

**CONCEPTUALIZING A ‘RIGHT TO  
RESEARCH’ AND ITS IMPLICATIONS FOR  
COPYRIGHT LAW**

**AN INTERNATIONAL AND EUROPEAN  
PERSPECTIVE**

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ABSTRACT

*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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<b>ABSTRACT .....</b>	<b>1</b>
<b>INTRODUCTION.....</b>	<b>2</b>
I.    THE FUNDAMENTAL AND HUMAN RIGHTS FOUNDATIONS FOR THE RIGHT TO RESEARCH	6
A. <i>A Fundamental Right to Research rooted in international human rights law</i>	6
B. <i>The Constitutional Framework for the Right to Research in the EU</i>	17
II.   THE CONTOURS OF A FUNDAMENTAL RIGHT TO RESEARCH.....	44
A. <i>Personal.....</i>	45
B. <i>Substantive.....</i>	45
C. <i>Geographic .....</i>	46
III.  THE NEED AND PLACE FOR A SPECIFIC, INDIVIDUALISED FUNDAMENTAL R2R IN FUNDAMENTAL RIGHTS INSTRUMENT .....	46
IV.   RESHAPING COPYRIGHT FOR RESEARCH .....	51
A. <i>Copyright as an Access Right: General Considerations .....</i>	52
B. <i>Specific Considerations .....</i>	53
<b>CONCLUSION.....</b>	<b>61</b>

## 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 free places and spaces to think, develop and innovate. Freedom to research is key to ensure that future generations are able to exercise and enjoy the same, or at least similar opportunities that recent and present generations have enjoyed over the last decades. In other words, to ensure that coming generations are able to live in dignity and prosperity requires significant efforts at multiple levels to ensure that current societies move towards a more sustainable way of living and exploitation of this planet's resources.

To face the challenges of the present in earnest and with seriousness is an

obligation towards future generations. Solutions for these challenges require investment in, but also the removal of barriers for research. Many modern research activities, especially research that involves large amounts of data, requires access to information, its processing, storage and analysis.<sup>1</sup> Restricting access to data can create insurmountable barriers to research, especially in the form of property rights over data.<sup>2</sup> Therefore, conceptualizing a ‘Right to Research’, as a right for individuals, but also as an intergenerational right which 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, expose the tensions between intellectual property law, policy and human rights,<sup>3</sup> but also other fields of the law, such as competition law.

The purpose of copyright is to incentivize creativity that drives cultural and social progress.<sup>4</sup> This is sometimes difficult to reconcile with copyright’s

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<sup>1</sup> See for Example the OECD Principles and Guidelines for Access to Research Data from Public Funding (2007), available at: <https://www.oecd.org/sti/inno/38500813.pdf>: “The power of computers and the 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.” Underlining the effects of improving access to data to diversify and democratize science: Abhishek Nagaraj, Esther Shears & Mathijs de Vaan, *Improving data access democratizes and diversifies science*, 117 PNAS 23490 (2020) see also on the importance of access to data: Martin Senftleben, STUDY ON COPYRIGHT AND RELATED RIGHTS AND ACCESS AND REUSE OF DATA (Study for DGRTD, 14 June 2022).

<sup>2</sup> See for example policy considerations on a right for data producers in the EU: Commission, Staff Working Document on the free flow of data and emerging issues of the European data economy, Brussels 10.01.2017, SWD(2017) 2 final; Commission, Europe 2020. A strategy for smart, sustainable and inclusive growth, Brussels 3.3.2020, COM(2010) 2020 final, p. 5, 33-36; see critically on such a right: Ivan Stepanov, *Introducing a property right over data in the EU: the data producer’s right – an evaluation*, 34 IRLCT 65 (2020). But also events such as the COVID-19 pandemic can make access to information difficult and underlines the importance of research-friendly access policies, see Marilena Vecco et al., THE IMPACT OF THE COVID-10 PANDEMIC ON CREATIVE INDUSTRIES, CULTURAL INSTITUTIONS, EDUCATION AND RESEARCH (Study for WIPO, 2022).

<sup>3</sup> Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971–1020 (2007); LAURENCE R. HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE (2011) and the various contributions in CHRISTOPHE GEIGER, RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY (2015) and PAUL TORREMANS, INTELLECTUAL PROPERTY LAW AND HUMAN RIGHTS (2020). More critical, see See only Ruth L. Okediji, *Does Intellectual Property Need Human Rights?*, 51 N.Y.U. J. INT’L & POL. 1, (2018).

<sup>4</sup> See only 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); Christophe Geiger, *Copyright and free access to information: for a fair balance of interests in a globalised world*, 28 E.I.P.R. 366, 367 (2006); Jenny Lynn Sheridan, *Copyright’s Knowledge Principle*, 17 VAND. J. ENT. & TECH. L. 39, 49-55 (2014), see also in this sense

exclusivity paradigm that allows to control access to and reuse of copyrighted works by several means, such as a set of exclusive (veto) rights and technological barriers or other automated protection measures.<sup>5</sup> Exclusivity as copyright's main paradigm<sup>6</sup> has resulted in broad interpretations of exclusive rights,<sup>7</sup> extensions of copyright terms<sup>8</sup> and, especially in Europe, in a narrow interpretation of exceptions and limitations. To counter these tendencies, reconceptualizing copyright in its 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.<sup>9</sup>

Therefore, a right to research can create constitutional imperatives for a research-enabling copyright framework, in order to achieve policy goals that include sustainability and intergenerational justice. Such a right has its roots in a balanced reading of the relevant international human rights instruments. However, as all intellectual property rights, copyright is territorial in nature, and is therefore dressed in national customs and traditions. For that reason, regard must also be had to regional codifications of fundamental rights, even if they tend to be inspired by the universality of human rights.<sup>10</sup> In the

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Ruth Okediji, *The Limits of International Copyright Exceptions for Developing Countries*, 21 VAND. J. ENT. & TECH. L. 689 (2019), arguing for a rethinking of copyright exceptions at international level to foster human development.

