test often comes to bear when two or more fundamental rights guaranteed and protected under the ECHR and the EUCFR come into conflict.¹²⁶

In the practice of the European courts, the proportionality test is divided into three steps.¹²⁷ First, a court will determine whether the measure that potentially infringes a right is appropriate to achieve the aim for which it is adopted. For that purpose, a relevant measure must pursue a legitimate aim and must be suitable to achieve that aim.¹²⁸ Second, the measure in question must be necessary. A measure is considered necessary if the aim it pursues could not be achieved by less onerous means. At the third stage, a court will conduct a balancing exercise; this stage is also referred to as “proportionality *strictu sensu*,” and it is the stage where the actual balancing of interests takes place.

In copyright law, proportionality has already become almost synonymous with the notion of a “fair balance.”¹²⁹ It has, for example,

Proportionality Review for Copyright Injunctions, 40 EUR. INTELL. PROP. REV. 579 (2018); Tuomas Mylly, *Regulating with Rights Proportionality? Copyright, Fundamental Rights and Internet in the Case Law of the Court of Justice of the European Union*, in COPYRIGHT AND FUNDAMENTAL RIGHTS IN THE DIGITAL AGE: A COMPARATIVE ANALYSIS IN SEARCH OF A COMMON CONSTITUTIONAL GROUND 54 (Oreste Pollicino et al. eds., 2020).

125. Mylly, *supra* note 124, at 54.

126. As a mechanism that resolves conflicts between fundamental rights, the proportionality test has helped to define the scope of specific fundamental rights by showing their limits by defining their inviolable core. See Christoffersen, *supra* note 124, at 19–20.

127. For an early application of the proportionality test in EU law, see Case C-331/88, *The Queen v. Fédération Européenne de la Santé Animale (FEDESA)*, ECLI:EU:C:1990:391, ¶¶ 12–18 (Nov. 13, 1990).

128. The standard under the first prong of the test is extremely broad. The courts would only refuse a measure as illegal which is manifestly inappropriate. DAMIAN CHALMERS ET AL., *EUROPEAN UNION LAW: TEXT AND MATERIALS* 386–88 (4th ed. 2019).

129. See, for example, the following analyses, all of which refer to Case C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*, ECLI:EU:C:2013:28, ¶¶ 50–68 (Jan. 22, 2013): Teunissen, *supra* note 124, at 581, 585; Christoffersen, *supra* note 124, at 35; Peter Oliver & Christopher Stothers, *Intellectual Property Under the Charter: Are the Court's Scales Properly Calibrated?*, 54 COMMON MKT. L. REV. 517, 546 (2017). See generally Caterina Sganga, *A Decade of Fair Balance*

been used to calibrate the rules for online copyright enforcement by intermediary service providers.¹³⁰ In this context, the CJEU has used proportionality to define the limits of enforcement obligations by balancing several fundamental rights with each other.¹³¹ Here, proportionality works as a tool to determine the interpretation of existing norms in the light of fundamental rights.¹³²

The complex nature of the test¹³³ has resulted in its creative application by the CJEU and the ECtHR.¹³⁴ However, it is an essential element in the EU's constitutional order to resolve conflicts between competing interests, specifically in multipolar relationships of competing rights.¹³⁵ It is not only applied by the courts but, as a general principle of EU law, also guides the legislature and the executive branches in the EU¹³⁶ as well as the Member States in implementing

Doctrine, and How to Fix It: Copyright Versus Fundamental Rights Before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online, 41 EUR. INTELL. PROP. REV. 683 (2019) (tracing the evolution of the fair-balance test over time).

130. See generally Christophe Geiger et al., *Intermediary Liability and Fundamental Rights*, in THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY 138 (Giancarlo Frosio ed., 2020) [hereinafter Geiger et al., *Intermediary Liability*].

131. See Christophe Geiger, *The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union*, in NEW DEVELOPMENTS IN EU AND INTERNATIONAL COPYRIGHT LAW 435, 442–43 (Irina A. Stamatoudi ed., 2016).

132. The role of proportionality can be described as a standard external to copyright law which enables to strike “a constitutional balance . . . within the copyright-private law sphere,” and it has also been suggested that proportionality can serve as an internal norm within copyright's normative system. See Fischman Afori, *supra* note 124, at 899; see also Christophe Geiger & Elena Izyumenko, *Towards a European “Fair Use” Grounded in Freedom of Expression*, 35 AM. U. INT'L L. REV. 1 (2019). The evolution of the role of the proportionality principle in EU copyright law is best demonstrated with reference to the CJEU's case-law. See generally Teunissen, *supra* note 124; see also Mylly, *supra* note 124, at 54–55.

133. See Christoffersen, *supra* note 124, at 19.

134. See Kristina Trykhlil, *The Principle of Proportionality in the Jurisprudence of the European Court of Human Rights*, 4 EU & COMPAR. L. ISSUES & CHALLENGES SERIES 128, 139 (2020).

135. Cf. Christoffersen, *supra* note 124, at 24 (noting the history of complex relationships between these competing rights).

136. A special protocol to the TFEU lays down instructions for EU institutions on the application of the proportionality principle. See Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality, May 9, 2008, 2008

EU law. Accordingly, acts of the institutions (such as secondary legislation) and the Member States are subject to judicial review in light of the principle of proportionality.¹³⁷

In practice, the CJEU has used proportionality to interpret existing rules with existing fundamental rights.¹³⁸ We will attempt to explore how a newly shaped right to research can be employed to re-interpret and complement existing copyright law. We argue that the right to research is a fundamental right that lies hidden in fragments amongst a set of existing rights and merely requires formal pronouncement. The proportionality test will assist us in reestablishing the balance between “established” fundamental rights and the right to research as a constitutional imperative.

O.J. (C 115) 206 [hereinafter, Protocol No. 2]. The CJEU itself, it is interesting to note, applies the test more liberally, not always distinguishing clearly between the three separate steps, but often folds the third stage of the test into stage one or two, or often simply omits the third stage completely in cases in which the test has already failed at an earlier stage. See CRAIG & DE BÚRCA, *supra* note 116, at 583.

137. Cf. TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* 655 (2d ed. 2007). Proportionality as a ground for judicial review was introduced in Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114 (Dec. 17, 1970), and has since been a general principle of EU law. In 2009, proportionality was expressly recognized in Article 5(4) of the TFEU, *supra* note 103, and Article 52(1) of the EUCFR, *supra* note 104, refers to proportionality as a tool to justify *prima facie* violations of the Charter rights. Article 5 of Protocol No. 2, *supra* note 136, requires the EU legislature to subject legislation to a subsidiarity and proportionality test.

138. See Geiger, *supra* note 131, at 442–43 (“[M]ost of the leading decisions of the last few years have applied fundamental rights reasoning in order to justify the solutions reached by the Court.”). The ECtHR refers regularly to proportionality in cases concerning intellectual property, for example in assessing whether criminal sanctions for large-scale copyright infringements online are appropriate. *Neij v. Sweden (The Pirate Bay Case)*, App. No. 40397/12, (Feb. 19, 2013), <https://hudoc.echr.coe.int/eng?i=001-117513>; see also Jütte, *Beginning*, *supra* note 97, at 16 (commenting on preceding case). See generally Christophe Geiger & Elena Izyumenko, *Shaping Intellectual Property Rights Through Human Rights Adjudication: The Example of the European Court of Human Rights*, 46 MITCHELL HAMLIN L. REV. 527, 547–48 (2020) [hereinafter Geiger & Izyumenko, *Shaping Intellectual Property Rights*] (discussing use of the proportionality principle by the ECtHR in copyright cases); Oleg Soldatov, *Copyright and Fundamental Rights in European Court of Human Rights Case Law*, in *COPYRIGHT AND FUNDAMENTAL RIGHTS IN THE DIGITAL AGE: A COMPARATIVE ANALYSIS IN SEARCH OF A COMMON CONSTITUTIONAL GROUND* 99, 99–100 (Oreste Pollicino et al. eds., 2020).

2. *European Values and the Objectives of the EU: the Right to Research as a Crucial Step Towards a Sustainable Copyright System*

Article 2 of the TEU lists the values of the EU, which itself is established by Article 1 of the Treaty.¹³⁹ The values include respect for human dignity, respect for human rights, non-discrimination, and solidarity.¹⁴⁰ These values are programmatic¹⁴¹ and they inspire and guide the action of the EU and its Member States, which share these values with the EU as a supranational institution.¹⁴² The “ever closer Union”¹⁴³ established by the Treaties links the EU with its Member States on a foundation of norms and values, at the heart of which are the fundamental rights set out in the EUCFR.¹⁴⁴ These values common to all Member States constitute an untouchable core of the legal order that is the EU.¹⁴⁵

The aims and goals of the EU have grown in number over time and their nature has changed with the maturing of the EU into a constitutional legal order.¹⁴⁶ Article 3 of the TEU defines the aims of the EU: it shall promote peace, its values, and the well-being of its people.¹⁴⁷ One of the most prominent and more concrete aims is the

139. TEU, *supra* note 102, arts. 1–2.

140. *Id.* art. 2 (“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”).

141. See generally Marcus Klamert & Dimitry Kochenov, ‘Article 2’, *para. 6 in THE EU TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS. A COMMENTARY* (Manuel Kellerbauer et al. eds., 2019) (discussing EU foundation upon systematic human rights, dignity, and common values between Member States).

142. TEU, *supra* note 102, art. 2, second sentence.

143. *Id.* art. 1 (“This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.”). Reference to this political mantra can also be found in the respective preambles of the TEU, *id.*, and the TFEU, *supra* note 103.

144. Opinion 2/13 of the Court (Full Court), Opinion Pursuant to Article 218(11) TFEU, ¶¶ 167–69 (Dec. 18, 2014).

145. See Klamert & Kochenov, *supra* note 141 (discussing the origins of the values and its initially implied nature).

146. See Joris Larik, *From Speciality to a Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union*, 63 INT’L COMPAR. L.Q. 935, 936 (2014).

147. TEU, *supra* note 102, art. 3(1).

establishment of an internal market.¹⁴⁸ This internal market is not an end in itself but should “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 promote *scientific and technological advance*.”¹⁴⁹ Sustainability found its place in the TEU in the 1992 Treaty of Maastricht, which established the European Union.¹⁵⁰ Article B of the Treaty of Maastricht stated that the EU sets itself the objective “to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion”¹⁵¹ Environmental protection was merely included as an aspiration that the EU claimed to be determined to meet.¹⁵² The EU Charter, proclaimed in 2000, and entered into force in 2009, includes an obligation to include a “high level of environmental protection and the improvement of the quality of the environment . . . ensured in accordance with the principle of sustainable development” into the objectives of the EU.¹⁵³ Accordingly, the TEU was changed to its current wording. These very abstract aims find concrete expression in special provisions contained in the TEU as well as the TFEU and the policies of the EU.¹⁵⁴

The aims of the EU are binding on its institutions, but they neither create direct obligations for the EU to act nor do they create competences for EU action.¹⁵⁵ The aims set out in Article 3 of the TEU “merely lay down a programme” that EU institutions and Member States must implement.¹⁵⁶ The aims of the EU, therefore, have a

148. *Id.* art. 3(3).

149. *Id.* (emphasis added).

150. Treaty on European Union (as in effect 1992), 1992 O.J. (C 191) 1.

151. *Id.* art. B.

152. *See id.* art. 130r.

153. EUCFR, *supra* note 104, art. 37.

154. Rudolf Streinz, *Artikel 3 EUV*, in *EUV/AEUV: VERTRAG ÜBER DIE EUROPÄISCHE UNION UND VERTRAG ÜBER DIE ARBEITSWEISE DER EUROPÄISCHEN UNION*, para. 1 (Rudolf Streinz ed., 3rd ed. 2018).

155. *Cf.* Case C-2/15, *Accord de Libre-Échange avec Singapour*, ECLI:EU:C:2016:992, ¶ 495 (Dec. 21, 2016) (Opinion of AG Sharpston).

156. Case C-149/96, *Portugal v. Council*, ECLI:EU:C:1999:574, ¶ 86 (Nov. 2, 1999).

guiding rather than an instructive function for the actions of the EU's institutions, which also includes the passing of legislation. This does not mean that these objectives are merely inspirational; they are part of the EU's constitutional order, and they must inform policies and legislation.¹⁵⁷

The aims of the EU are abstract notions and are difficult to define. The CJEU itself has failed to provide assistance in shaping the substance of these programmatic aims. To define these broad notions, which are, of course, also relevant in defining the concrete normative substance of intellectual property rights harmonized under EU law, it is instrumental to look for help outside the domain of EU law. A beneficial side-effect of a more global approach to defining the aims of the EU, for the purposes of our argument, is that aims of the EU can be defined and located at a more general and international level. As a result, our findings can also be translated into an international discourse on a right to research.

Among the aims of the EU are sustainability and technological advancement, two aims that also feature prominently in the international development agenda.¹⁵⁸ These two aims are closely interlinked in the sense that sustainable development inevitably requires technological advancement, which in itself should be sustainable.

A definition for "sustainability" can be found at the international level where the homonymous 1987 UN Commission introduced the so-called "Brundtland-definition."¹⁵⁹ According to this definition, sustainability means "meeting the needs of the present whilst ensuring future generations can meet their own needs."¹⁶⁰ Sustainability, under

157. See Nicolas de Sadeleer, *Sustainable Development in EU Law. Still a Long Way to Go*, 6 JINDAL GLOB. L. REV. 39, 58 (2015) (referring to sustainability as a "binding constitutional objective").

158. G.A. Res. 70/1, ¶¶ 32–33 (Sept. 25, 2015).

159. WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE ch. 2, ¶ 1 (1987).

160. *Id.*; see Sander R.W. van Hees, *Sustainable Development in the EU: Redefining and Operationalizing the Concept*, 10 UTRECHT L. REV. 60, 75 (2014) (defining sustainable development as "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").

this definition, has a clear welfare dimension with an intergenerational aspect. The European Commission has developed aspects of the notion of “sustainability” in many of its policy programs, especially over the last decade.¹⁶¹ For example, in its “Europe 2020” strategy, the Commission defined “sustainable growth” as one of its three priorities as the need to “[promote] a more resource efficient, greener and more competitive economy.”¹⁶² Further, in the 2016 Communication “Next Steps for a Sustainable Future,” adopting and further refining the Brundtland-definition, the Commission underlined that sustainability requires:

[A 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.¹⁶³

This definition broadens the notion of sustainability, which is an objective or aim that permeates a multitude of policy areas, first and foremost within the European internal market.¹⁶⁴ These areas range from “youth unemployment to ageing populations, climate change, pollution, sustainable energy and migration.”¹⁶⁵ But the Commission’s approach also clearly highlights a global responsibility that reaches beyond the borders of the internal market, and the EU for that purpose.¹⁶⁶ What is more important, however, for the purposes of our argument, is creating a link to technological development. The

161. E.g., *Europe 2020*, *supra* note 2, at 5; *Europe’s Moment: Repair and Prepare for the Next Generation*, at 2, COM (2020) 456 final (May 27, 2020) [hereinafter *Europe’s Moment*]; *Next Steps For a Sustainable European Future: European Action For Sustainability*, at 2, COM (2016) 739 final (Nov. 22, 2016) [hereinafter *Next Steps*].

162. *Europe 2020*, *supra* note 2, at 5; *Europe’s Moment*, *supra* note 161, at 1–2, 6 (highlighting that a post-pandemic recovery “must guide and build a more sustainable, resilient and fairer Europe for the next generation” and underlining a “crucial role of research and innovation in driving the shift towards a clean, circular, competitive and climate neutral economy” by dedicating “25% of the EU budget . . . on climate investments and additional funding for Horizon Europe”).

163. *Next Steps*, *supra* note 161, at 2.

164. *Id.*

165. *Id.*

166. *Id.* at 3.