<sup>5</sup> See in this sense Jane C. Ginsburg, *Essay – How Copyright Got a Bad Name For Itself*, 26 COLUM. J.L. & ARTS 61, 61 (2003).

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

<sup>7</sup> For the EU, see for example the interpretation of the CJEU of the reproduction right in CJEU, Judgment 19 July 2009 *Infopaq I*, C-5/08, EU:C:2009:465 and the constantly expanding construction of the right to communication to the public (see for a critical summary João Pedro Quintais, *Untangling the hyperlinking web: In search of the online right of communication to the public*, 21 JWILP 385 (2018)).

<sup>8</sup> In the US, 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 critically Richard Epstein, A., *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123 (2002); in the EU, the Term Directive (Directive 2006/116/EC on the term of protection of copyright and certain related rights, [2006] OJ L 372/12) harmonizes the term of protection for literary and artistic works, which the directive sets at 70 years after the death of the authors. This extends the term of protection 20 years beyond that required under Article 7 of the Berne Convention. 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 (see the 2014 Report, available under: [https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=60517](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60517)).

<sup>9</sup> For a critical analysis of the exclusivity paradigm in copyright law, see already Christophe Geiger, *Promoting Creativity through Copyright Limitations, Reflections on the Concept of Exclusivity in Copyright Law*, 12 VAND. J. ENT. & TECH. L. 515 (2010).

<sup>10</sup> See for example CJEU, Judgment of 14 October 2004 *Omega*, C-36/92, EU:C:2004:614, para. 33: “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

European Union (EU), as a developed and highly integrated regional constitutional order, the contours of a right to research can already be traced in law and in policy.

The aim of this contribution is to conceptualize and sketch a right to research 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 for research activities.<sup>11</sup> Especially in data-driven, digital societies and economies access to information for research purposes is essential. The wide reach of copyright makes lawful access to such information difficult, either because of the gatekeeper function of holder of exclusive rights, or because of high transaction costs.

While international human right 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. It is therefore suggested that copyright law must be adapted to take into account that research is amongst 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 distil the essence of a European right to research and demonstrate, to the extent possible with a sketch of a ‘new’ fundamental right, how copyright should or must be (re)interpreted and normatively adapted to reflect the rights of researchers, but also of 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 and indeed should be integrated in 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 with the objective to create a robust and innovation-friendly copyright framework that serves to tackle the challenges of the present and future

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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 (para. 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.

<sup>11</sup> Cf. the extensive study conducted by Senftleben (n 1), identifying a variety of copyright barriers in European copyright law (Section 3)

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 which 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 develop subsequently, 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, 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. 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 those 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 provides protection for authors only for specific purposes linked with the development of science and culture, which is closely connected to research. In fact, it can be argued 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 international as well as European level. While its protection is fairly well developed in relation to journalistic activities and the media in general,<sup>12</sup> as well as political participation,<sup>13</sup> its relevance for research outside these categories<sup>14</sup> remains largely underexplored.<sup>15</sup> The UN Human Rights Committee's 2022 General comment No. 34 mentions 'researchers' only once in relation to treason laws.<sup>16</sup> It is incompatible with Article 19(3) ICCPR to invoke such 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." 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.<sup>17</sup>

Researchers and research activities enjoy some privileges, or some elevated level of protection as compared to 'ordinary' people. The General comment privileges researchers only in relation to the dissemination of information.<sup>18</sup> However, access to certain information is also necessary to safeguard efficient and unobstructed research. The General comment

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<sup>12</sup> The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in its annual report to the UN General Assembly and in statements delivered to the UN Human Rights Council regularly comments on the situation of journalists in a variety of contexts, see for example the Reports of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression A/HRC/20/17, A/HRC/14/23, A/HRC/11/4.

<sup>13</sup> General Assembly (2018) Draft guidelines for States on the effective implementation of the right to participate in public affairs, A/HRC/39/28.

<sup>14</sup> In fact, it can easily be argued that journalist are a category of researchers and medias in general provide research activities when documenting themselves and using these information to inform the public.

<sup>15</sup> Only one of the relevant reports dealt expressly with academic freedom, General Assembly (2020) Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, A/75/261, which refers to intellectual property as a potential limitation for academics to cooperate globally (para. 49).

<sup>16</sup> Human Rights Committee. (2011) General comment No 34. Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 [hereinafter 'General comment No. 34'], para. 30; in this context the Committee warns that laws "relating to national security are in strict complicate with paragraph 3 of Article 19 ICCPR, which determines the conditions under which restrictions to Article 19 are permitted.

<sup>17</sup> General Assembly (2013) Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 68th Session, A/68/362.

<sup>18</sup> General comment No. 34, para. 30.

discusses a right to access to information held by public bodies, which it derives directly from Article 19(2) ICCPR.<sup>19</sup> In combination with Article 25 ICCPR, which grants certain participatory rights in democratic processes, the press and other media enjoy a right to access information on public affairs, to inform critical debate and to enable citizen engagement. Not as a right but rather as a recommendation, to enable access to information in the public interest, the General comment suggests that Governments should make information in the public interests available in the public domain.<sup>20</sup> This could be understood to require that information of such a nature should not enjoy copyright protection in the first place and that a monopolistic position granted under intellectual property law could not be used to restrict access to or even to suppress information. In the absence of open accessibility, access to information mechanisms should be put in place.<sup>21</sup>

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 can arise from the growing urgency at global level to support research activities indispensable for developing sustainably 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',<sup>22</sup> as it also referred to, dates back to the 1948 Universal Declaration of Human Rights (UDHR)<sup>23</sup> and has been re-elaborated in the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>24</sup> However, it has only attracted increased scholarly attention over the last three decades,<sup>25</sup> and its realization is lagging

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<sup>19</sup> General comment No. 34, para. 18.

<sup>20</sup> General comment No. 34, para. 19.

<sup>21</sup> General comment No. 34, para. 19.

<sup>22</sup> See for an overview of other sources of the 'right to science': Anna-Maria Huber, *The Human Right to Science and Its Relationship to International Environmental Law*, 31 EJIL 625–656, 628–629 (2020), , on the evolution of both provisions see AURORA PLOMER, PATENTS, HUMAN RIGHTS AND ACCESS TO SCIENCE (2015), Chapters 3 and 4.

<sup>23</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

<sup>24</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 UNGA Res 2200 A (XXI) (ICESCR), UNTS vol. 993, p. 3.

<sup>25</sup> See for example Audrey R. Chapman, *Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications*, 8 Journal of Human Rights 1 (2009); Klaus D. Beiter, Terence Karran & Kwado Appiagyei-Atua, *Yearning to Belong: Finding a "Home" for the Right to Academic Freedom in the U.N. Human Rights Covenants*,



behind its ambitious scope.<sup>26</sup> 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.<sup>27</sup> However, the precise scope has remained obscure for a long time during which it has been neglected by academic commentators.<sup>28</sup> Only with 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,<sup>29</sup> and the 2009 Venice Statement on the right to enjoy the benefits of scientific progress<sup>30</sup> and its applications did the debate on the contours of this right begin properly.

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.” 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.” The two statements can be read to be contradictory, the first to guarantee free access to productions of the cultural, scientific and artistic domain, the second to guarantee the authors of these productions rewards in terms of protection and remuneration for their efforts, and effective control over their use. This seeming contradiction stems from contemporary understanding of

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11 INTERCULT. HUM. RIGHTS LAW REV. (2016); Klaus D. Beiter, *Where Have All the Scientific and Academic Freedoms Gone? And What Is ‘Adequate for Science’? The Right to Enjoy the Benefits of Scientific Progress and Its Applications*, 52 ISRAEL LAW REVIEW 233 (2019); Sebastian Porsdam Mann, Helle Porsdam & Yvonne Donders, “*Sleeping Beauty*”: *The Right to Science as a Global Ethical Discourse*, 42 HUMAN RIGHTS QUARTERLY 332 (2020); Effy Vayena & John Tasioulas, “*We the Scientists*”: *a Human Right to Citizen Science*, 28 PHILOS. TECHNOL. 479 (2015), see from an intellectual property perspective: Helfer, supra (n 3) [**Toward a Human Rights Framework for Intellectual Property**], 975-977, 987 et seq.; specifically on the right of authors Hans Morten Haugen, *General Comment No. 17 on ‘Authors’ Rights*”, 10 JWIP 53 (2007) and on the interface with IP, see Christophe Geiger (ed.), INTELLECTUAL PROPERTY AND ACCESS TO SCIENCE AND CULTURE: CONVERGENCE OR CONFLICT?, CEIPI/ ICTSD publication series on “Global Perspectives and Challenges for the Intellectual Property System” (Christophe Geiger, ed., 2016).

<sup>26</sup> Cf. Porsdam Mann et al., supra (n 25), 340, with reference to Right to Science, American Association for the Advancement of Science (n.d.), <https://www.aaas.org/article15>.

<sup>27</sup> Cf. Chapman, supra (n 25), 2; Jeffrey H. Toney et al., *Science and Human Rights: A Bridge Towards Benefiting Humanity*, 32 HUM. RTS. Q. 1008 (2010).

<sup>28</sup> Cf. Chapman, supra (n 25), 1; Porsdam Mann et al., supra (n 25), 344.

<sup>29</sup> Committee on Economic, Social and Cultural Rights. (2005) 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. E.C.12/GC/17.