Commission states rather firmly that “[for] these challenges to become opportunities for new businesses and new jobs, *a strong engagement in research and innovation is needed.*”¹⁶⁷ This essential connection is also apparent in other policy documents, in which the Commission interconnects sustainability, innovation, research, and other, broader goals of the EU.¹⁶⁸

Because of sustainability’s overarching nature as one of the major policy goals, the EU relies on it throughout its policy areas, including its external trade policy.¹⁶⁹ These ambitions must necessarily also spill over into intellectual property policy, but there is still room for development. In its 2020 Communication on an intellectual property action plan, the Commission stressed the importance of intellectual property to “boost recovery and resilience” in order to “offer valuable and sustainable jobs to society.”¹⁷⁰ However, sustainability does not appear as a general theme throughout the policy document, only appearing occasionally in very specific contexts.¹⁷¹

167. *Id.* at 2 (emphasis added).

168. *See, e.g., Energy 2020: A Strategy For Competitive, Sustainable and Secure Energy*, at 15, COM (2010) 639 final (Nov. 10, 2010) (“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.”); *State of the Energy Union 2015*, at 13, COM (2015) 572 final (Nov. 18, 2015) (“Research, innovation . . . 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.”).

169. *See, e.g., Eur. Comm’n, Trade Policy Review: An Open, Sustainable and Assertive Trade Policy*, at 5–6 (Luxembourg 2021), https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159541.0270_EN_05.pdf. The document highlights the EU’s commitment to tackle new internal and external challenges, for example, those created by the COVID-19 pandemic and the necessary economic recovery, including “green and digital transformations” for “building a more resilient Europe in the world,” *id.* at 5. The document also highlights the importance of intellectual property in this context, *id.* at 6; *see also* Samantha Velluti, *The Promotion and Integration of Human Rights in EU External Trade Relations*, 32 *UTRECHT J. INT’L EUR. L.* 41, 57–61 (2016).

170. *See Making the Most of the EU’s Innovative Potential. An Intellectual Property Action Plan to Support the EU’s Recovery and Resilience Communication*, at 1, COM (2020) 760 final (Nov. 25, 2020) [hereinafter *Making the Most*] (emphasis omitted).

171. For example, in relation to geographical indications “part of Europe’s cultural heritage and contribute to the social, environmental and economic

The relevant policy documents frequently refer to research as a necessary driver for innovation and sustainability.¹⁷² Intellectual property, in these contexts, is presented as an enabler.¹⁷³ For example, the “Intellectual Property Action Plan” focuses on the pooling of resources and easier licensing solutions to “facilitate access to critical [intellectual property] in the times of crisis” and the facilitation of compulsory licensing at the national level.¹⁷⁴ Specifically, concerning copyright, the Commission suggests more transparency in relation to ownership and management and the use of high-quality metadata, supported by new technologies such as blockchain to ensure information transparency.¹⁷⁵ These actions relate largely to an intellectual property infrastructure as opposed to substantive changes to an inherently restrictive intellectual property system. Despite the relatively weak link between intellectual property and sustainability—which is much more pronounced in literature at the international level¹⁷⁶—regular references to research, intellectual property, and

sustainability of the rural economy” and in reference to the EUs “Farm to Fork” strategy, *A Farm to Fork Strategy For a Fair, Healthy and Environmentally-Friendly Food System*, COM (2020) 381 final (May 20, 2020) [hereinafter *Farm to Fork Strategy*], or in relation to Community Plant variety rights and the need to develop new plant varieties in line with the objectives of the European Green Deal, *The European Green Deal*, Brussels, at 2, 18, COM (2019) 640 final (Dec. 11, 2019) [hereinafter *European Green Deal*]. The European Green Deal also recalls the horizontal nature of sustainability in its introduction when it states “[t]he EU has the collective ability to transform its economy and society to put it on a more sustainable path. It can build on its strengths as a global leader on climate and environmental measures, consumer protection, and workers’ rights,” *id.* at 2.

172. See also *European Green Deal*, *supra* note 171, at 9; *Farm to Fork Strategy*, *supra* note 171, at 15–18.

173. *Making the Most*, *supra* note 170, at 11.

174. *Id.* at 12.

175. *Id.*

176. Most of these contributions build on the United Nation’s sustainability goals, for example, Margaret Chon, *Recasting Intellectual Property in Light of the U.N. Sustainable Development Goals: Towards Knowledge Governance*, 34 AM. U. INT’L L. REV. 763–64 (2019); Ahmed Abdel-Latif & Pedro Roffe, *The Interface Between Intellectual Property and Sustainable Development*, in HANDBOOK OF INTELLECTUAL PROPERTY RESEARCH (Irene Calboli & Maria Lilla Montagnani eds., 2021), the latter arguing that, despite extensive multilateral discussions in various fora on a range of issues, some of which the authors address in exemplary way in their chapter, “they have not, in general, resulted in changes to existing international IP rules on the creation of new ones to accommodate some of these concerns (with the notable exception of public health and access to medicines which is of significant

sustainability as drivers of an innovative and sustainable European economy and society must be understood as a responsibility and mission to examine current intellectual property legislation in the light of these aims.¹⁷⁷

Sustainability is only one of the aims of the EU, but, certainly, one that can help to re-evaluate the way copyright currently supports the attainment of these aims. And, of course, it has to be considered together with the other aims included in Article 5 of the TEU.¹⁷⁸ Taking sustainability as a starting point with its fairly slim definition of “meeting the needs of the present whilst ensuring future generations can meet their own needs,”¹⁷⁹ it is possible to understand as part of the EU’s mission the development of a sustainable EU copyright system whereby copyright should foster innovation and technological advancement (as another interrelated aim of the EU) and provide appropriate remuneration to creators (needs of the present), while at the same time ensuring that downstream creativity and innovation is not unnecessarily hindered (needs of the future generations). With a balanced copyright system geared toward sustainability that allows for flexibility and ease of access¹⁸⁰ to necessary information and research resources, the EU could ensure that the canon of values its sets out as guidelines for its constitutional order can be progressively realized.

importance in the context of the response to the COVID-19 crisis)”; *see also* Freedom-Kai Phillips, *Intellectual Property Rights in Traditional Knowledge: Enabler of Sustainable Development*, 32 *UTRECHT J. INT’L EUR. L.* 1 (2016); Ioannis E. Nikolaou et al., *Intellectual Property and Environmental Innovation: An Explanation Using the Institutional and Resource-Based Theories*, 6 *INT’L J. FORESIGHT & INNOVATION POL’Y* 268 (2010); Elisabeth Eppinger et al., *Sustainability Transitions in Manufacturing: The Role of Intellectual Property*, 49 *CURRENT OP. ENV’T SUSTAINABILITY* 118 (2021).

177. *See generally* Geiger & Jütte, *supra* note 98 (providing a more detailed overview).

178. TEU, *supra* note 102, art. 5.

179. WORLD COMM’N ON ENV’T & DEV., *supra* note 159, ch. 2, ¶ 1.

180. *See* Sheridan, *supra* note 4. Sheridan frames her critique of modern copyright around an “access rights model” that defines access in “quality and quantity of access,” *id.* at 53. Her “knowledge principle” is based on the idea that “access to the intellectual commons allows for the freedom of movement of knowledge resources, and in turn, positively stimulates the processes of knowledge production, participation, and transmission that leads to more production of knowledge resources,” *id.* at 104. *See also* Geiger, *Copyright as an Access Right*, *supra* note 4, at 75–76 (noting negative side effects and creator frustrations with a less flexible copyright model).

While this is a first attempt to develop the idea of a “sustainable copyright,” the direction of 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 constitutional framework of the EU, could serve to reflect and represent the aims of the EU.

C. A EUROPEAN RIGHT TO RESEARCH AS A COMBINED READING OF EXISTING FUNDAMENTAL RIGHTS

The fundamental rights of the ECHR and the EUCFR are more defined compared to their international counterparts.¹⁸¹ They benefit from a rich and extensive body of case law in which the CJEU and the ECtHR have developed the substance of the rights contained in both documents, and in which the courts have also partially clarified the relations between the various fundamental rights.¹⁸² Based on this rich jurisprudence, we will examine some of the fundamental rights that contain elements out of which we will then undertake to construct a right to research *à l'europpéenne*.

1. *Freedom of Expression and the Right to Receive and Impart Information*

The right to freedom of expression is protected under Article 10 of the ECHR and Article 11 of the EUCFR.¹⁸³ The broad guarantee of the right of freedom of expression includes the right “to receive and impart information and ideas without interference by public authority”¹⁸⁴ and

181. ECHR, *supra* note 108; EUCFR, *supra* note 104.

182. See Laurence R. Helfer, *The New Innovation Frontier Revisited: Intellectual Property and the European Court of Human Rights*, in *INTELLECTUAL PROPERTY LAW AND HUMAN RIGHTS*, *supra* note 3, at 29, 30; see also Geiger & Izyumenko, *Progress*, *supra* note 97, at 283 (“In the first part of the new millennium, the rise of the use of fundamental rights in shaping and using intellectual property norms has led one of the authors of this article to predict that this movement will be “constitutionalizing” intellectual property law. More than a decade and a half later, the influence of fundamental rights on the scope and limitations of intellectual property has never been more important, as illustrated by three seminal copyright decisions (in the *Funke Medien*, *Pelham* and *Spiegel Online* cases) delivered in July 2019 by the Court of Justice of the European Union.”).

183. ECHR, *supra* note 108, art. 10; EUCFR, *supra* note 104, art. 11.

184. ECHR, *supra* note 108, art. 10(1). The ECtHR has interpreted Article 10 to also apply in situations in which private parties effectively interfere with the rights

extends to natural and legal persons.¹⁸⁵ It obliges Member States not only to refrain from restricting the right to freedom of expression but also to provide a framework that protects the exercise of this right in certain circumstances.¹⁸⁶ The ECtHR acknowledged that Article 10 of the Convention had to be interpreted as imposing on States a positive obligation to create an appropriate regulatory framework to ensure effective protection of journalists' freedom of expression on the Internet.¹⁸⁷ The right is subject to limitations set out in Article 10(2).¹⁸⁸ It can be limited or restricted to the extent necessary in a democratic society and for a variety of reasons including "the interests of others."¹⁸⁹ In the jurisprudence of the ECtHR, these interests of others have been interpreted to include the right of rightsholders.¹⁹⁰

guaranteed under the provision in the course of employment relationships, *Fuentes Bobo v. Spain*, App. No. 39293/98, ¶ 38 (Feb. 29, 2000), <https://hudoc.echr.coe.int/eng?i=001-58502>, stemming from a positive obligation of the State, *Young v. United Kingdom*, App. Nos. 7601/76 & 7806/77, ¶ 55 (Aug. 13, 1981), <https://hudoc.echr.coe.int/eng?i=001-57604>.

185. *Çetin v. Turkey*, App. Nos. 40153/98 & 40160/98, ¶ 57 (Feb. 13, 2003), <https://hudoc.echr.coe.int/eng?i=001-60940>.

186. *Fuentes Bobo*, App. No. 39293/98, ¶ 32.

187. *Ed. Bd. of Pravoye Delo v. Ukraine*, App. No. 33014/05, ¶ 64 (May 5, 2011), <https://hudoc.echr.coe.int/eng?i=001-104685>.

188. ECHR, *supra* note 108, art. 10(2).

189. *Id.*

190. *The Pirate Bay Case*, App. No. 40397/12, 10-11 (Feb. 19, 2013), <https://hudoc.echr.coe.int/eng?i=001-117513> ("The Court reiterates that the test of 'necessity in a democratic society' requires it to determine whether the interference complained of corresponded to a 'pressing social need' The test of whether an interference was necessary in a democratic society cannot be applied in absolute terms. On the contrary, the Court must take into account various factors, such as the nature of the competing interests involved and the degree to which those interests require protection in the circumstances of the case. In the present case, the Court is called upon to weigh, on the one hand, the interest of the applicants to facilitate the sharing of the information in question and, on the other, the interest in protecting the rights of the copyright-holders. As to the weight afforded to the interest of protecting the copyright-holders, the Court would stress that intellectual property benefits from the protection afforded by Article 1 of Protocol No. 1 to the Convention Moreover, it reiterates the principle that genuine, effective exercise of the rights protected by that provision does not depend merely on the State's duty not to interfere, but may require positive measures of protection Thus, the respondent State had to balance two competing interests which were both protected by the Convention. In such a case, the State benefits from a wide margin of appreciation").

The EUCFR guarantees the same right under Article 11.¹⁹¹ The provision itself does not contain a limitation that corresponds to Article 10(2) ECHR. However, Article 52 of the EUCFR provides that limitations to the exercise of rights granted under the Charter must be “provided for by law and respect the essence of those rights and freedoms.”¹⁹²

The ECtHR has conceived copyright as an exception to the right to freedom of expression. In two decisions handed down in 2013, the Court argued that the use of works protected by copyright constitutes the exercise of the right of freedom of expression and the exclusive rights of rightsholders are restrictions to this right. In the *Ashby Donald*¹⁹³ and the *Pirate Bay*¹⁹⁴ cases, the Court concluded that the interferences with the right granted by the Convention were justified, but also suggested that in other cases, the balancing of interests between freedom of expression and the right to property could permit uses that constitute *prima facie* infringements of copyright.¹⁹⁵

The CJEU is not so clear on the relation between copyright and freedom of expression. What is clear is that conflicts between the two rights are internalized in copyright law.¹⁹⁶ In the 2019 landmark ruling

191. Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. (C 303) 17, 21 [hereinafter EUCFR Explanations] (“Article 11 corresponds to Article 10 of the European Convention on Human Rights”); Article 52(3) of the EUCFR, *supra* note 104, further provides that “[insofar] as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.” Accordingly, the scope of protection under the Charter is the same as under the Convention. However, in principle, the EU can foresee a higher level of protection for corresponding rights in the Charter.

192. EUCFR, *supra* note 104, art. 52(1).

193. *Ashby Donald v. France*, App. No. 36769/08, 12, 14-15 (Jan. 10, 2013), <https://hudoc.echr.coe.int/eng?i=001-115845>.

194. *The Pirate Bay Case*, App. No. 40397/12, 11.

195. For comments on both cases, see, for example, Geiger, *Copyright as an Access Right*, *supra* note 4, at 74–76; Christophe Geiger & Elena Izyumenko, *Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression*, 42 INT’L REV. INTEL. PROP. & COMPETITION L. 316 (2014); Dirk Voorhoof, *Freedom of Expression and the Right to Information: Implications for Copyright*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY, *supra* note 3, at 331; Jütte, *Beginning*, *supra* note 97.

196. Bernd Justin Jütte & Joao Pedro Quintais, *The Pelham Chronicles*:

in *Pelham v. Hütter and Schneider-Esleben*,¹⁹⁷ the CJEU ruled that the owner of a right in a sound recording cannot prevent the use of a sample of that recording if the user integrates the sample in a new work “in a modified form unrecognizable to the ear.”¹⁹⁸ According to the Court, such use does not amount to reproduction within the meaning of Article 2(c) of the InfoSoc Directive. Moreover, in *Funke Medien v. Bundesrepublik Deutschland*¹⁹⁹ and *Spiegel Online v. Beck*,²⁰⁰ the Court ruled that in certain cases, full reproductions of protected works do not require authorization if such uses fall within one of the exceptions included in Article 5(1) through (3) of the InfoSoc Directive. These exceptions, as implemented into national law and interpreted and applied by national courts, must be interpreted in the light of fundamental rights, having regard to the “nature of the ‘speech’ or information at issue”²⁰¹ and the extent of the reproduction must be proportionate, that is, it “must not be extended beyond the confines of what is necessary to achieve the informatory purpose” of the reproduction.²⁰²

In all three cases, the CJEU balanced the proprietary interest of rightsholders against the right to freedom of expression in its different

Sampling, Copyright and Fundamental Rights, 16 J. INTELL. PROP. L. PRAC. 213, 222 (2021); see also Geiger & Izyumenko, *Progress*, *supra* note 97, at 285 (delineating the relationship between rights of expression and copyright exceptions as presented in fundamental CJEU cases).