<sup>30</sup> UNESCO, Experts’ Meeting on the Right to Enjoy the Benefits of Scientific Progress and Its Application, Venice, Italy, July 16– 17, 2009, Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and Its Applications [hereinafter ‘The Venice Statement’], para. 10.

intellectual property rights as exclusive rights that grant monopolistic positions in relation to cultural and scientific outputs. Instead, they can also be seen as a “balanced framework” that reconciles copyright’s natural law and utilitarian foundations.<sup>31</sup>

The ICESCR includes a similar commitment made by its signatories to guarantee three separate rights. Splitting the first paragraph of Article 27 UDHR, the Covenant first recognizes the right “[t]o take part in cultural life”, second “[t]o enjoy the benefits of scientific progress and its applications”,<sup>32</sup> and third “[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.”<sup>33</sup> These broad notions are complemented with more concrete instructions for the State parties to realize these rights. While still very general, these instructions set out aims that must be achieved at national, and implicitly also at international level. According to the second, third and fourth paragraph, State parties must ensure that the necessary steps are taken to conserve, develop and diffuse culture and science,<sup>34</sup> that they “*respect the freedom indispensable for scientific research and creative activity*”<sup>35</sup> and that they recognize, and also encourage and develop international contacts and co-operation in science and culture.<sup>36</sup>

Intellectual property is regularly cited as a potential hindrance to the realization of the ‘right to science’.<sup>37</sup> The proliferation of restrictive intellectual property norms, most prominently by the 1994 Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS),<sup>38</sup> has contributed to a perception of intellectual property as a monopolistic system.<sup>39</sup>

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<sup>31</sup> Christophe Geiger, *Reconceptualizing the Constitutional Dimension of Intellectual Property*, in *INTELLECTUAL PROPERTY LAW AND HUMAN RIGHTS* 117, 130-131 (Paul L.C. Torremans ed., 2020).

<sup>32</sup> ICESCR, art. 15(a) and (b).

<sup>33</sup> ICESCR, art. 15(1)(c); see in general on the provision: Beiter et al., *supra* (n 25), 163 ff.

<sup>34</sup> ICESCR, art. 15(2).

<sup>35</sup> ICESCR, art. 15(3).

<sup>36</sup> ICESCR, art. 15(4).

<sup>37</sup> Chapman, *supra* (n 25), 28-29; Vayena & Tasioulas, *supra* (n 25), 483-484.

<sup>38</sup> Special Rapporteur, *The Right to Enjoy the Benefits of Scientific Progress and its Applications*, U.N. ESCOC, Comm’n on Hum. Rts., U.N. Doc. A/HRC/20/26 (2012) [hereafter Report on Right to Science], para. 56: “Concern has been widely expressed about the conflict between the right to science and intellectual property rights, in particular since the adoption of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). 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.” (references omitted).

<sup>39</sup> However, it has been stressed that the TRIPs Agreement itself contains express objectives that make intellectual property protection subject to the condition that they

To ensure the realization of these rights, to respect them and to recognize the benefits of international cooperation, regard must be had to 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’.<sup>40</sup> These rights include the freedom of thought,<sup>41</sup> the right to freedom of expression,<sup>42</sup> association,<sup>43</sup> the right to move freely across borders;<sup>44</sup> and the right to academic freedom.<sup>45</sup> Limitations on these rights, and others, would effectively constitute limitations on the rights listed in Article 27 UDHR and Article 15(1) ICESCR.<sup>46</sup> On the other side, the right to benefit from the progress of science, and technology is also a condition for the realization and enjoyment of these other rights.<sup>47</sup>

In both instruments, the two rights are separated in different paragraphs or subparagraphs, but they appear in a specific context.<sup>48</sup> This gives reason

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“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 (Article 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” (Article 8(1). Christophe Geiger and Luc Desautnettes, *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 267 (Jonathan Griffiths and Tuomas Mylly eds., 2021). Abuses of intellectual property rights may be addressed by “[a]ppropriate measures” to ensure the “international transfer of technology” (Article 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).

<sup>40</sup> Report on Right to Science, para. 18.

<sup>41</sup> UDHR, art. 18.

<sup>42</sup> ICCPR, art. 19(2).

<sup>43</sup> ICCPR, art. 23, UDHR, art. 20.

<sup>44</sup> ICCPR, art. 12; UDHR art. 13.

<sup>45</sup> This right is not formally included in either the UDHR or the ICESCR, or any other international human rights instrument for that purpose. However, there exists a growing body of literature that conceptualizes this right: Beiter et al., supra (n 25) ; Beiter, supra (n 25) .

<sup>46</sup> Chapman, supra (n 25) , 17.

<sup>47</sup> Porsdam Mann et al., supra (n 25), 346-347; Peter K. Yu, *Challenges to the Development of a Human Rights Framework for Intellectual Property*, in INTELLECTUAL PROPERTY LAW AND HUMAN RIGHTS 89, 116 (Paul L.C. Torremans ed., 2020), 116.

<sup>48</sup> See on the drafting history of Article 27 UDHR: Aurora Plomer, *The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science*, 35 HUM. RTS. Q. 143, 160-175 (2013) 160-175; reviewing the negotiating positions of the different state parties, Plomer concludes that the right granted to individuals under Article 27(2) (2) are meant to protect “personal, creative abilities, and capacities of individual human beings” and can therefore “only be claimed by, individual human beings rather than entities such as commercial organizations or limited companies.” This also means that these rights must not necessarily be 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 individuals rights granted under the provisions “should not cut across the

to argue that both rights are systematically linked and therefore interrelated and complimentary,<sup>49</sup> which is to say that neither of them is absolute nor that they necessarily limit each other. It is therefore without doubt that the realization of both rights creates tensions, which have not been resolved within Article 15 ICESCR or Article 27 UDHR,<sup>50</sup> and most commentators have lamented the failure to resolve this conflict with concrete guidance.<sup>51</sup> 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 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 ICESCR provides more detailed, though still rather abstract instructions on how this immanent normative conflict should be resolved. 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 amongst the people of the world. Article 2(1) 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 the present Covenant by all appropriate means, including particularly the adoption of legislative measures”.<sup>52</sup> The parties to the Covenant agree to provide each other, in order to achieve the rights set out therein, with technical assistance.<sup>53</sup> Such a provision of assistance, the sharing of expertise and knowledge, of processes and equipment necessarily

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public good of facilitating access to knowledge, culture, and science, whether for liberal, utilitarian, or communitarian reasons“ and that “national and international IP and patent laws may certainly, and indeed, should be deployed to the service of human rights.”; see also Porsdam Mann et al., *supra* (n 25) , 335-339.

<sup>49</sup> See for example 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 661 (Christophe Geiger ed., 2015), see also Chapman, *supra* (n 25) , 5, the author traces the development of the negotiations that led to the ultimate text of Article 25 UDHR and Article 15(1) ICESCR

<sup>50</sup> Porsdam Mann et al., *supra* (n 25) , 339, see further Helfer & Austin, *supra* (n 3) , 234-235, The Venice Statement, para. 10.

<sup>51</sup> See in particular Helfer & Austin, *supra* (n 3) , 238; Helfer, *supra* (n 3), 976; Haugen, *supra* (n 25), 66.

<sup>52</sup> Cf. Chapman, *supra* (n 25) , 4.

<sup>53</sup> ICESCR, art. 23. The rights referred to include the right to be free from hunger (art. 11(2)), the right to “improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge” (art. 11(2)), and “enjoyment of the highest attainable standard of physical and mental health” (art. 12(1)).

requires the sharing of information, much of it will be protected by copyright.

In terms of its substance, the right refers to ‘scientific advancement’ and its ‘benefits’, both notions define and potentially qualify the right. However, neither of them has 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.<sup>54</sup> 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.”<sup>55</sup> This notion is fundamentally noneconomic, as opposed to a technological understanding of the term, which, as a more recent phenomenon, conceptualizes science as an enterprise that is profit-oriented.<sup>56</sup> Depending on the understanding of ‘science’, the benefits to be shared, including arguably scientific results and other information that can generate further benefits certainly, 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 in general areas that pertain to rights foreseen in the ICESCR.

The notion of ‘benefits’, read together with that of scientific advancements, supports a broad understanding of the term, at least this can reasonably be argued. Eventually, it is not relevant for the improvement of living conditions, human health, and the eradication of hunger in the world, whether discoveries of a scientific or technological nature have been made by profit-oriented enterprises or publicly funded research institutions. 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.<sup>57</sup> 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 science would also have to be a globally cooperative and inclusive process, including the sharing of scientific resources and information.

The “right to science”<sup>58</sup> 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 for participation in democratic processes in general. Intellectual property and copyright, by its very nature, constitutes a barrier to the realization of this facet of the right to *access* to science.<sup>59</sup> Such a broad

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<sup>54</sup> Chapman, *supra* (n 25) , 6.

<sup>55</sup> Chapman, *supra* (n 25) , 7.

<sup>56</sup> Chapman, *supra* (n 25) , 8-9.

<sup>57</sup> Cf. Chapman, *supra* (n 25) , 9-10.

<sup>58</sup> Cf. Porsdam Mann et al., *supra* (n 25) .

<sup>59</sup> Cf. Porsdam Mann et al., *supra* (n 25) ., 342-344; Chapman, *supra* (n 25) , 15-16, see in general on the conflict between intellectual property and human rights: Laurence R.

reading is supported by Article 15(2)-(4) ICCPR which require 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”; “to respect the freedom indispensable for scientific research and creative activity”; 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.”<sup>60</sup> To realize and to guarantee these freedoms, it is necessary to share and communicate information. 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, to collect and process information, in other words to research. The Venice Statement is clear in that intellectual property should neither hinder the advancement of science, nor the enjoyment of the benefits of science.<sup>61</sup>

- 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) ICESCR is its neighbor in Article 15(c). The potentially limiting effect of this provision is better expressed in the Revised Recommendation on Science and Scientific Researchers. 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”. It calls on Member States to “encourage and facilitate access to knowledge, including open access”, while at the same time demanding that “that the scientific and technological results of scientific researchers [should] enjoy appropriate legal protection of their intellectual property, and in particular the protection afforded by patent and copyright law.”<sup>62</sup>

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 national level is not necessarily congruent with that required under Article 15(1)(c) ICESCR.<sup>63</sup>

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Helfer, *Mapping the interface between human rights and intellectual property*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 6 (Christophe Geiger ed., 2015).

<sup>60</sup> Cf. Chapman, *supra* (n 25) , 16-17.

<sup>61</sup> The Venice Statement, para 10.; see Helfer & Austin, *supra* (n 3) , 136-137, cf. also Chapman, *supra* (n 25) , 14.