197. Case C-476/17, *Pelham GmbH v. Hütter*, ECLI:EU:C:2019:624, ¶¶ 35–36, 39 (July 29, 2019). For comments, see Jütte & Quintais, *supra* note 196, at 222, and Martin Senftleben, *Flexibility Grave – Partial Reproduction Focus and Closed System Fetishism in CJEU*, *Pelham*, 51 INST. FOR INNOV. & COMPET. 751, 758–59 (2020).

198. See Bernd Justin Jütte & João Pedro Quintais, *Advocate General Turns Down the Music—Sampling Is Not a Fundamental Right Under EU Copyright Law*, 41 EUR. INTELL. PROP. REV. 654, 654 (2019); Jütte & Quintais, *supra* note 196, at 222 (expanding on the definition and scope of unrecognizable samples); Senftleben, *supra* note 197, at 758–59 (providing a broader perspective on the CJEU’s lack of a systematic approach).

199. Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, ECLI:EU:C:2019:623, (July 29, 2019).

200. Case C-516/17, *Spiegel Online GmbH v. Beck*, ECLI:EU:C:2019:625, (July 29, 2019).

201. *Funke Medien*, ECLI:EU:C:2019:623, ¶ 74.

202. *Spiegel Online*, ECLI:EU:C:2019:625, ¶ 83; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10 [hereinafter InfoSoc Directive].

facets.²⁰³ While in *Pelham*, the freedom of the arts, as an emanation of the right to freedom of expression, was most relevant, in *Spiegel Online* and *Funke Medien* the right to information in its two dimensions was most closely examined.²⁰⁴ The Court in these cases recognized the importance of a free press, arguing that “the purpose of the press, in a democratic society governed by the rule of law, justifies it in informing the public, without restrictions other than those that are strictly necessary.”²⁰⁵ It is this informatory purpose that enables us to create a connection to a right to research.

It is interesting to note that the AG in *Funke Medien* took a completely different approach. Instead of arguing on the permissibility of using works protected by copyright—in this case, the works were periodic briefing reports which were classified as confidential and only provided to select members of the German Parliament—AG Szpunar suggested that such works, potentially failing the required standard of originality, should not attract copyright protection.²⁰⁶ He further argued that the suppression or control of information is not the purpose of copyright law and that other mechanisms serve the purpose of keeping information secret or exclusive.²⁰⁷

The informatory function of the right to freedom of expression as

203. For commentary on all three decisions, see generally Geiger & Izyumenko, *Progress*, *supra* note 97; Bernd Justin Jütte, *Copyright and Fundamental Rights in the Digital Single Market*, in *EU INTERNET LAW IN THE DIGITAL SINGLE MARKET 3*, (Tatiana-Eleni Synodinou et al. eds., 2021); Bernd Justin Jütte, *Finding the Balance in Copyright Law: Internal and External Control Through Fundamental Rights*, in *INTELLECTUAL PROPERTY LAW AND HUMAN RIGHTS*, *supra* note 3, at 461 [hereinafter Jütte, *Finding the Balance*]; Teunissen, *supra* note 124; Thom Snijders & Stijn van Deursen, *The Road Not Taken – the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – a Case Note on the Pelham, Spiegel Online and Funke Medien Decisions*, 50 *INT’L REV. INTELL. PROP. & COMPETITION L.* 176 (2019); Sganga, *supra* note 129. On *Funke Medien*, specifically, see generally Bernd Justin Jütte & Giulia Priora, *Leaking of Secret Military Reports Qualifies as Reporting of Current Events*, 15 *J. INTELL. PROP. L. PRAC.* 681 (2020). On *Spiegel Online*, specifically, see generally Giulia Priora & Bernd Justin Jütte, *No Copyright Infringement for Publication by the Press of Politician’s Controversial Essay*, 15 *J. INTELL. PROP. L. PRAC.* 583 (2020).

204. Geiger & Izyumenko, *Progress*, *supra* note 97, at 285.

205. *Spiegel Online*, ECLI:EU:C:2019:625, ¶ 72.

206. Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, ECLI:EU:C:2018:870, ¶ 62 (Oct. 25, 2018) (Opinion of AG Szpunar) (rejecting the practices as demonstrated by the Federal Republic of Germany).

207. *Id.* ¶ 64.

an active and passive right to transmit information, opinions and, in essence, forms of expression, is highlighted particularly well in the jurisprudence of the ECtHR.²⁰⁸ Privilege is given to expression unless the expression of an opinion undermines the foundations of a democratic society.²⁰⁹ Parallels can be drawn to the development of the substantive scope of the concept of academic freedom at the international level,²¹⁰ which is also a broad right accommodating a wide array of expressions and opinions, including pseudo-science.²¹¹

The Strasbourg Court determined that access to information or its collection is a privileged act—for example, for journalists²¹² and

208. See *Handyside v. United Kingdom*, App. No. 5493/72, ¶ 49 (Dec. 7, 1976), <https://hudoc.echr.coe.int/eng?i=001-57499> (advancing the purpose of freedom of expression regardless of the subject matter of the “information” or “ideas”); *Axel Springer AG v. Germany*, App. No. 39954/08, ¶¶ 78, 90 (Feb. 7, 2012), <https://hudoc.echr.coe.int/eng?i=001-109034> (affirming that the exceptions to freedom of expression are to “be construed strictly, and the need for any restrictions must be established convincingly”).

209. This is implicit in the permitted limitation to the right to freedom of expression under the ECHR. ECHR, *supra* note 108, art. 10(2) (“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are *necessary in a democratic society*, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”) (emphasis added).

210. See discussion *infra* Section I.C.2.

211. See *Kaye*, *supra* note 18, ¶ 29 (noting that the regulation of “pseudoscientific, polemical, advocacy-driven or antisemitic or racist” academic work should not be limited by fundamental rights but left to the self-regulatory governance structures of academic institutions).

212. See *Satakunnan Markkinapörssi Oy v. Finland*, App. No. 931/13, ¶ 128 (June 27, 2017), <https://hudoc.echr.coe.int/eng?i=001-175121> (“[I]t is well-established that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom.”); *Magyar Helsinki Bizottság v. Hungary*, App. No. 18030/11, ¶ 130 (Nov. 8, 2016), <https://hudoc.echr.coe.int/eng?i=001-167828> (providing an overview of the jurisprudence establishing the gathering of information as a protected part of press freedom); *Guseva v. Bulgaria*, App. No. 6987/07, ¶ 37 (Feb. 17, 2015), <https://hudoc.echr.coe.int/eng?i=001-152416> (discussing the negative implications of obstacles blocking access to information, including the discouragement to media professionals); *Shapovalov v. Ukraine*, App. No. 45835/05, ¶ 68 (July 31, 2012), <https://hudoc.echr.coe.int/eng?i=001-112570> (citing *Dammann v. Switzerland*, App. No. 77551/01, ¶ 52 (Apr. 25, 2006), <https://hudoc.echr.coe.int/eng?i=001-75174>, and other relevant case-law on

researchers in relation to activities in the public interest—noting in *Gillberg v. Sweden* that a negative right to access also exists.²¹³ Academic research is also privileged, but the justifications for an elevated right to access information are different.²¹⁴ It is also instrumental to look at the rich jurisprudence of both European courts on intermediary liability for online copyright infringement,²¹⁵ but also website blocking and blocking and filtering of information in general. This case law demonstrates the importance of the right to freedom of expression and the right to receive and impart information in Europe's constitutional tradition.²¹⁶

The CJEU underlined repeatedly that copyright enforcement by means of blocking and filtering cannot lead to the suppression of information unprotected by copyright, or the use of works protected by copyright falling under exceptions or limitations to copyright. In its earlier case law, the CJEU limited the obligations that can be imposed on online intermediaries with reference to competing fundamental

the matter of protecting the gathering of information for press freedom); *cf.* Annelies Vandendriessche & Bernd Justin Jütte, *Responsible Information Sharing: Converging Boundaries between Private and Public in Privacy and Copyright Law*, 10 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 310, 314 (2019) (comparing the right of access to information and data protection and its parallels to copyright law).

213. See *Kenedi v. Hungary*, App. No. 31475/05, ¶ 43 (May 26, 2009), <https://hudoc.echr.coe.int/eng?i=001-92663> (“[A]ccess to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant’s right to freedom of expression.”); *Gillberg v. Sweden*, App. No. 41723/06, ¶¶ 96–97 (Apr. 3, 2012), <https://hudoc.echr.coe.int/eng?i=001-110144> (assessing that the applicant did not have the alleged “negative” right within the meaning of Article 10 of the ECHR); *Roşianu v. Romania*, App. No. 27329/06, ¶ 47 (June 24, 2014), <https://hudoc.echr.coe.int/eng?i=001-144999> (employing the relevant criteria to balance the protection of private life against the freedom of expression); *Shapovalov*, App. No. 45835/05, ¶¶ 63, 68.

214. See *Başkaya v. Turkey*, App. Nos. 23536/94 & 24408/94, ¶¶ 61–67 (July 8, 1999), <https://hudoc.echr.coe.int/eng?i=001-58276>; *Kenedi*, App. No. 31475/05, ¶ 42 (presenting a national government’s argument of national security as a legitimate aim served through the retroactive classification of documents); *Gillberg*, App. No. 41723/06, ¶ 93 (accord[ing] the relevant University and other parties’ rights in assessing the applicant’s lack of right under Article 10 of the Convention).

215. See Geiger & Jütte, *Towards a Virtuous Legal Framework*, *supra* note 97; Geiger & Jütte, *Platform Liability*, *supra* note 97.

216. See generally Christophe Geiger & Elena Izyumenko, *The Role of Human Rights in Copyright Enforcement Online: Elaborating a Legal Framework for Website Blocking*, 32 AM. U. INT’L L. REV. 43 (2016) (recognizing fundamental rights in the EU Charter and the ECHR and the role of the European legislature in assessing “valid objective[s]”).

rights.²¹⁷ These limitations extend to the provision of personal data of internet users to identify infringers in *Promusicae v. Telefónica*,²¹⁸ to the scope of blocking and filtering injunctions in *SABAM v. Netlog*²¹⁹ and *Scarlet Extended v. SABAM*,²²⁰ and to the obligation of operators of open wireless networks in *Mc Fadden v. Sony Music*.²²¹ Common to all these cases is that the CJEU refused to grant unconditional protection to copyright if this would mean that other rights—for example, the right to freedom of expression—would be disproportionately infringed. The CJEU particularly highlighted that the right to receive information on internet users, in general, would be critical in assessing the scope of injunctions.²²²

On website blocking in general, the ECtHR ruled that restricting access to websites constitutes an infringement of the right to receive and impart information, even if the blocking of a particular website is only incidental.²²³ The mere fact that a website is even temporarily unavailable restricts the owner of that website in their right to impart information and the general public of the right to receive

217. Jütte, *Finding the Balance*, *supra* note 203, at 476–77; CHRISTINA ANGELOPOULOS, EUROPEAN INTERMEDIARY LIABILITY IN COPYRIGHT A TORT-BASED ANALYSIS, 108–43 (2016).

218. Case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España*, ECLI:EU:C:2008:54, ¶ 70 (Jan. 29, 2008).

219. Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, ECLI:EU:C:2012:85, (Feb. 16, 2012).

220. Case C-70/10, *Scarlet Extended SA v. Société Belge des Auteurs Compositeurs et Éditeurs (SABAM)*, ECLI:EU:C:2011:771, (Nov. 24, 2011).

221. Case C-484/14, *Mc Fadden v. Sony Music Ent. Ger. GmbH*, ECLI:EU:C:2016:689, (Sept. 15, 2016).

222. See *SABAM v. Netlog*, ECLI:EU:C:2012:85, ¶ 48; *Scarlet Extended*, ECLI:EU:C:2011:771, ¶ 50; Case C-314/42, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, ECLI:EU:C:2014:192, ¶ 62 (Mar. 27, 2014); *Mc Fadden*, ECLI:EU:C:2016:689, ¶ 93. In his Opinion in *Mc Fadden*, AG Szpunar took an even more restrictive position, arguing “[m]ore generally, I would observe that any general obligation to make access to a Wi-Fi network secure, as a means of protecting copyright on the Internet, could be a disadvantage for society as a whole and one that could outweigh the potential benefits for rightholders.” Case C-484/14, *Mc Fadden v. Sony Music Ent. Ger. GmbH*, ECLI:EU:C:2016:170, ¶ 148 (Mar. 16, 2016) (Opinion of AG Szpunar).

223. Geiger & Izyumenko, *Shaping Intellectual Property Rights*, *supra* note 138, at 584 (presenting the “general trend . . . in European law” of “shift[ing] enforcement burdens onto intermediaries”).

information.²²⁴

The expression of this balance is not only reflected (as interpreted by the ECtHR and CJEU in the cases described above) in Article 15 of the E-Commerce Directive²²⁵ but it has also been carried over into the sector-specific copyright and related rights in the Digital Single Market (CDSM) Directive,²²⁶ which prohibits imposing an obligation on specific platforms to install general monitoring or filtering mechanisms to enforce copyright on their services.²²⁷ The adoption of the CDSM Directive gave the CJEU the opportunity to reiterate its position on the importance of the right to freedom of expression. In shaping the enforcement rules for so-called online content-sharing service providers (OCSSPs), the Court restated that the *ex-ante* blocking of potentially infringing uploads must be reduced to a necessary minimum.²²⁸ This position was—slightly nuanced but equivalent in principle—shared by the European Commission and most national legislators.²²⁹

Similarly, the Court has also ruled that the employment of

224. See *Observer v. United Kingdom*, App. No. 13585/88, ¶ 59 (Nov. 26, 1991), <https://hudoc.echr.coe.int/eng?i=001-57705> (emphasizing the rights of freedom of expression and the exercise thereof); *Guerra v. Italy*, App. No. 14967/89, ¶ 53 (Feb. 19, 1998), <https://hudoc.echr.coe.int/eng?i=001-58135> (expanding the right of access to information to potentially confer on the government the obligation to “collect and disseminate information of its own motion”); Christophe Geiger & Elena Izyumenko, *Blocking Orders: Assessing Tensions with Human Rights*, in OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY 566, 584 (2020) (noting that recent trends and jurisprudence indicate a growing responsibility on IPSs and intermediaries to undertake enforcement of intellectual protection rights).

225. See Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1 (balancing the requirement that “Member States shall not impose a general obligation” with the allowance that “Member States may establish obligations . . . to inform the competent public authorities”).

226. CDSM Directive, *supra* note 101.

227. *Id.* art. 17(8).

228. *Id.*

229. Case C-401/19, *Poland v. Parliament*, ECLI:EU:C:2021:613, (July 15, 2021) (Opinion of AG Saugmandsgaard Øe) The AG highlighted that “[The] preventive ‘over-blocking’ of all of those legitimate uses and the systematic reversal of the burden of demonstrating that legitimacy on users could therefore lead, in the short or long term, to a ‘chilling effect’ on the freedom of expression and creation, resulting in a decrease in the activity of those users,” *id.* ¶ 187, and therefore “adopting such preventive measures would . . . risk causing ‘irreparable’ damage to freedom of expression,” *id.* ¶ 216.

technological protection measures, which enjoy protection under Article 6 of the InfoSoc Directive and Article 7 of the Software Directive, must not prevent lawful uses.²³⁰ To respect the principle of proportionality, “digital locks” cannot be used to prevent uses that do not have as their primary aim the infringement of copyright.²³¹

The jurisprudence of the CJEU and the ECtHR illustrates that the right to freedom of expression can only be limited under strict conditions.²³² The purpose of this fundamental right, it becomes clear, is to enable communication and access to information.²³³ In relation to copyright, the courts have repeatedly stressed that copyright cannot stand in the way of relatively unimpeded access to information.²³⁴ More importantly, the CJEU has also stressed that the purpose of copyright is not to protect information or ideas.²³⁵ The fundamental principle of copyright law that copyright protects expressions and not ideas is reflected in the balance struck by the CJEU, albeit implicitly, in *Pelham*, but also more expressly in *Funke Medien*.

2. Academic Freedom and Scientific Research

A right to academic freedom does not exist in the ECHR but is implicitly subsumed under the right to freedom of expression.²³⁶ The EUCFR gives concrete expression to freedom of the arts and sciences

230. Case C-355/12, *Nintendo Co. v. PC Box Srl*, ECLI:EU:C:2014:25, ¶¶ 30–31 (Jan. 23, 2014).

231. *See id.* (stating that the use of “devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection” cannot be prohibited under Article 6(2) InfoSoc Directive, and “that legal protection [for technological protection measures] is granted only with regard to technological measures which pursue the objective of preventing or eliminating, as regards works, acts not authorised by the rightholder of copyright Those measures must be suitable for achieving that objective and must not go beyond what is necessary for this purpose.”).

232. *See Geiger & Izyumenko, Progress, supra* note 97, at 285 (discussing the Court’s consideration of exceptions “beyond the list of *codified* exceptions in EU copyright law provided for in Art. 5 of the [InfoSoc Directive]”).

233. *Id.*

234. *Id.*

235. *See id.* at 295 (emphasizing the balance between copyright and the right to freedom of expression rather than copyright as a means of protecting information and ideas).

236. EUCFR Explanations, *supra* note 191, at 21 (“Article 11 corresponds to Article 10 of the European Convention on Human Rights. . . .”).

and academic freedom as express rights in Article 13.²³⁷ The pooling of these separate rights in one provision can be explained by their common roots in the right to freedom of expression, and it is also an indication of their related nature.²³⁸ Especially in relation to academic freedom, the Council of Europe and the EU institutions have produced several Recommendations to shape the scope of this right.²³⁹ Intellectual property concerns do not play a prominent role in these documents.²⁴⁰ The freedom of scientific research is limited but is affirmed in principle by the Oviedo Convention on Human Rights in Biomedicine and its four protocols.²⁴¹

237. EUCFR, *supra* note 104, art. 13.

238. Debbie Sayers, *Article 13 Freedom of the Arts and Sciences*, ¶ 13.01 in *THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY* 379 (Peers et al. eds., 2014).

239. See Council of Europe, Committee of Ministers, Recommendation No. R (90) 3 Concerning Medical Research on Human Beings (Feb. 6, 1990) (emphasizing the confidential nature of “any information of a personal nature obtained during medical research”); Eur. Parl. Ass. Deb. 24th Sitting, ¶¶ 7–9 (Feb. 2, 1989) (seeking international action aimed at common research advancement and safeguards related to the use of human embryos and fetuses in scientific research); Eur. Parl. Ass. Deb. 23rd Sitting, ¶ 14 (June 30, 2006) (pursuing the requirement of “recognition of academic freedom and university autonomy as a condition for membership of the Council of Europe”); Defense of Academic Freedom in the EU’s External Action, 2020 O.J. (C 363) 173, 176–78 (promoting academic autonomy, defending academic freedom, and encouraging dialogue between institutions).

240. Committee of Ministers 705th Meeting, Recommendation No. R (2000) ¶ 9 (Mar. 30, 2020) (“Governments should encourage universities to define clear rules for accepting, managing and accounting for funds from outside the university. These should cover . . . the allocation of income from intellectual property . . .”).

241. See Convention on Human Rights and Biomedicine, Apr. 4, 1997, E.T.S. 164 (“Scientific research in the field of biology and medicine shall be carried out freely, subject to the provisions of this Convention and the other legal provisions ensuring the protection of the human being.”); Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, Jan. 1, 1998, E.T.S. 168 (prohibiting the cloning of human beings given the ramifications of this potential research); Additional Protocol to the Convention on Human Rights and Biomedicine Concerning Transplantation of Organs and Tissues of Human Origin, Jan. 25, 2002, E.T.S. 186; Additional Protocol to the Convention on Human Rights and Biomedicine, Concerning Biomedical Research, Jan. 25, 2005, C.E.T.S. 195 (limiting research given considerations of necessity, proportionality to potential benefits, and consent); Additional Protocol to the Convention on Human Rights and Biomedicine Concerning Genetic Testing for Health Purposes. Nov. 27, 2008, C.E.T.S. 203 (establishing the right of respect, security, and confidentiality for private data).

The non-binding UNESCO *Recommendation Concerning the Status of Higher Education Teaching Personnel*²⁴² sets out a list of elements that constitute academic freedom, among them certain individual freedoms of the teacher.²⁴³ It states in its preamble that “teaching and research can only be fully enjoyed in an atmosphere of academic freedom and autonomy for institutions of higher education and that the open communication of findings, hypotheses and opinions lies at the very heart of higher education and provides the strongest guarantee of the accuracy and objectivity of scholarship and research.”²⁴⁴ The Recommendation defines research within the context of higher education as “original scientific, technological and engineering, medical, cultural, social and human science or educational research which implies careful, critical, disciplined inquiry, varying in technique and method according to the nature and conditions of the problems identified, directed towards the clarification or resolution of the problems, and when within an institutional framework, supported by an appropriate infrastructure.”²⁴⁵ Researchers within the scope of the Convention should “have access, without censorship, to international computer systems, satellite programmes and databases required for their teaching, scholarship or research”²⁴⁶ and dissemination of research results should be encouraged “with a view to promoting the advancement of science, technology, education and culture generally.”²⁴⁷

It is not difficult to read into these aspirational statements—which are flanked by further recommendations that remain aspirational in most parts of the world—a political will to facilitate research and to provide researchers with the infrastructure and means, including the necessary information in form of the scientific state of the art and other information, to conduct research without restraint. The recommendations are precisely that—recommendations—and little guidance is provided by these instruments on the interplay between

242. UNESCO, *Recommendation Concerning the Status of Higher Education Teaching Personnel*, (1997) [hereinafter UNESCO Recommendation].

243. Sayers, *supra* note 238, ¶ 13.29.

244. UNESCO Recommendation, *supra* note 242, pmb1.

245. *Id.* at I.1(b).

246. *Id.* at IV.11.

247. *Id.* at IV.12.

academic freedom and the freedom of scientific research on the one side, and intellectual property on the other. It is, however, possible to draw some conclusions from the general jurisprudence of the ECtHR and the CJEU on the right to freedom of expression, freedom of scientific research, and the freedom of the arts.²⁴⁸ This systematic cross-pollination for the purpose of defining the scope, including its limitations, of the right to scientific freedom as an individual freedom but also as an integral element of academic freedom, is permitted because all three rights and freedoms are contained in one provision in the EUCFR, have the same roots in Article 10 of the ECHR and are subject to the same limitations and restrictions.

In *Commission v. Hungary*, the CJEU confirmed that academic freedom has two dimensions, one institutional and one individual.²⁴⁹ At the individual level, academic freedom largely falls under a qualified right to freedom of expression, which grants researchers specific freedoms.²⁵⁰ Therefore, academic freedom covers areas of artistic expression and scientific research²⁵¹ by providing freedoms similar to those of journalists but also charges researchers with specific responsibilities due to their special position as both researchers and as educators.²⁵² The individual freedom of researchers is therefore pronounced, but not limitless. The scope of the right to research is likely broader than the institutionally limited academic

248. The freedom of the arts is probably the broadest of these rights and transcends, at least to a certain extent, the classical understanding of art, giving it a special character. See Eleni Polymenopoulou, *Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights*, 16 HUM. RTS. L. REV. 511, 535–38 (2016) (presenting a wide range of examples of artistic expressions which the CJEU has deemed to fall under the definition of “art” and therefore under the protection of artistic freedom).

249. Case C-66/18, *Comm’n v. Hungary*, ECLI:EU:C:2020:792, ¶ 227 (Oct. 6, 2020); cf. Sayers, *supra* note 238, ¶ 13.41.

250. *Comm’n v. Hungary*, ECLI:EU:C:2020:792, ¶ 227.

251. Sayers, *supra* note 238, ¶ 13.60.

252. Cf. *id.* ¶ 13.55; see also *Hertel v. Switzerland*, App. No. 25181/94, ¶ 22 (Aug. 25, 1998), <https://hudoc.echr.coe.int/eng?i=001-59366> (“[I]t is necessary to distinguish scientific freedom from the freedom to communicate to others the knowledge gained.”); *Magyar Helsinki Bizottság v. Hungary*, App. No. 18030/11, ¶ 159 (Nov. 8, 2016), <https://hudoc.echr.coe.int/eng?i=001-167828> (conveying the special obligations of journalists who must act “in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism”).

freedom.²⁵³ For example, academic researchers within the scope of academic freedom enjoy rights that are qualified and only extend to the sphere of academic activity and the researcher's respective area of competence.²⁵⁴ In general, the right to "academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information, and freedom to conduct research and distribute knowledge and truth without restriction."²⁵⁵

It is notable that academic freedom and the freedom to research are also closely linked to important aims and policy areas of the European Union which must be taken into consideration as programmatic goals in the interpretation and balancing of the right to scientific research and academic freedom.²⁵⁶ More recently, the 2021 Digital Europe

253. *Beiter et al., Yearning to Belong, supra* note 30, at 169. Although recognized in national constitutions and somewhat in the Charter of Fundamental Rights of the EU, a right to academic freedom is not expressly contained in either the International Covenant on Civil and Political Rights or the ICESCR, *id.* at 110.

254. *See* Erdoğan v. Turkey, App. Nos. 346/04 & 39779/04, ¶ 40 (May 27, 2014), <https://hudoc.echr.coe.int/eng/?i=001-144129> (as adopted by Comm'n v. Hungary, ECLI:EU:C:2020:792, ¶ 225) (asserting that the restrictions for academics and researchers extends "in the areas of their research, professional expertise and competence").

255. *Id.*

256. The TFEU foresees a specific chapter on research policy, TFEU, *supra* note 103, arts. 179–90, which is aimed at establishing a European Research Area (ERA). The ERA should enable the free movement of researchers and scientific knowledge to promote "all the research activities deemed necessary by virtue of other Chapters of the Treaties," *id.* art. 179. The ERA has been consistently shaped by high-level policy programs, which includes mandatory open access requirements for EU funded research, see 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>, and supporting open access mechanisms, see EUROPEAN OPEN SCIENCE CLOUD (EOSC), https://research-and-innovation.ec.europa.eu/strategy/strategy-2020-2024/our-digital-future/open-science/european-open-science-cloud-eosc_en (last visited Jan. 25, 2023) ("The European Open Science Cloud aims to build infrastructures to provide seamless access to FAIR data and interoperable services for the scientific community."). *See Conclusions on research assessment and implementation of open science*, Note from Permanent Representatives Committee to Council, 9515/22 (May 25, 2022) (confirming the Council conclusions on research assessment and implementation of open science in order to support the implementation of the European Research Area (ERA)); *see also* Commission Communication on A European strategy for data, COM(2020) 66 final, Appendix ¶ 10 (Feb. 19, 2020) (describing the European Open Science Cloud (EOSC) as "the basis for a science, research and innovation data space that will bring

Programme aspired to “accelerate the digital transformation of the European economy, industry and society”²⁵⁷ and to “foster better exploitation of the industrial potential of policies on innovation, research and technological development.”²⁵⁸ The Digital Europe Programme refers to the Paris Agreement,²⁵⁹ adopted under the United Nations Framework Convention on Climate Change and the United Nations Sustainable Development Goals, stating 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.”²⁶⁰

3. Freedom to Conduct a Business

The freedom to conduct a business is one of the economic fundamental rights of the EUCFR.²⁶¹ It is closely connected to, and originally derived from, national expression of the right to property (Article 17 EUCFR) and the freedom to choose an occupation and to engage in work (Article 15 EUCFR).²⁶² It guarantees the freedom of entrepreneurship as an individual right and is reflective of the EU’s economic constitution as an open market economy with free

together data resulting from research and deployment programmes”); Commission Communication on the European Cloud Initiative—Building a competitive data and knowledge economy in Europe, COM (2016) 178 final (May 19, 2016) (declaring policies to be implemented by EU Member States for “for reinforcing the preservation and re-use of scientific information”); Commission Staff Working Document: Implementation Roadmap for the EOSC, SWD(2018) 83 final (Mar. 14, 2018).

257. Regulation (EU) 2021/694 of the European Parliament and of the Council of 29 April 2021 Establishing the Digital Europe Programme and Repealing Decision (EU) 2015/2240, art. 3, 2021 O.J. (L 166) 1 [hereinafter Regulation (EU) 2021/694].

258. *Id.* art. 9; *see also* rec. 16 (stating “the need to support small and medium-sized enterprises that intend to harness the digital transformation in their production processes”).

259. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

260. Regulation (EU) 2021/694, *supra* note 257, rec. 61. The Programme also encourages open-source solutions with the aim to improve the sustainability of funded projects. *Id.* rec. 54.

261. EUCFR, *supra* note 104, art. 16.

262. *Id.* arts. 15, 17.

competition.²⁶³

The freedom to conduct a business as an individual fundamental right²⁶⁴ first appeared in the European legal order in *Nold*, when the CJEU derived it from the common constitutional traditions of the Member States, in this case, the right to the free pursuit of business activity protected by the German Basic Law.²⁶⁵ Amongst the elements that constitute this right, the most crucial for copyright is the right to contract, which can only be limited under certain circumstances.²⁶⁶

The scope of the freedom to conduct a business is broad, covering every economic activity and guaranteeing the right of a business to dispose freely of its economic, technical, and financial resources.²⁶⁷ Its scope also includes the right of an undertaking to choose with whom to enter into a contract, or, in general, with whom to do business.²⁶⁸

263. See TFEU, *supra* note 103, art. 119(1) (mandating that the activities of the European Union and the Member States be coordinated “in accordance with the principle of an open market economy with free competition”); Michelle Everson & Rui Correia Gonçalves, *Article 16 Freedom to Conduct a Business*, THE EU CHARTER OF FUNDAMENTAL RIGHTS 437, ¶¶ 16.11-12 (Peers et al. eds., 2014).

264. Everson & Correia Gonçalves, *supra* note 263, ¶¶ 16.05–06.

265. Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Comm’n of the Eur. Cmty.*, ECLI:EU:C:1974:51, ¶¶ 12–14, at 507–08 (May 14, 1974) (qualifying the right to property, or any proprietary rights for that purpose with the social function of property: “If rights of ownership are protected by the constitutional laws of all the Member States and if similar guarantees are given in respect of their right freely to choose and practice their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder.”).

266. See Case 151/78, *Sukkerfabriken Nykøbing Limiteret v. Ministry of Agric.*, ECLI:EU:C:1979:4, ¶¶ 19, 23, at 13–14 (Jan. 16, 1979) (contending that relevant Regulations do not advise procedures for the restriction of the freedom to contract but rather protect such freedoms); see also Case C-240/97, *Spain v. Comm’n of Eur. Cmty.*, ECLI:EU:C:1999:479, ¶¶ 101, 103, 105 (Oct. 5, 1999) (reaffirming the power of the relevant parties to contract through the evaluation of the circumstances and will of the parties).

267. Case C-314/42, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, ECLI:EU:C:2014:192, ¶ 49 (Mar. 27, 2014). On the relation between intellectual property and freedom to conduct a business, see Gustavo Ghidini & Andrea Stazi, *Freedom to Conduct a Business, Competition and Intellectual Property*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY, *supra* note 3, at 410, 414.

268. See Case C-393/92, *Gemeente Almelo v. Energiebedrijf Ijsselmij NV*, ECLI:EU:C:1994:171, ¶ 32 (Apr. 27, 1994) (finding that a regional electric power distributor’s exclusive purchasing clause and exclusive sales undertaking

The scope, however, is easily restricted by national or EU measures. Early in its case-law on Article 16 of the EUCFR, the CJEU underlined in *Sky Österreich* that, like the right to property, the freedom to conduct a business can be restricted in pursuance of “an objective of general interest.”²⁶⁹

This case is also relevant in arguing for a right to research as an access right. In *Sky Österreich*, the CJEU had to rule on the legality of a national rule implementing Directive 2010/13,²⁷⁰ obliging broadcasters to give access to their broadcasts on fair, reasonable, and non-discriminatory conditions. This obligation to allow access was granted by virtue of national law to enable other broadcasters to use excerpts for the purpose of reporting on events of high interest to the public in the context of short news reports.²⁷¹ The rule clearly constituted a violation of the right to property under Article 17(2) of the EUCFR in the form of a compulsory license, and it was argued before the CJEU that the obligation to contract would also constitute a violation of Article 16.²⁷² The CJEU found that the limitation of both fundamental rights was proportionate. The CJEU stressed that licensing broadcasts on an exclusive basis, conserving contractual freedom for rightsholders, would prevent the public from gaining access to information on current events.²⁷³ The CJEU stated further that “[i]n the light, first, of the importance of safeguarding the fundamental freedom to receive information and the freedom and pluralism of the media guaranteed by Article 11 of the Charter and, second, of the protection of the freedom to conduct a business as

requirement was not covered by Article 37 of the EEC Treaty which mandates a policy of non-discrimination in the use of state trading); Case C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*, ECLI:EU:C:2013:28 ¶¶ 42–43 (Jan. 22, 2013).