<sup>62</sup> UNESCO, (39<sup>th</sup> Session) 2017 Revised Recommendation on Science and Scientific Researchers (ANNEX II).

<sup>63</sup> Committee on Economic, Social and Cultural Rights. (2001) Human Rights and Intellectual Property, Statement of the Committee on Economic, Social and Cultural Rights, 27th Session, UN Doc E/C.12/2001/15, at 6 [hereinafter ‘Human Rights and Intellectual

The Committee however stressed “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.” 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,<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> Referring to the Venice Statement, she highlighted intellectual property’s social function and that monopolies granted under intellectual property laws should be managed responsibly.<sup>67</sup>

In General Comment No. 17, the Committee established five core obligations that State parties incur “to ensure the satisfaction of minimum essential [level]”<sup>68</sup> of protection required under Article 15(1)(c) ICESCR. 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.”

It is notable in the Comment that the moral rights of authors precede the

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Property (2001)’, see Chapman, *supra* (n 25), 28., Yu, *supra* (n 47), 90-91.

<sup>64</sup> Human Rights and Intellectual Property (2001), at 15.

<sup>65</sup> Human Rights and Intellectual Property (2001), at 17.

<sup>66</sup> On the report, see the contributions of the Special rapporteur Farida Shaheed herself, as well as those of Lea Shaver and Mylène Bidaut, in Geiger, *supra* (n 25) respectively at 19, 21 and 30.

<sup>67</sup> Paragraph 10 of the Venice Statement 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.”

<sup>68</sup> Based on the standard established by the Committee on Economic, Social and Cultural Rights. (1990) General Comment 3. The Nature of States Parties’ Obligations, 5th Session UN Doc E/1991/2, at 10.

guarantee that authors must be able to enjoy an adequate standard of living. Modern copyright laws, certainly those in developed countries, which systematic structure and standards of protection have been imported into the developing world, go beyond these minimum requirements, which casts doubt on the appropriateness of the balance struck by national legislators. It has indeed been suggested that modern intellectual property laws provide a level protection that goes beyond that required by Article 15 ICESCR, but that this provision could be of assistance in finding a new balance.<sup>69</sup> It becomes apparent, however, that international human rights instruments do not support a narrow reading of the right of authors, but make the protection granted under copyright law if not conditional, then at least complementary on the enjoyment, and this can only mean access to the expression and information of works protected by copyright.<sup>70</sup>

Enabling citizens to enjoy the benefits of science in the wider sense, or even to enable citizens to participate actively 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 created convective effects.<sup>71</sup> Therefore, access to science is a precondition not only for scientific production but also for diffusing scientific production, to create impact and to enable civic participation in science itself, and in other fields of civic engagement and decision-making.<sup>72</sup> Ensuring access also requires provision of a proper infrastructure on a non-discriminatory basis, which in some parts of the world includes the provision of basic information technology infrastructure.<sup>73</sup>

The rights of authors to moral and material benefits must therefore be interpreted in relation to other fundamental rights alongside which they are listed as preconditions for their exercise. Their function is to enable cultural and scientific productions as incentives, on the one side. On the other side, in order to fulfil their function as rights-in-context, they must be constructed to “enable rather than constrain cultural participation and access to scientific progress.”<sup>74</sup> This secondary nature of the right expressed in Article 27 UDHR

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<sup>69</sup> 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 HUMAN RIGHTS L. REV. 765–784, 775 (2010).

<sup>70</sup> Geiger argues that this function of copyright law constitutes an expression of the social function of the right to property and be reflective of the human rights, historical and philosophical foundations of intellectual property law, see Christophe Geiger, *Taking the right to culture seriously: time to rethink copyright law*, in Geiger (n 25) 84, 86 .

<sup>71</sup> Vayena & Tasioulas, supra (n 25), 484.

<sup>72</sup> Porsdam Mann et al., supra (n 25) , 343-344, see also Hans Morten Haugen, *Human Rights and Technology—A Conflictual Relationship? Assessing Private Research and the Right to Adequate Food*, 7 JOURNAL OF HUMAN RIGHTS 224, 232 (2014), stating: “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.”

<sup>73</sup> Report on Right to Science, para. 29, 36-37.

<sup>74</sup> Paul Torremans, ‘Article 17(2)’, para. 17(2).25 in THE EU CHARTER OF



and 15 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 knowledge is pivotal for the realization of the right to science.”<sup>75</sup>

### *B. The Constitutional Framework for the Right to Research in the EU*

For the purpose of this contribution, European copyright law is a case study. The Union’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 in policy than in any other jurisdiction. European copyright law has been shaped significantly, certainly over the last decade, by fundamental rights<sup>76</sup> and research plays an important part in the EU’s policy agenda.<sup>77</sup> The legislator in the EU, where copyright today is to a large extent within the exclusive competence of the Union,<sup>78</sup> has adopted a rule-

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FUNDAMENTAL RIGHTS (Peers et al, eds., 2021).

<sup>75</sup> Report on Right to Science, para. 27.