269. *Sky Österreich*, ECLI:EU:C:2013:28, ¶¶ 44–46 (referencing the right to property by stating that “the freedom to conduct a business is not absolute but must be viewed in relation to its social function”).

270. Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services, 2010 O.J. (L 95) 1.

271. *See id.* art. 15(1), 15(6)

272. *See Sky Österreich*, ECLI:EU:C:2013:28, ¶¶ 30, 42–43, 46 (highlighting that Article 16 protects the freedom of exercise in contract; economic and commercial activity; and the right to dispose of property).

273. *Id.* ¶ 65.

guaranteed by Article 16 of the Charter, the European Union legislature was entitled . . . *to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over contractual freedom.*²⁷⁴ In coming to this conclusion, the CJEU underlines that Article 15 of Directive 2010/13 provided that broadcasters could charge fees for the provision of access to their broadcasts under a set of clearly defined conditions.²⁷⁵

Considering *Sky Österreich*, copyright undoubtedly can be made subject to limitations and exceptions that restrict the right to contractual freedom of rightsholders. A duty to contract by way of compulsory licenses or remunerated statutory exceptions would be permitted, as long as they comply with the general conditions of Article 51(2) of the EUCFR.²⁷⁶ For that purpose, any limitations to the fundamental right must be foreseen by law, respect the essence of the right affected, and comply with the principle of proportionality.²⁷⁷ The same standard has also been applied, albeit more implicitly, in a number of cases on the extent to which intermediaries can be required to stop and prevent copyright infringements online.²⁷⁸

4. *The Right to (Intellectual) Property*

The right to property in Europe is guaranteed by Art. 1, First Protocol to the ECHR and Art. 17 of the EUCFR.²⁷⁹ The ECHR is more general in its scope and subsumes, as clarified by the case-law of the ECtHR, intellectual property under the general guarantee of

274. *Id.* ¶ 66 (emphasis added).

275. *See id.*, ¶¶ 63–64 (stating that the absence of a possibility of refinancing should be reflected in the price and that Member States are required to impose certain limitations and requirements).

276. *See* Geiger & Jütte, *Platform Liability*, *supra* note 97, at 525–26 (quoting EUCFR, *supra* note 104, art. 52) (noting that Article 52 of the EUCFR requires that “[a]ny limitation on the exercise of the rights and freedom” must be provided for by law).

277. *Sky Österreich*, ECLI:EU:C:2013:28, ¶ 48.

278. *See* Geiger & Jütte, *Platform Liability*, *supra* note 97, at 525–26 (highlighting that the Court of Justice has largely shielded commercial intermediaries from excessive obligations).

279. Protocol 1 to Supplement the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR Protocol 1]; EUCFR, *supra* note 104, art. 17.

property as “the peaceful enjoyment of . . . possessions.”²⁸⁰ The EUCFR more expressly protects intellectual property by stating that “[i]ntellectual property shall be protected.”²⁸¹ The protection is, of course, not absolute, especially considering the utilitarian or social function of copyright in particular. Neither European fundamental rights catalog provides for a definition of the scope of protection, or what intellectual property is for the purposes of the Charter or the Convention.²⁸² However, both instruments state that the right to property can be subject to limitations.²⁸³ Under the ECHR, “[n]o one shall be deprived of his possessions except in the public interest” and any interference with the right to property must be provided for by law.²⁸⁴ Under the EU Charter, the general norm to limit fundamental rights under Article 51 of the EUCFR applies to limitations on the

280. The ECtHR confirmed that the right to property also includes intellectual property in the scope of Article 1 of the First Protocol to the ECHR in *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, (Jan. 11, 2007), <https://hudoc.echr.coe.int/eng?i=001-78981>, and *Brit.-Am. Tobacco Co. v. Netherlands*, App. No. 19589/92, (Nov. 20, 1995), <https://hudoc.echr.coe.int/eng?i=001-57953>. In relation to copyright, see *AsDAC v. Moldova*, App. No. 47384/01, (Dec. 8, 2020), <https://hudoc.echr.coe.int/eng?i=001-206726>; see also *The Pirate Bay Case*, App. No. 40397/12, (Feb. 19, 2013), <https://hudoc.echr.coe.int/eng?i=001-117513>; *Ashby Donald v. France*, App. No. 36769/08, (Jan. 10, 2013), <https://hudoc.echr.coe.int/eng?i=001-115845>; Torremans, *supra* note 95, at 530.

281. EUCFR, *supra* note 104, art. 17(2). *But see* Christophe Geiger, *Intellectual Property Shall be Protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope*, 31 EUR. INTEL. PROP. REV. 113, 116 (2009) (emphasizing that the legal consequences of Article 17(2) should not be overestimated and noting that intellectual property rights can be limited to safeguard public interest); Jonathan Griffiths & Luke McDonagh, *Fundamental Rights and European IP Law – The Case of Art 17(2) of the EU Charter*, in CONSTRUCTING EUROPEAN INTELLECTUAL PROPERTY: ACHIEVEMENTS AND NEW PERSPECTIVES 75, 93 (Christophe Geiger ed., 2013) (stating that it cannot be reasonably suggested that Article 17(2) would require the introduction of a specific enforcement mechanism); Alain Strowel, *Copyright Strengthened by the Court of Justice Interpretation of Article 17(2) of the EU Charter of Fundamental Rights*, in COPYRIGHT AND FUNDAMENTAL RIGHTS IN THE DIGITAL AGE: A COMPARATIVE ANALYSIS IN SEARCH OF A COMMON CONSTITUTIONAL GROUND 28, 29 (Oreste Pollicino et al. eds., 2020) (emphasizing that certain fundamental rights are in tension with the rights surrounding intellectual property); Torremans, *supra* note 95, at 532 (suggesting that the protection of intellectual property rights as private rights must be inherently weaker as opposed to broader public interest).

282. See ECHR, *supra* note 108, art. 10; EUCFR, *supra* note 104, art. 17(2).

283. ECHR Protocol 1, *supra* note 279, art. 1(1); EUCFR, *supra* note 104, arts. 17(2), 51 (allowing for the regulation by law).

284. ECHR Protocol 1, *supra* note 279, art. 1(1).

right to property.

In its early case-law on the free movement of goods, the CJEU recognized the necessity to limit the exercise of intellectual property rights in order to ensure the functioning of the internal market. To realize one of the aims of the EU, the internal market,²⁸⁵ the CJEU has consistently limited the exercise of territorial intellectual property rights in order to ensure the free movement of goods and services between the Member States of the EU.²⁸⁶ Even before the introduction of the EU Charter, the CJEU denied the applicability of Treaty restrictions of the free movement of goods on grounds of “the protection of industrial and commercial property.”²⁸⁷ Such limitations—one of the most prominent aims of the EU—would only be possible to protect “rights which constitute the essential subject-matter of such property.”²⁸⁸ This “essence” of the various intellectual property rights has been constructed, albeit not in a systematic manner, by the CJEU.²⁸⁹ It becomes clear from the CJEU’s case-law that

285. See discussion *supra* Section I.B.2.

286. *E.g.*, Case 78/70, *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH*, ECLI:EU:C:1971:489, ¶¶ 12–13 (June 8, 1971) (limiting the exercise of the right of phonogram producers to prevent the sale of phonogram copies in an EU Member State after the copies had already been lawfully sold in another Member State).

287. TFEU, *supra* note 103, art. 36.

288. *Deutsche Grammophon*, ECLI:EU:C:1971:489, ¶ 11. *But see* Case C-484/14, *Mc Fadden v. Sony Music Ent. Ger. GmbH*, ECLI:EU:C:2016:689, ¶ 95 (Sept. 15, 2016) (citing Case C-314/42, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, ECLI:EU:C:2014:192, ¶ 62 (Mar. 27, 2014)) (ruling that measures that serve to protect the rights of rightholders, for example, by way of an injunction directed against an internet access provider, must be effective in preventing unauthorized access to protected works and subject matter, or if complete protection is not possible without infringing unduly infringing other fundamental rights, make access to protected content more difficult in order to potentially discourage users or at least make it more difficult to access such content to the effect that users are discouraged).

289. See *Husovec*, *supra* note 122, at 863 (concluding that the essence of intellectual property is not determined by EU law); *Joined Cases C-403/08 & C-429/08, Football Ass’n Premier League v. QC Leisure*, ECLI:EU:C:2011:631, ¶ 108 (Oct. 4, 2011) (“[T]he specific subject-matter of the intellectual property does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration. Consistently with its specific subject-matter, they are ensured—as recital 10 in the preamble to the Copyright Directive and recital 5 in the preamble to the Related Rights Directive envisage—only appropriate remuneration for each use

copyright can be limited, and only a very serious violation of the “essence” or the specific subject-matter of copyright would constitute an unjustifiable infringement of copyright as a fundamental right.²⁹⁰

Accordingly, the right to property is not absolute and can be subject to restrictions.²⁹¹ Copyright protection as a property right under the EUCFR and the ECHR is very much dictated by a balancing exercise built around the assumption that intellectual property can be limited in the public interest.²⁹² The CJEU, from its unique position as the prime interpreter of EU law, has reserved the task of limiting copyright for the legislator and refused to assume and exercise external control over the balance within copyright law.²⁹³ While the EUCFR does not

of the protected subject-matter.”). *See also* Joined Cases C-682/18 & C-683/18, *Peterson v. Google LLC*, ECLI:EU:C:2020:586, ¶¶ 238–39 (July 16, 2020) (Opinion of AG Saugmandsgaard Øe) (stating that the exclusive right of communication to the public mentioned in InfoSoc Directive Article 3(1) “does not necessarily have to be interpreted in a manner which ensures *maximum protection* for rightholders”) (emphasis added).

290. *Cf.* Case C-149/17, *Bastei Lübbe GmbH v. Strotzer*, ECLI:EU:C:2018:841, ¶ 46 (Oct. 18, 2018) (holding that any limitation of the exclusive rights must respect the essence of those rights); *see* Husovec, *supra* note 122, at 855 (noting that case-law of the CJEU only points to a higher level of scrutiny for fundamental rights).

291. *See, e.g.,* Case C-476/17, *Pelham GmbH v. Hütter*, ECLI:EU:C:2019:624, ¶ 33 (July 29, 2019); Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, ECLI:EU:C:2019:623, ¶ 72 (July 29, 2019); Case C-516/17, *Spiegel Online GmbH v. Beck*, ECLI:EU:C:2019:625, ¶ 56 (July 29, 2019); Case C-201/13, *Deckmyn v. Vandersteen*, ECLI:EU:C:2014:2132, ¶ 26 (Sept. 3, 2014); *UPC Telekabel Wien*, ECLI:EU:C:2014:192, ¶¶ 46–47; Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, ECLI:EU:C:2012:85, ¶¶ 42–43 (Feb. 16, 2012); Case C-70/10, *Scarlet Extended SA v. Société Belge des Auteurs Compositeurs et Éditeurs (SABAM)*, ECLI:EU:C:2011:771, ¶ 44 (Nov. 24, 2011); Case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, ECLI:EU:C:2008:54, ¶ 65 (Jan. 29, 2008).

292. *See* Case C-277/10, *Luksan v. van der Let*, ECLI:EU:C:2012:65, ¶ 68 (Feb. 9, 2012); *Sganga*, *supra* note 129, at 690.

293. *See generally* *Funke Medien*, ECLI:EU:C:2019:623; *Pelham*, ECLI:EU:C:2019:624; *Spiegel Online*, ECLI:EU:C:2019:625. Although the AG in *Pelham* suggested that in exceptional cases an external review of existing copyright law could be warranted, “[t]hat balancing exercise must, in a democratic society, be undertaken first of all by the legislature, which embodies the general interest. The legislature enjoys a broad margin of discretion in that regard. The application of legislative solutions is then subject to the control of the courts which are in turn responsible for ensuring compliance with fundamental rights in the context of that application to specific cases. However, except in exceptional cases, that control must

distinguish between “real” and intellectual property—and despite the rather blunt statement that intellectual property “shall be protected”—the balancing between the various rights and interests, particularly in the light of the international obligations derived from Article 27 of the UDHR and Article 15 of the ICESCR, copyright could, and arguably must, be subject to restrictions that enable it to perform its inherently social function.²⁹⁴ At least in Europe, this balancing must primarily be performed by the legislator.²⁹⁵

II. THE CONTOURS OF A FUNDAMENTAL RIGHT TO RESEARCH

As we have seen, the imperative to strengthen arguments in favor of research activities and their constitutional requirements is a result of a combined reading of the aims and objectives of the European Union, a commitment to regional and global sustainability, and the interplay of several human rights recognized at the European and international level. We shape the contours of this right in relation to copyright law, but we suggest that the underlying *Gedankenspiel* can also serve to transplant similar arguments into other areas.

A right to research as we propose would not undermine the “credibility of the human rights tradition,” but reflects a “dynamic approach” to consider “changing needs and perspectives and responds

normally be undertaken within the limits of the applicable provisions enjoying a presumption of validity, including with regard to fundamental rights. If only one solution were considered compatible with fundamental rights, the margin of discretion of the legislature would be zero.” Case C-476/17, *Pelham GmbH v. Hütter*, ECLI:EU:C:2018:1002, ¶ 94 (Dec. 12, 2018) (Opinion of AG Szpunar) (references omitted). See Jütte, *Finding the Balance*, *supra* note 203, at 468.

294. See Geiger, *Copyright as an Access Right*, *supra* note 4, at 88 (highlighting that the Charter of Fundamental Rights of the European also functions to limits copyright’s exclusive rights in light of copyright’s social function); Caterina Sganga & Silvia Scalzini, *From Abuse of Right to European Copyright Misuse: A New Doctrine for EU Copyright Law*, 48 INT’L REV. INTEL. PROP. & COMPETITION L. 405, 426 (2016) (distilling from the terminology used in EU legislation the indication that absolute protection is not granted to rightholders, but that the definition of the scope of the rights, and even the granting of exclusive rights themselves serves social and cultural functions); CATERINA SGANGA, *PROPERTIZING EUROPEAN COPYRIGHT: HISTORY, CHALLENGES AND OPPORTUNITIES* (2018).

295. In the EU, this prerogative rests largely with the EU legislator in order to avoid a disharmonious development of copyright in the EU Member states. See, e.g., *Spiegel Online*, ECLI:EU:C:2019:625, ¶ 47.

to the emergence of new threats to human dignity and well-being.”²⁹⁶ Concretely, a right to research would enable access to information to conduct research to help realize other core fundamental rights and to work towards a more sustainable future.

A right to research that would influence copyright policy and, as a result, copyright rules, their interpretation, and application must be defined in three main dimensions to be effective and fulfill its function as an enabler of research activities: personal, substantive, and geographic.

A. PERSONAL

The right to research should not be limited to a particular institutional context or a specific professional background. To put it simply, not only university professors conduct research, but also non-academic researchers, commercial enterprises, and even private individuals, alone or collectively.²⁹⁷ That does not mean that all of these groups should enjoy the same privileges, but they should all be enabled to access necessary information freely, and if necessary, against remuneration. The right to research should have a similar scope to that of the right to scientific research. With its underlying purpose to support research with a copyright system that incentivizes research, the right’s scope should be broad. This is in line with the EU’s aims, also articulated in the UN’s Sustainable Development Goals, which require research not only by publicly funded institutions.²⁹⁸ Instead, technological progress and scientific discoveries in theory and practice must be supported in the public and private spheres, and ideally at the intersection of public and private research.²⁹⁹ As we will expand further below, research-enabling copyright rules should not distinguish between public and private or

296. See Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT’L L. 607, 609 (1984) (emphasizing the EU’s challenge to respond to the changing needs and perspectives created by new threats).

297. See Jesse A. Goldner, *Regulating Conflicts of Interest in Research: The Paper Tiger Needs Real Teeth*, 53 ST. LOUIS U. L.J. 1211, 1216–17 (2009) (noting that more research is supported by private sources).

298. G.A. Res. 70/1, *supra* note 158, ¶¶ 41, 43, 45.

299. See Johan Schot & W. Edward Steinmueller, *Three Frames for Innovation Policy: R&D, Systems of Innovation and Transformative Change*, 47 RSCH. POL’Y 1554, 1564 (2018) (emphasizing the importance of bridges and networks between institutional arrangements and government structures).

commercial and non-commercial users.³⁰⁰

B. SUBSTANTIVE

A right to research should be aimed at facilitating access to information. Compared to the right to freedom of expression, the right to research is focused on the right to receive and process information. Acts of reproduction are required to collect and digest, intellectually and technologically, information to further our understanding of science and technology, but, more importantly in an information society, to generate new analytical insights from large amounts of data. In this context, the more important prong of a right to research is its access function. Whereas the right protected under Article 11 of the EUCFR is a right to receive and impart information, a right to research is a right to access and use copyrighted protected work to collect and analyze information. In other words, Article 11 protects a right to actively and passively communicate, whereas a right to research would guarantee researchers a right to obtain, process, store, and share information for research purposes, including when this requires copyright-relevant actions.³⁰¹

C. GEOGRAPHIC

Research today is not conducted hermitically by individual researchers but is an interconnected activity with interpersonal and international dimensions. A right to research must reflect this. Human rights are global and European fundamental rights have a regional reach. The right to freedom of expression already underlines its borderless nature, as is reflected in the jurisprudence of the European Courts on the importance of the internet as a delocalized communication infrastructure. A right to research must equally support cross-border collaboration and, potentially, an aspiration to support the global exchange of information for research purposes as a counterweight not only to the exclusivity of copyright but also its

300. Compare the application of the research exception under Article 5 of the InfoSoc Directive, *supra* note 202, with the TDM exception in Articles 3 through 4 of the CDSM Directive, *supra* note 101.

301. EUCFR, *supra* note 104, art. 11.

territorial nature.³⁰² A right to research should not be specifically defined to generate cross-border effects, but it should be understood that it can only create the desired changes in copyright law if it enables the exchange of information between researchers in different jurisdictions.³⁰³

III. THE NEED AND PLACE FOR A SPECIFIC, INDIVIDUALIZED FUNDAMENTAL RIGHT TO RESEARCH IN FUNDAMENTAL RIGHTS INSTRUMENTS

The emergence of new fundamental rights is not unprecedented in the EU legal order³⁰⁴ nor the international human rights framework.³⁰⁵

302. See, e.g., Laurence R. Helfer et al., *Copyright Exceptions Across Borders: Implementing the Marrakesh Treaty*, 42 EUR. INTEL. PROP. REV. 332, 333 (2020) (highlighting the importance of congruent exceptions at the national level to enable the cross-border exchange of works).

303. See *id.* at 338–40 (noting that the EU and developing countries are working to expand exceptions and limitations to copyright for libraries, educational institutions, and persons with disabilities).

304. See Emily Hancox, *The Relationship Between the Charter and General Principles: Looking Back and Looking Forward*, 22 CAMBRIDGE Y.B. EUR. LEGAL STUD. 233, 234–35, 240, 256 (2020) (demonstrating the emergence of fundamental rights out of the general principle of EU law, leaving room for the possibility of other emerging rights).

305. Amongst these rights is the right to development and the right to a clean environment, both of which would be strongly supported by a right to research. See Alston, *supra* note 296, at 611–14 (highlighting the Rights to Clean Environment and Development); G.A. Res. 41/128, Declaration on the Right to Development arts. 1, 3 (Dec. 4, 1986), states that “[t]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.” *Id.* art. 1. To realize the right “states have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.” *Id.* art. 3. Prior instances in which the right to research was mentioned, without any further specification of its substance, include G.A. Res. 34/46, Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms, ¶ 8 (Nov. 23, 1979) (“[T]he right to development is a human right . . .”) and as a participatory right, G.A. Res. 37/200, Further Promotion and Protection of Human Rights and Fundamental Freedoms, ¶ 7 (Dec. 18, 1982) (“[E]veryone has the right to participate in, as well as to benefit from, the development process.”). On the development of the right to development, see Nico Schrijver, *A New Convention*

A good example is the “freedom to conduct a business” which has been developed by the European courts and which eventually found its way into the EUCFR as a concretely expressed fundamental right.³⁰⁶ But there is, of course, caution to be exercised when “conjuring up” new fundamental or human rights out of the mist of general principles, national constitutions, and their constitutional traditions. Simply the “want” for a new right is insufficient to argue for the perpetual anchoring of a new right in the Olympus of privileged values—and indeed human rights are hardly ever revoked. There have also been criticisms of the dangers of “rights talk” as a potential for an escalation of political and judicial discourse.³⁰⁷

We argue that an express recognition of an individualized right to research is indeed necessary. Furthermore, its crystallization out of existing rights is not a revolutionary leap, it merely spells out what has been hiding in the shadows.³⁰⁸ Formulating a right to research as its own, self-standing right would merely give contours to what effectively already exists as elements in other fundamental rights. The right to research sits in the central overlap of a Venn diagram of existent fundamental rights.

One could reasonably argue that a de facto existing right deserves

on the Human Right to Development: Putting the Cart before the Horse?, 38 NETH. Q. HUM. RTS. 84, 92 (2020) (remarking on the right to development that “the added value of formulating and recognising the right to development lies not so much in its novel features or individual parts but rather in the sum of its parts and its integrative value,” stressing that the substance of a right to development is already contained in a number of fundamental rights included in global and regional human rights treaties).

306. See Marie-Pierre Granger & Kristina Irion, *The Right to Protection of Personal Data: The New Posterchild of European Union Citizenship?*, in CIVIL RIGHTS AND EU CITIZENSHIP 279, 279–84 (Sybe de Vries et al. eds., 2018) (demonstrating the gradual development of the right to protection of personal data in the European EU).

307. See Carys J. Craig, *Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks*, 33 AM. U. INT'L L. REV. 1, 57–58, 71 (2017) (discussing the rights rhetoric in copyright discourse, positing that user rights, as a concept, have no higher value than normative arguments “based on politics, morality, or subjective values”).

308. See, e.g., Schrijver, *supra* note 305, at 92 (arguing for a right to development as a “cluster right” that is composed of existing fundamental rights, including “[t]he right to a decent standard of living, including the right to food, water, clothing and housing, the right to work, the right to education, the right to life, and the right to freedom of expression and organization, are a cluster of rights that together form a ‘human right to development’”).

its own label, and the question is also, of course, a political one. The right to research does not cover an obvious *lacuna* in international human rights or European fundamental rights, one might therefore argue that its inclusion is not strictly necessary. But its inclusion would highlight societal developments and the necessity of sustainable human progress at a particular and critical point in time. Societal necessity suggests, even commands, that we assign specific importance to research as an activity without which other recognized human rights will most likely not be realizable in the near future.

Positioning the right in existing rights catalogs is of secondary concern, but of equal importance. Once the decision to give concrete expression to a right has been made, its positioning will determine its interrelations with other rights, its normative value, and the general scope of its application. A right to research, to promote a more open and research-permitting copyright system, must be established not only at the regional level. As a normative statement to underline its societal significance at a global level, the right must also be implemented at the highest international level. The effects of this new constellation must, in any case, transpire to the national level, because national parliaments are where legislation is made—copyright law in particular. Positioning this newly formulated right as a binding principle for legislators would safeguard that it unfolds its beneficial effects on copyright law. In the EU, where copyright is largely within the EU's competence, the EUCFR is the appropriate locus of a right to research, which does not mean that the right should not be directly recognized in international and other regional instruments. We propose, therefore, that a right to research should be given concrete expression in the ICESCR as well as the EUCFR.

To avoid the escalation of “conflicts of interest” between different fundamental rights, we suggest an “individualized right to research” which is context-specific to avoid the danger that it radiates into other fundamental rights. For example, we do not suggest that a right to research should, at any stage, come in conflict with the right to life. The tension between a right to research and a right to (intellectual) property would be most appropriately resolved close to or within the relevant rights. That also means that the location of the right as proposed here would limit the effects of its introduction to copyright and would largely insulate other areas from its reach.

At the international level, a revision of Article 15(1)(c) of the ICESCR could promote a right to research as a counterweight to intellectual property. For that purpose, the “right” to moral and material interests could be deleted from the “rights” section under Article 15(1) of the ICESCR. Instead, a purpose-bound obligation in the form of a concrete instruction to ensure an appropriate level of protection of the moral and material interests of rightsholders would be inserted into the second paragraph.

A reformulated Article 15 would look as follows:

CURRENT TEXT	PROPOSED TEXT
<p style="text-align: center;">ARTICLE 15</p> <p>1. The States Parties to the present Covenant recognize the right of everyone:</p> <p style="padding-left: 40px;">(a) To take part in cultural life;</p> <p style="padding-left: 40px;">(b) To enjoy the benefits of scientific progress and its applications;</p> <p style="padding-left: 40px;">(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.</p> <p>2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.</p>	<p style="text-align: center;">ARTICLE 15</p> <p>1. The States Parties to the present Covenant recognize the right of everyone:</p> <p style="padding-left: 40px;">(a) To actively take part in cultural life;</p> <p style="padding-left: 40px;">(b) To enjoy the benefits of scientific progress and its applications;</p> <p style="padding-left: 40px;">(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.</p> <p style="padding-left: 40px;">(c) To actively conduct research for cultural advancement and scientific progress.</p> <p>2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture, which shall include an appropriate protection for authors in relation to</p>

	<p>their moral and material interests resulting from any scientific, literary or artistic production.</p>
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The result of this intervention would be the relegation of the protection of the moral and material interests to a mandatory intervention for member states to ensure the realization of the rights established by Article 15(1)(a) and (b). A right to research by way of a positive obligation, rather than an individual right, would shift the balance within Article 15 of the ICESCR by establishing a clear hierarchy. The rights of authors would be reshaped into an instrument to achieve a social purpose. To stress the importance of the right to research, not only as a right of passive enjoyment but as an explicit right to positive action, the bodies could add a right to participate actively and without barriers for a specific set of purposes including research.

At the European level, the integration of an express right to research is a bit more complicated. No provision of the ECHR or the EUCFR currently hosts an obvious provision for integrating a new right to research.³⁰⁹ By way of example, in the EU fundamental rights order, potential “homes” for a right to research could be found in the freedom of arts and sciences, the right to freedom of expression, or as a purposive qualification of the right to property.³¹⁰ One option is to integrate a right to research as a limitation to the right to intellectual property under Article 17(2) of the EUCFR. Another option would be to expressly include a broader right to access information in the right to freedom of expression under Article 11 of the EUCFR. Finally, the freedom of the arts and sciences could serve as a host for a research-specific qualification.³¹¹ Deriving the right to research from these three rights, and potentially others, it seems almost unjust to attach it to one of these sources. Such an approach might even suggest that there is a center of gravity of a right to research, or a place in the Charter where

309. See generally ECHR, *supra* note 108; EUCFR, *supra* note 104.

310. EUCFR, *supra* note 104, arts. 11, 13, 17.

311. See Christophe Geiger, *Building an Ethical Framework for Intellectual Property in the EU: Time to Revise the Charter of Fundamental Rights*, in REFORMING INTELLECTUAL PROPERTY 77 (Gustavo Ghidini & Valeria Falce eds., 2022) (explaining, in detail, similar options for a more balanced and ethical foundation for intellectual property in European fundamental rights).

the right exists and takes form with a few additions. And, of course, the dangers of a broad, self-standing right to research should not be underestimated.³¹² However, hiding an individual as well as collective claim to research that mandates reforming copyright law in existing property guarantees could also carry with it significant dangers.

Without a complete overhaul of the Charter, the most appropriate place for a guarantee for research is therefore Article 11 of the EUCFR. In a redrafted right to “Freedom of expression and information,” research would be anchored as an express right. The reformulated Article would look as follows:

CURRENT TEXT	PROPOSED TEXT
<p style="text-align: center;">ARTICLE 11</p> <p style="text-align: center;"><i>Freedom of expression and information</i></p> <p>1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.</p> <p>2. The freedom and pluralism of the media shall be respected.</p>	<p style="text-align: center;">ARTICLE 11</p> <p style="text-align: center;"><i>Freedom of expression and information</i></p> <p>1. Everyone has the right to freedom of expression. This right shall include:</p> <p style="padding-left: 2em;">a. the right to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers;</p> <p style="padding-left: 2em;">b. the right to seek information and to conduct research to promote the progress of science and technology, culture and learning.</p> <p>2. The freedom and pluralism of the media shall be respected.</p>

In the new Article 11, the existing norm is supplemented by an insertion in its first paragraph that expressly recognizes the right to seek information for a specific set of purposes. The right is inherently limited by Article 52(2), which replicates, in essence, the limitation of Article 10 of the ECHR. The insertion elevates “research” to the status

312. *See id.* (discussing the need for limits on the right to research).

of a full fundamental right as a component of freedom of expression. It is therefore not limited by institutional contexts, as is the case with the freedom of the arts and sciences. Most importantly, it puts the right to intellectual property explicitly codified in Article 17(2) of the EUCFR into perspective. The conflict between both rights can now be appropriately resolved through Article 52(2) and a proportionality analysis.

IV. RESHAPING COPYRIGHT FOR RESEARCH

We suggest that a right to research properly constructed can serve as an argument in an orderly dialogue between other interests and fundamental rights that inform copyright debates on its systematic structure, but also its interpretation by the courts. As we will illustrate in this section, a right to research provides reasons for reasonable adjustments in copyright law. A weakening or even a complete eradication of copyright as an institution would not be tenable under either international or European human and fundamental rights.³¹³ In particular, if the rights of authors are written into the constituent documents of international human rights law and the European fundamental rights canon, they would not be conceived as inflexible and absolute entitlements to control remuneration and access³¹⁴—or

313. See Marcella Favale, *The Right of Access in Digital Copyright: Right of the Owner or Right of the User?*, 15 J. WORLD INTELL. PROP. 1, 2–3 13–14 (2012) (highlighting the relevant difference of the framing of copyright in different legal spheres).

314. See *id.* at 2–3, 14. The author argues that the extension of copyright protection to technological protection measures in Europe goes beyond what is required under the international copyright treaties, including Article 11 of the EUCFR. The author also employs a human rights reasoning to argue that copyright as an access right, that serves the objectives set out in Article 27 of the UDHR and Article 15 of the ICESCR, cannot restrict acts that are expressly permitted by copyright exceptions and limitations. In light of international human rights law and European fundamental rights, copyright access control by rightholders must be limited to the extent that the “ultimate goal of copyright, the circulation of culture” can still be realized. The reward function of copyright must be designed by lawmakers within the limits set by copyright’s purpose. Specifically on the balance between “paracopyright” (established by the legal protection of technical measures by copyright law) and fundamental rights, see Patricia Akester & UNESCO, *The New Challenges of Striking the Right Balance Between Copyright Protection and Access to Knowledge, Information and Culture*, IGC(1971)XIV/4, 3, 14 (Mar. 8, 2010), <https://unesdoc.unesco.org/ark:/48223/pf0000187683>; Animesh Ballabh,

the latter for the purpose of the former. A fundamental right granted should not be taken away, but it can be reconceived or altered to give full effect to other rights.³¹⁵

Adding a fundamental right to the existing ones can be a justified intervention to clarify or recalibrate the balance that seems to have gotten lost through excessive, or ill-conceived interventions by national and regional legislators. In this sense, we make four suggestions to illustrate the potential effects of a right to research, largely based on examples taken from European copyright law. This is not to say that such changes are not necessary for other areas of copyright law, but such analyses simply go beyond the scope of this paper. We do consider, however, that changes to international copyright instruments could work well to underline the importance of a new (research) theme in copyright law to reassess the normative values and preferences underlying the international copyright framework.³¹⁶ We depart in our consideration from the notion of copyright as an access right that promoted access to information and instead consider copyright with prevention and exclusivity as the main drivers of copyright rule-making and rule-interpretation

A. COPYRIGHT AS AN ACCESS RIGHT: GENERAL CONSIDERATIONS

The idea of copyright as an access right has gained traction as a counter-movement to investment-based rationales for the protection of copyright.³¹⁷ Common to this understanding of copyright as a right

Paracopyright, 30 EUR. INTELL. PROP. REV. 138 (2008) (explaining the term “paracopyright”).