<sup>76</sup> The constitutionalization of intellectual property, and copyright in particular, is a counter movement to the property-paradigm of intellectual property (cf. Christophe Geiger, „Constitutionalising“ *Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 IIC 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 notable under the influence of the European judiciary, see Jonathan Griffiths, *Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law*, 31 E.L.REV. 65 (2013), Bernd Justin Jütte, *The Beginning of a (Happy?) Relationship: Copyright and Freedom of Expression in Europe*, 38 E.I.P.R. 11 (2016) and 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 IIC 282 (2020). From the interpretation of copyright norms by the Court of justice in cases such as CJEU, Judgment of 9 February 2012 *Luksan*, C-277/10, EU:C:2012:65, CJEU, Judgment of 22 May 2014 *Deckmyn*, C-201/13, EU:C:2014:2132 and CJEU, Judgment of 8 September 2016 *GS Media*, C-160/15, EU:C:2016:644, copyright norms were recently directly challenged before the highest EU court in CJEU, Judgment of 26 April 2022 *Poland v Parliament and Council*, C-401/19, EU:C:2022:297; see for a fundamental rights-based analysis; 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 E.I.P.R. 625 (2021); 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. 517 (2021).

<sup>77</sup> See below under I. B., see also in Christophe Geiger & Bernd Justin Jütte, *The Right to Research as a 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 (forthcoming)* (Taina E. Pihlajarinne et al. eds.)

<sup>78</sup> See only Ana Ramalho, *Conceptualising the European Union’s Competence in*

exception approach to copyright, which 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).<sup>79</sup> 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 user rights.<sup>80</sup> This makes EU copyright law, *viz.* 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. And this also allows to reflect the findings and 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*

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*Copyright – What Can the EU Do?*, 45 IIC 178 (2014); Ana Ramalho, Copyright law-making in the EU: what lies under the ‘internal market’ mask, 9 J. INTELLECT. PROP. LAW PRACT. 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 further BERND JUSTIN JÜTTE, RECONSTRUCTING EUROPEAN COPYRIGHT LAW FOR THE DIGITAL SINGLE MARKET: BETWEEN OLD PARADIGMS AND DIGITAL CHALLENGES 535-537 (2017).

<sup>79</sup> 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 rightholders must enjoy “a high level of protection” in relation to their protected subject matter, see for example *Infopaq I* supra (n 7), paras. 40-43 and 56-57; CJEU, Judgment of 16 June 2011 *Stichting de Thuiskopie*, C-462/09, EU:C:2011:397, paras. 30-32; CJEU, Judgment of 4 October 2011 *FAPL/Murphy*, C-429/08, EU:C:2011:631, para. 186, but see the qualification in paras. 162- 162 whereby 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 authorise 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 further CJEU, Judgment of 11 December 2011 *Painer*, C-145/10, EU:C:2011:798, paras. 107-109; *Deckmyn* supra (n 76), paras. 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 (paras. 26-30); and most recently in CJEU, Judgment of 29 July 2019 *Funke Medien NRW*, C-469/17, EU:C:2019:623; CJEU, Judgment of 29 July 2019 *Pelham and others*, C-476/17, EU:C:2019:624; CJEU, Judgment of 29 July 2019 *Spiegel Online*, C-516/17, EU:C:2019:625.

<sup>80</sup> See Article 17(9) CDSM Directive establishing an enforceable right to benefit from exceptions in relation to uses of protected works and other subject matter. These rights should shield such uses from content moderation by way of filtering and blocking performed by platforms falling within the scope of Article 17 CDSM Directive, see Geiger & Jütte, supra (n 76), 539-540; 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 and Council* supra (n 76), para. 87.

The EU's constitutional order consist of the Treaty on European Union (TEU),<sup>81</sup> the Treaty on the Functioning of the European Union (TFEU)<sup>82</sup> and the Charter of Fundamental Rights of the European Union (EUCFR).<sup>83</sup> 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 Union, fundamental rights form an integral part of the EU's constitutional order, including 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 Nations Charter".<sup>84</sup> 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 and formed out of the common constitutional traditions of the Member States.<sup>85</sup> However, a hierarchy amongst the fundamental rights of the EU Charter does not exist.<sup>86</sup> 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) in so far as corresponding rights exist in both documents.<sup>87</sup> This very close relationship is further illustrated by regular references by the CJEU and its Advocates General to judgments by the European Court of Human Rights (ECtHR).<sup>88</sup> While the EU's commitment to the fundamental rights of the ECHR is clearly expressed in its self-imposed – yet to be completed – accession to the Convention,<sup>89</sup> its relation to international human rights is

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<sup>81</sup> Consolidated Version of the Treaty on European Union [2012] *OJ C 326/13* (TEU).

<sup>82</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2012] *OJ C326/47-390* (TFEU).

<sup>83</sup> Charter of Fundamental Rights of the European Union [2012] *OJ C 326/391* (EUCFR).

<sup>84</sup> TEU, 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. See however Peggy Ducolombier, *The Perspective of the European Court of Human Rights on Intellectual Property and Access to Science and Culture*, in Geiger supra (n 25), 79.

<sup>85</sup> CJEU, Judgment of 14 May 1974 *Nold*, 4/73, EU:C:1974:51 1, para. 13; see in relation to copyright: CJEU, Judgment of 12 September 2006 *Laserdisken II*, C-479/04, EU:C:2006:549, para. 61.

<sup>86</sup> See however Alexander Peukert, *The fundamental right to (intellectual) property and the discretion of the legislature*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 132, (Christophe Geiger ed., 2015), arguing that certain fundamental rights, for example the right to freedom of expression under Article 11 EUCFR, should enjoy priority over other. In particular, the right to property due to its peculiar nature, 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 "as 'creatures' of the legislature", and it the legislature who defines their scope.