315. See Akester & UNESCO, *supra* note 314, at 3, 14 (discussing how balancing will impact the right to copyright).

316. See, e.g., Reto M. Hilty et al., *International Instrument on Permitted Uses in Copyright Law*, 52 INT'L REV. INTELL. PROP. & COMPETITION L. 62, 65 (2021) (proposing an international instrument on permitted uses in copyright law, in which the authors include research amongst the objectives of a social, political and cultural nature, for which an exception, or more general, a permitted use, should be foreseen in national laws).

317. Geiger, *Copyright as an Access Right*, *supra* note 4, at 89–109; see also Geiger, *Copyright and Free Access*, *supra* note 4, at 685; Christophe Geiger, *The Future of Copyright in Europe: Striking a Fair Balance Between Protection and Access to Information*, 14 INTELL. PROP. Q. 1, 3–5 (2010); Geiger, *supra* note 30, at 91; Chon, *supra* note 176, at 764 (discussing a different understanding of an “accessright” instead of a “copyright”); Simon Olswang, *Access Right: An*

to manage access to works, and eventually information, is the understanding that copyright serves a purpose.³¹⁸ The extent to which copyright grants protection and the extent to which copyright exceptions and other mechanisms, such as technological protection measures, manage access to knowledge must be designed to serve copyright's purpose.

The main purpose—which is reflected in the various norms of international human rights and European fundamental rights law—is to promote the progress of the arts and sciences, cultural and technological participation.³¹⁹ The protection of copyright is not “an end in itself”.³²⁰ Instead, it serves a particular purpose, which is to realize specific goals.³²¹ Besides the objectives expressly mentioned in the UDHR, the ICESCR, the EU Charter, and the ECHR, we must also consider larger societal objectives. These objectives are expressed in the EU's founding treaties as aims and objectives of internal market harmonization but can also be found in international intellectual property discourses.³²²

Whether it is sustainability, sustainable development,³²³ or well-

Evolutionary Path for Copyright Into The Digital Era?, 17 EUR. INTELL. PROP. REV. 215, 215, 217 (1995) (discussing the multiplicity of protection rationales and how they can be theoretically reconciled); Alexander Peukert, *Fictitious Commodities: A Theory of Intellectual Property Inspired by Karl Polanyi's "Great Transformation,"* 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1151, 1153–72 (2019) (discussing alternative theory of intellectual property); Uma Suthersanen, *Creativity, Pluralism, and Fictitious Narratives: Understanding IP Law Through Karl Polanyi*, in (25 Queen Mary L. Rsch. Paper No. 381, 2022) (discussing alternative theories of intellectual property).

318. See Simone Schroff, *The Purpose of Copyright—Moving Beyond The Theory*, 16 J. INTELL. PROP. L. & PRAC. 1262, 1262–64 (2021).

319. See Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *Report on Copyright Policy and The Right to Science and Culture*, ¶¶ 32, 66, U.N. Doc. A/HRC/28/57 (Dec. 24, 2014) (discussing the promotion of progress of the arts and sciences and the intersection of copyright law).

320. See Alexander Peukert, *Intellectual Property as an End in Itself?* 33 EUR. INTELL. PROP. REV. 67 (2011) (discussing how the development of European intellectual property law as an end in itself).

321. *Id.* at 68.

322. TEU, *supra* note 102, art. 3.

323. See Phillips, *supra* note 176, at 6; see also Chon, *supra* note 176, at 776; Abdel-Latif & Roffe, *supra* note 176, at 616–18.

being,³²⁴ these global objectives promote an understanding of copyright as a right that facilitates access to information as a regulatory imperative. Admittedly, global, societal, and development considerations in intellectual property discourses are nothing new, but the introduction of these notions into an argument for a right to research reinforces the case for a more open copyright system that promotes the generation of knowledge and facilitates access to that knowledge.³²⁵

B. SPECIFIC CONSIDERATIONS

Beyond a general shift in an understanding of copyright towards a right that is designed by the legislature to enable access to information, and which exists to realize fundamental rights and societal goals, current copyright rules should be examined. The areas we consider below are examples of copyright mechanisms or specific rights that would benefit from a rethinking in light of a right to research. They are also symptomatic of the failure to properly consider the interests of researchers in the past. The examples selected, far from being exhaustive, are illustrative of recent changes, omissions, or elements of copyright law that are currently debated in the European Union.

1. *The Need for a General, Open-Ended Exception for Research Purposes*

The malaise of European copyright exceptions is well documented.³²⁶ The pre-emptive effect of EU harmonization in the

324. See Estelle Derclaye & Tim Taylor, *Happy IP: Replacing the Law and Economics Justification for Intellectual Property Rights with a Well-Being Approach*, 37 EUR. INTELL. PROP. REV. 197 (2015) (outlining a theory-neutral approach to intellectual property and well-being).

325. See SENFTLEBEN, *supra* note 1, at 63.

326. Since the introduction of the InfoSoc Directive, *supra* note 202, the systematic deficits of Article 5, *id.*, which sets out a list of one mandatory and twenty optional exceptions, have been addressed regularly, as has the unclear role of the three-step test, which has been adopted expressly in Article 5(5), *id.* The basic setup of the directive was already criticized for failing to achieve effective harmonization, see P. Bernt Hugenholtz, *Why the Copyright Directive is Unimportant, and Possibly Invalid*, 22 EUR. INTELL. PROP. REV. 499, 500–02 (2000); Christophe Geiger & Franciska Schönherr, *Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis Regarding Limitations and Exceptions*, in CODIFICATION OF EUROPEAN COPYRIGHT LAW: CHALLENGES AND PERSPECTIVES

field of copyright exceptions makes it unlawful for individual Member States to introduce exceptions beyond those already included in Article 5 of the InfoSoc Directive,³²⁷ or the few contained in special instruments on the protection of computer programs or databases. Although a general research exception can be implemented into national law, Member States are not obliged to do so.

2. *A Right to Research Requires a Mandatory Exception for Research Purposes*

The first point of critique, and a starting point for altering existing copyright rules, is to make a research exception mandatory throughout the EU. It can, of course, be argued, and convincingly so, that a research exception should also be included in the international conventions, starting with the Berne Convention, but also extending to other copyright treaties.³²⁸ To illustrate the effect of a right to research, a regional approach will suffice.

A mandatory exception would eliminate the risk that disharmonious implementations of a research exception will result in innovation-chilling effects.³²⁹ This is particularly true in an area of the world that boasts an active research industry, with some of the largest pharmaceutical manufacturers in the world, and some of the most important producers of technologies that will be indispensable for a

133, 160 (Tatiana-Eleni Synodinou, ed. 2012). For analyses with a specific focus on the three-step test, see Christophe Geiger, *Right to Copy v. Three-Step Test*, 6 COMPUT. L. REV. INT'L 7, 7, 9, 12–13 (2005); Christophe Geiger, *The Three-Step Test, a Threat to a Balanced Copyright Law?*, 37 INT'L REV. INTELL. PROP. & COMPETITION L. 683, 687–88, 694–97 (2006); Christophe Geiger, *The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society*, UNESCO e-Copyright Bulletin 1, 1–2, 18–19 (2007); Herman Cohen Jehoram, *Is There a Hidden Agenda Behind the General Non-Implementation of the EU Three-Step Test?*, 31 EUR. INTELL. PROP. REV. 408, 408–09 (2009); Jonathan Griffiths, *The "Three-Step-Test" in European Copyright Law – Problems and Solutions* 1, 10–11 (Queen Mary U. Sch. L., Legal Stud. Rsch. Paper No. 31, 2009); Christophe Geiger et al., *The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, 29 AM. U. INT'L. REV. 581, 590–600 (2014).

327. See Case C-476/17, *Pelham GmbH v. Hütter*, ECLI:EU:C:2019:624, ¶ 65 (July 29, 2019).

328. See Sean Flynn et al., *Implementing User Rights for Research in the Field of Intelligence: A Call for International Action*, 42 EUR. INTELL. PROP. REV. 393, 398 (2020) (discussing the need for international leadership on discussions surrounding international property law).

329. See SENFTLEBEN, *supra* note 1, at 18.

European and global move towards a more sustainable future. Not only would a mandatory research exception with the same scope provide legal certainty to researchers and innovators across Europe, but it would also enable cross-jurisdictional cooperation between researchers who rely on the exchange of information. Copyright should not constitute an obstacle in such an environment.

The effects of a harmonious copyright framework should also not be underestimated to incentivize competitiveness between EU Member States. A level playing field for copyright protection, or to put it differently, a level playing field for access to information, can eradicate differences in regulatory advantages. Of course, copyright is only one element that contributes to the attractiveness of a jurisdiction for innovation and research-intensive industries, but one that should not be underestimated.

3. *A Right to Research Requires a Broad Research Exception*

The current research exception of Article 5(3)(a) is clumped together with an exception for teaching.³³⁰ It permits reproductions and, potentially, acts of communication to the public “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.”³³¹ Its scope is narrow and does not support the broad research mission reflected in the aims and objectives of the EU or the imperatives of sustainable development.

First, the exception is limited to scientific research, which could be interpreted to mean that industrial research or applied research is not covered by the exception. Although it could be argued that the scope could be broader to include research at the fringes of science, a clear definition of the scope could provide the legal certainty necessary to provide for a research-friendly legal framework. The limitation of a remuneration-free exception to “scientific” research suggests that all other types of research would have to be based on licensing solutions to use protected material.

330. See InfoSoc Directive, *supra* note 202, art. 5(3)(a).

331. See SENFTLEBEN, *supra* note 1, at 66 (suggesting, among other things, to clarify that the “illustration” requirement only applies to teaching activities).

This concern links in with the second problematic condition of Article 5(3)(a), namely that the exception applies only to non-commercial research.³³² This significant limitation overlooks the fact that most of the research is conducted by private companies for largely commercial purposes.

A broader research exception must be technologically neutral to enable research with different types of data and with different methodologies. It must extend to a variety of uses of protected works and other subject matter to allow for the progress of science and technology to achieve the goals set out in Article 3 of the TEU and in particular those that relate to the realization of the internal market.³³³ A broad research exception should incentivize risk-taking, but these risks should be confined to potential outcomes of research endeavors and not in the form of potential legal liability. In other words, a broadly expressed research exception must enable researchers to work with data and information to contribute to scientific and technological advancement in order to work toward a more sustainable and socially just internal market in the EU, and, eventually, throughout the world. And, of course, a broad research exception should eventually not be confined to the EU's internal market but should work to the benefit of researchers that cooperate with counterparts in the EU, individually or in groups around the globe.

4. *Specific TDM Exception*

The recent introduction of a text and data mining (TDM) exception in Articles 3 and 4 of the CDSM Directive remedies some of the shortcomings of the general research exception under Article 5(3)(a) of the InfoSoc Directive.³³⁴ It was introduced to “benefit the research community and, in so doing, support innovation.”³³⁵ However, the new exception itself is not without flaws and underlines some of the

332. See InfoSoc Directive, *supra* note 202, art. 5(3)(a).

333. See TEU, *supra* note 102, art. 5.

334. See InfoSoc Directive, *supra* note 202, art. 5.

335. See CDSM Directive, *supra* note 101, rec. 8; see also Christophe Geiger et al., *Text and Data Mining: Articles 3 and 4 of the Directive 2019/790/EU*, in PROPIEDAD INTELECTUAL Y MERCADO ÚNICO DIGITAL EUROPEO 23, 27–28 (Conception Saiz Garcia & Raquel Evangelio Llorca eds., 2019) (discussing the recent evolution of property law brought on by digitalization).

existing systemic deficiencies of copyright law.³³⁶ In general, a specific exception for TDM should be welcomed as it clarifies the lawfulness of TDM in principle. However, the definition of the scope raises further problems but also shows the way forward.

The exception of Article 3 of the CDSM Directive is mandatory but is limited to “research organisations and cultural heritage institutions.”³³⁷ Article 4 of the CDSM Directive also applies to primarily commercial research, but this exception is more limited in its scope. While Article 3 provides that extractions and reproductions can be stored “with an appropriate level of security and may be

336. See generally GEIGER ET AL., THE EXCEPTION FOR TEXT AND DATA MINING (TDM) IN THE PROPOSED DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET—LEGAL ASPECTS (2018). For a critical evaluation of the Directive proposal, see Christophe Geiger et al., *Text and Data Mining in the Proposed Copyright Reform: Making the EU Ready for an Age of Big Data?*, 49 INT'L REV. INTELL. PROP. & COMPETITION L. 814, 825 (July 5, 2018) (discussing the recent evolution of property law brought on by digitalization); Christophe Geiger et al., *The EU Commission's Proposal to Reform Copyright Limitations: A Good but Far Too Timid Step in the Right Direction*, 40 EUR. INTELL. PROP. REV. 4, 5–7 (2018) (discussing the European Commission's desire to develop a strategy to evolve copyright law into the 21st century); Eur. Copyright Soc'y, *General Opinion on the EU Copyright Reform Package*, 5 (2017), <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf> (discussing general support of the policy objectives of the CDSM directive); Reto M. Hilty & Heiko Richter, *Text and Data Mining*, in MODERNISATION OF THE EU COPYRIGHT RULES 25, 25 (Reto M. Hilty & Valentina Moscon eds., 2017); Nicolas Jondet, *L'exception Pour Le Data Mining Dans Le Projet De Directive Sur Le Droit D'auteur—Pourquoi l'Union Européenne Doit Aller Plus Loin Que Les Législations Des États Membres [The Text and Data Mining Exception in the Proposal for a Directive on Copyright]*, 67 PROPRIÉTÉS INTELLECTUELLES 25, 26 (2018) (discussing the EU debate over the adoption of a broader TDM exception to boost international competitiveness of knowledge in property).

337. See CDSM Directive, *supra* note 101, art. 3. The limitation of the broader of the two TDM exceptions to specific institutions is significant. The CDSM Directive defines “research organization” as “a university, including its libraries, a research institute or any other entity, the primary goal of which is to conduct scientific research or to carry out educational activities involving also the conduct of scientific research” on either a “not-for-profit basis or by reinvesting all the profits in its scientific research” or when that institution acts “pursuant to a public interest mission recognised by a Member State,” *id.* art. 2(1); a “cultural heritage institution” is a “publicly accessible library or museum, an archive or a film or audio heritage institution,” *id.* art. 2(3). The express limitations to institutions that operate on a non-for-profit basis or largely within the public interest in the narrow sense enjoy broad TDM freedoms, as opposed to other actors which are caught by Article 4 of the CDSM Directive, *id.*

retained for the purposes of scientific research, including for the verification of research results,"³³⁸ Article 4 provides that data "may be retained for as long as is necessary for the purposes of text and data mining."³³⁹ More critically, the exception under Article 4 will only apply as long as the use of works and other subject matter under the exception has not been reserved by the relevant rightsholder.³⁴⁰ Both exceptions also differentiate between the types of works subject to the exception.³⁴¹

Without going into further detail on the precise differences in scope, already these three differences demonstrate the potential for chilling effects in TDM research. It is laudable that TDM received its own research exceptions because the application of the general research exception to TDM was unclear.³⁴² However, the narrow scope of Articles 3 and 4 creates uncertainties, and, through the opt-out clause under Article 4(3), a limitation of available mining material can potentially frustrate research efforts or lead to results that do not perfectly capture all relevant data.

The exception has been subject to substantive criticism³⁴³ and a further development of TDM-freedoms in the EU would help to create

338. *Id.* art. 3(2).

339. *Id.* art. 4(2).

340. *Id.* art. 4(3).

341. The exception under Article 3, *id.*, applies to the reproduction right as harmonized by the InfoSoc Directive, as well as temporary reproductions of original databases under Article 5(a) of the Database Directive, Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) 20, and extraction and re-utilization from and of sui generis databases under Article 7(1), *id.*, and the reproduction right in relation to press publication granted by Article 15 of the CDSM Directive, *supra* note 101. The exception under Article 4, *id.*, also applies to certain exclusive rights granted under Article 4(1)(a) and (b) of the Software Directive, Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs, 2009 O.J. (L 111) 16.

342. *See* CDSM Directive, *supra* note 101, rec. 19.

343. *See, e.g.*, 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 *INTELLECTUAL PROPERTY AND SPORTS: ESSAYS IN HONOUR OF P. BERNT HUGENHOLTZ* 383, 387–88 (Martin Senfleben et al. eds., 2021) (arguing that recent strategies of the European Union in the field of Artificial Intelligence (AI) resemble a football team missing a goal-scorer to win any of the competitions with other jurisdictions); Flynn et al., *supra* note 328, at 398.

a research-conducive environment for future technologies.³⁴⁴

5. *Statutory Remuneration Rights*

The idea of remunerated exceptions has been discussed in relation to derivative works, and a statutory remuneration system already exists for other exceptions.³⁴⁵ For example, the private copy exception under Article 5(2)(b) of the InfoSoc Directive enable unauthorized private reproductions while ensuring that rightsholders do not suffer economic harm.³⁴⁶ Similarly, the use of works and other subject matter protected by copyright in the context of cross-border digital teaching activities can be made subject to a mandatory licensing mechanism under Article 5(2) of the CDSM Directive or subject to statutory remuneration under Article 5(4).³⁴⁷

Statutory remuneration has the advantage of circumventing the authorization requirement, and thereby reduces transaction costs and the possibility of potential access refusals.³⁴⁸ Similar proposals have

344. See Geiger et al., *Crafting a Text and Data Mining Exception for Machine Learning and Big Data in the Digital Single Market*, in *INTELLECTUAL PROPERTY AND DIGITAL TRADE IN THE AGE OF ARTIFICIAL INTELLIGENCE AND BIG DATA* 95 (Xavier Seuba et al. eds. 2018); Begoña Gonzalez Otero, *Machine Learning Models Under the Copyright Microscope: Is EU Copyright Fit for Purpose?*, 70 *GRUR INT'L: J. EUR. & INT'L INTELL. PROP. L.* 1043, 1052 (2021) (discussing suitability of copyright system over core components of ML systems). The European Commission has also stressed the importance of artificial intelligence, for which text and data mining is essential, in its 2021 AI Strategy, introducing the Recovery and Resilience Facility (RRF) which “will enable Europe to raise its ambitions and become a first mover in adopting AI” as part of the EU’s recovery plan during Europe’s “Digital Decade”. *Communication: Fostering a European Approach to Artificial Intelligence*, at 2, COM (2021) 205 final (Apr. 21, 2021). The RRF is expected to “boost Member States’ investments in AI and support leading research, innovation and testing capacities, so that the accelerated development and use of AI can contribute to economic and social recovery and improve competitiveness in the longer term.” *Id.*

345. See Christophe Geiger & Oleksander Bulayenko, *Creating Statutory Remuneration Rights in Copyright Law: What Policy Options Under the International Legal Framework*, in *INTELLECTUAL PROPERTY ORDERING BEYOND BORDERS* 408, 417, 430, 459 (Axel Metzger & Henning Grosse Ruse-Khan eds., 2022) (analyzing possible ways of creating remuneration rights in the light of international treaty obligations and maps all options).

346. See InfoSoc Directive, *supra* note 202, art. 5(2)(b).

347. See CDSM Directive, *supra* note 101, art. 5(2), 5(4).

348. See Geiger & Bulayenko, *supra* note 345, at 413–14, 437, 461; see also

been made not only in relation to facilitating the use of protected subject matter for derivative works³⁴⁹ but also for more general uses.³⁵⁰ Because of their existence and the experience national legislators have with remunerated statutory limitations, they could be easily implemented and embedded in existing infrastructures at the national level.³⁵¹

More importantly, such limitations could give concrete expression to the social and innovation function of copyright and would be further justified by the EU's policies. Remunerated statutory limitations to exclusive rights would ensure that, within the objective of copyright, information could be used and reused to create and innovate to the benefit of society, while ensuring that rightsholders receive remuneration and stay incentivized not only to create works but also to make them available to the public for use and re-use.

6. *The Reform of Database Rights*

The protection of databases under EU law has been criticized vehemently³⁵² since the adoption of the Database Directive.³⁵³

Geiger, *supra* note 9, at 526 (reflecting on the limitations and exceptions to copyright from the perspective of the creators and their interests).

349. See Christophe Geiger, *Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?*, 8 U.C. IRVINE L. REV. 413, 439 (2018) (assessing the different options available for legislators and courts to secure creative uses in the context of derivative works).

350. See Jane C. Ginsburg, *Fair Use for Free, or Permitted-But-Paid?*, 29 BERKELEY TECH. L.J. 1383, 1436–37 (2014) (discussing the off and on relationship of fair use).

351. In relation to the *sui generis* database right, it has been suggested to introduce a system of compulsory licensing that would require rightsholder to offer licenses upon request, which would have to rely on a registration requirement to identify the relevant rightholders. See Commission Study in Support of the Evaluation of Directive 96/9/EC on the legal protection of databases, Final Report, at 34 (2018), <https://data.europa.eu/doi/10.2759/04895>. At the international level, such compulsory licenses are foreseen, for example, in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1161 U.N.T.S. 3, as revised at Paris July 24, 1971. At the EU level, compulsory licenses for information pre-*sui generis* database protection have been required under the competition rules in the CJEU, Joined Cases C-241/91 P & C-242/91 P, *Radio Telefis Eireann (RTE) v. Comm'n of the Eur. Comtys.*, ECLI:EU:C:1995:98, ¶¶ 77–78 (Apr. 6, 1995).

352. See generally P. Bernt Hugenholtz, *Against Data Property*, in KRITIKA: ESSAYS ON INTELLECTUAL PROPERTY (Peter Drahos et al. eds., 2018).

353. See Database Directive, *supra* note 341.

Databases are either protected as original databases if they display originality in the arrangement of the data³⁵⁴ or as *sui generis* databases if the creation of the database required significant investment in the collection of the data.³⁵⁵ It is the latter that has borne the brunt of criticism. What started as a “unique policy experiment”³⁵⁶ provides rightsholders in such databases a broad scope of protection of unoriginal content in unoriginal form. What the right protects, in other words, is gathering information, not creativity.

Protecting information contained in sets of data inevitably has effects on innovation and research. Not only does a right granted for investing in the collection of data fail to incentivize creativity and innovation, but it also grants the investor control over this data in its specific collection.³⁵⁷ This increases information and transaction costs, either because of the necessity to obtain licenses for the use of databases or because of lengthy litigation.³⁵⁸ The absence of a sufficiently broad and relevant exception to the right is also a matter of concern that should be addressed to enable downstream innovation.³⁵⁹ The Database Directive itself only foresees a mandatory exception for lawful users to extract and re-utilize insubstantial parts of an unoriginal database³⁶⁰ and three optional exceptions for the purposes of private use, illustration for teaching and scientific

354. See Case C-604/10, *Football Dataco Ltd. v. Yahoo! UK Ltd*, ECLI:EU:C:2012:115, ¶ 38 (Mar. 1, 2012).

355. In a series of cases, the CJEU has limited the broad scope of the *sui generis* right to a certain extent. See Case C-203/02, *Brit. Horseracing Bd. Ltd v. William Hill Org. Ltd*, ECLI:EU:C:2004:695, ¶ 42 (Nov. 9, 2004) (excluding databases in which the investment constituted the creation of the data from the scope of protection, instead stressing that the protection is granted for investing “in the resources used to seek out existing independent materials and collect them in the database”); Case C-444/02, *Fixtures Mktg. Ltd v. Organismos Prognostikon Agonon Podosfairou AE (OPAP)*, ECLI:EU:C:2004:697, ¶ 51 (Nov. 9, 2004) (stressing that protection under Article 1 of the Database Directive requires “investment independent of the investment in the creation of its constituent data”). See also Case C-46/02 *Fixtures Mktg. Ltd v. Oy Veikkaus Ab*, ECLI:EU:C:2004:694, ¶¶ 43–48 (Nov. 9, 2004); Case C-338/02, *Fixtures Mktg. Ltd v. Svenska Spel AB*, ECLI:EU:C:2004:696, ¶¶ 31–37 (Nov. 9, 2004).

356. See Estelle Derclaye & Martin Husovec, *Sui Generis Database Protection 2.0: Judicial and Legislative Reforms*, 44 EUR. INTELL. PROP. REV. 323, 323 (2022).

357. *Id.* at 324.

358. *Id.* at 323.

359. See Database Directive, *supra* note 341, recs. 47–50.

360. *Id.* art. 8.

research, and the purposes of public security.³⁶¹ Extending the applicability of general copyright exceptions to original and non-original databases would be a first step in the right direction.³⁶²

Two reviews of the Database Directive³⁶³ have not resulted in changes to the current regime and, only recently, legislative proposals have suggested minor changes to the *sui generis* right.³⁶⁴ The proposed Data Governance Act³⁶⁵ takes an enabling approach to the use of data but remains firm on the protection of databases under intellectual property law. However, it considers that “[t]he idea that data that has been generated at the expense of public budgets should benefit society has been part of Union policy for a long time.”³⁶⁶ Therefore, while, in general, the “[r]e-use of data shall only be allowed in compliance with intellectual property rights,” such rights should not be exercised by public sector bodies.³⁶⁷

The proposed Data Act³⁶⁸ limits the applicability of the *sui generis* database right by excluding databases “containing data obtained from or generated by the use of a product or a related service.”³⁶⁹ This exception, according to the relevant recital, aims to enable “users to access and use data and the right to share data with third parties.”³⁷⁰

361. *Id.* art. 9(a)–(c). The exceptions that correspond to those included in Article 5 of the InfoSoc Directive, *supra* note 202, are equally subject to the narrow scope. Specifically, the exception for purposes of scientific research will have to be understood to be limited to research at universities or other research institutions for non-commercial purposes.

362. See Annette Kur et al., *First Evaluation of Directive 96/9/EC on the Legal Protection of Databases—Comment by the Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich*, 37 INT’L REV. INTELL. PROP. & COMPETITION L. 551, 556 (2006) (discussing data exchange and existing or proposed access to regimes of EU copyright law).

363. See Commission First Evaluation of Directive 96/9/EC on the Legal Protection of Databases, (Dec. 12, 2005); Commission Evaluation of Directive 96/9/EC on the Legal Protection of Databases, SWD (2018) 146 final (Mar. 25, 2018).

364. See Commission Proposal for a Regulation of the European Parliament and of the Council on Harmonized Rules on Fair Access to and Use of Data, COM (2022) 68 final, (Feb. 23, 2022) [hereinafter Data Act].

365. See Proposal for a Regulation of the European Parliament and of the Council on European Data Governance, COM (2020) 767 final, (Nov. 25, 2020).

366. *Id.* rec. 5.

367. *Id.* rec. 7.

368. See Data Act, *supra* note 364.

369. *Id.* art. 35.

370. *Id.* rec. 84.

The changes suggested by the two draft proposals will not address the main problem of the database right; that it monopolizes information in collected form if the rights in the database are held by private parties. Access to such information, to such data, can be essential in driving innovative products and services. The CJEU has recognized this in its recent ruling in *CV-Online Latvia*³⁷¹ when it stated that it “is necessary to strike a fair balance between, on the one hand, the legitimate interest of the makers of databases in being able to redeem their substantial investment and, on the other hand, that of users and competitors of those makers in having access to the information contained in those databases and the possibility of creating innovative products based on that information.”³⁷² Here, the CJEU introduced fundamental rights into the mix of considerations that a reshaped copyright framework for databases should rely on. A right to research as an additional argument that encapsulates not only utilitarian notions of added competitiveness and innovation, but also reflects the long-term mission of the European Union, could add critical weight to the balancing scales. It is for the European legislator to seize this opportunity to steer European database protection in the right direction.³⁷³ This is particularly necessary because database owners would be able to opt out of the TDM exception of Article 4 of the CDSM Directive, which also applies to commercial research.³⁷⁴

CONCLUSION

Research is a precondition to creating a sustainable future. It is indispensable to realize substantive and programmatic human and fundamental rights that inform global, European, and national policies and which take shape in concrete actions envisaged to create a more sustainable global community. Copyright plays an important role in enabling access to information in order to meet the ambitious goals set out, for example, in EU policies and the Sustainable Development

371. Case C-762/19, ‘CV-Online Latvia’ SIA v. ‘Melons’ SIA, ECLI:EU:C:2021:434 (June 3, 2021).

372. In striking this balance, the CJEU adjusted the infringement test and now requires that, for an extraction or re-utilization to constitute an infringement under Article 7(1) of the Database Directive, it must be demonstrated that such use adversely affects the investment of the maker of the database. *Id.* ¶ 41.

373. See Derclaye & Husovec, *supra* note 356, at 330.

374. See CDSM Directive, *supra* note 101, art. 4.

Goals at the international level. A right to research, expressed as such, can help to realize these goals by providing convincing arguments for copyright reform but has not been included expressly in international or European fundamental rights instruments. Its pieces are, however, present in the canon of European and international fundamental rights and are an elementary part of the aims and objectives of the EU.

As a result, a right to research as we propose is influenced by existing concepts, interpretations, and understandings present in the fundamental rights of the ECHR and the EUCFR, as well as international human rights instruments, including the UDHR, the ICCPR, and the ICESCR. A right to research is also rooted in the political mission of the European Union and the United Nations Sustainable Development Goals, which establish political goals for which continued and persistent research efforts are a precondition. A right to research is, therefore, conceived as a constitutional imperative. Giving shape and express recognition to this right under its own label will give better weight to research as a necessary policy goal in political discourses and negotiations on the future shape of copyright law. This mission is admittedly much broader than designing a sustainable copyright system, but copyright plays an important part in building a sustainable global future.

For copyright law, a right to research will serve two main functions: first, it will inform legislatures when debating and (re-)drafting copyright law, when creating, repealing, and shaping exclusive rights, and when designing exceptions and limitations that permit uses necessary and indispensable for research; second, it will inform the judiciary when applying copyright law in the light of fundamental rights, a technique that is of paramount importance in the Member States of the European Union.

The impact of a right to research will, of course, be much broader than a simple corrective to existing copyright norms. It can, and we have argued that it should, create a normative shift in copyright law towards a more paradigmatic understanding of copyright as a system of rules that is intended to promote and enable creativity and innovation for the benefit of society at large. Designing or excavating a new (fundamental) right based on specific policy considerations must inevitably shift the balance in normative systems that rely on fundamental rights as guiding norms.

We have demonstrated that this shift would change copyright, interpreted and understood in light of an “upgraded” fundamental rights regime, into a right that permits access to information if used for purposes that promote copyright’s mission. Putting copyright in the service of our societal mission and our normative goals will be the logical result of a right-to-research-infused copyright regime.

In the coming decades, as the last years have demonstrated, the importance of research for human development, and to a clear extent for human survival, will depend on continuous and intensive research to face and master the challenges we will face as a global society in a physically and digitally interconnected world. A right to research can help ensure that a legal institution designed to enhance progress and access to science and culture—copyright—does not stand in the way of the best possible sustainable development of our global society.