<sup>87</sup> EUCFR, art. 52(3).

<sup>88</sup> See for example *Pelham and others* supra (n 79), para. 34.

<sup>89</sup> TEU, art. 6(2), see however the CJEU's rejection of a first accession agreement, CJEU, Opinion of 18 December 2014 *Adhésion de l'Union à la CEDH*, 2/13,

slightly more complicated.<sup>90</sup> Nevertheless, it is undisputed that the EU is bound by binding international human rights law, if for no other reason because of the obligations incurred by its Member States.<sup>91</sup> In so far as international human rights norms have become part of customary international law, they have become binding on the EU.<sup>92</sup> This makes a majority of international human rights norms relevant not only to construct an internationally inspired right to research, but international human rights norms are also relevant in shaping such at right at European level.

Article 51 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.’<sup>93</sup> As a result, the European legislator is bound by fundamental rights and any legislation that violates fundamental rights without sufficient justification can be challenged 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,<sup>94</sup> and national courts in the EU Member states must

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EU:C:2014:2454, underlining the different positions on the EU’s obligations under international human rights law Tawhida Ahmed & de Jesús Butler, *The European Union and Human Rights: An International Law Perspective*, 17 EJIL 771 (2006).

<sup>90</sup> Article 3(5) states that the EU “[i]n its relations with the wider world, [...] 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.”; Cf. on the nature and evolution of the EU’s international human rights obligations: Gráinne de Búrca, *The Road Not Taken: The European Union as a Global Human Rights Actor*, 105 AM J INT LAW 649 (2011).

<sup>91</sup> Ahmed & Butler, supra (n 89) [**The European Union and Human Rights: An International Law Perspective**], 61; possibly also by virtue of their *jus cogens* nature as suggested by Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EJIL 491–508, (2008). Although the CJEU has subjected international law rules, such as UC Security Council resolutions to judicial review under EU law and *jus cogens*, see CJEU, Judgment of 18 July 2013 *Kadi II*, Joined Cases C-584/10 P, EU:C:2013:518, para. 131 where the Court stated: “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 UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *THE EUROPEAN UNION AND INTERNATIONAL HUMAN RIGHTS LAW* (2008), available at: [https://europe.ohchr.org/Documents/Publications/EU\\_and\\_International\\_Law.pdf](https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf), p. 7 [hereinafter ‘OHCHR Report 2008’].

<sup>92</sup> CJEU, Judgment of 3 June 2008 *Intertanko*, EU:C:2008:312, para. 51, see OHCHR Report 2008, 23.

<sup>93</sup> EUCFR, art. 51(1).

<sup>94</sup> For example, Member States must transpose directives, which are not directly applicable in the Member States (TFEU, 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

have regard to fundamental rights when they apply and interpret national norms that are the result of, or fall within the scope of EU harmonization.<sup>95</sup> However, if at national level a situation does not fully fall within the scope of harmonization under EU law, Member States remain free in their actions 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.<sup>96</sup>

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 existed as to its constitutionality.<sup>97</sup> In most cases, the CJEU is simply asked to interpret a provision of national law and guide its application in the light of EU law. 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.

Fundamental rights are not absolute, they can be limited to give effect to other fundamental rights as long as their essence is respected.<sup>98</sup> The concept

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protected under EU law. See e.g. CJEU, Judgment of 29 January 2008 *Promusicae*, C-275/06, EU:C:2008:54, para. 70; CJEU, Judgment of 18 October 2018 *Bastei Lübbe*, C-149/17, EU:C:2018:841, para. 45; see also CJEU, Judgment of 16 July 2015 *Coty Germany*, C-580/13, EU:C:2015:485, para. 34. See more generally; PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW. TEXT, CASES AND MATERIALS* 430-431 (2020),.

<sup>95</sup> Specifically in the field of copyright law: CJEU, Judgment of 24 November 2011 *Scarlet Extended*, C-70/10, EU:C:2011:771; CJEU, Judgment of 16 July 2012 *SABAM v Netlog*, C-360/10, EU:C:2012:85, CJEU, Judgement of 15 September 2016 *Mc Fadden*, C-484/14, EU:C:2016:689.

<sup>96</sup> *Funke Medien NRW* supra (n 79), para. 32.

<sup>97</sup> The CJEU has been called upon to examine the constitutionality, in the light of fundamental rights, of secondary harmonization in the field of copyright law. In this context, the intensity of the Courts review varies significantly. A good example for a thorough and structured review is CJEU, Judgment of 22 January 2013 *Sky Österreich*, C-283/11, EU:C:2013:28, paras. 31-68 and slightly less intensive *Luksan* supra (n 76), paras. 68-72. In both cases the CJEU was asked to consider in the course of a preliminary reference procedure under Article 267 TFEU to assess the validity of a provision of national law implemented pursuant to 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. This case is special as it constitutes one of the relatively rare cases in which a Member States 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 for a through discussion of the challenge Geiger & Jütte, supra (n 76).

<sup>98</sup> Article 52(1) EUCFR; see also to that effect *Pelham and others* supra (n 79); AG Szpunar, Opinion of 12 December 2018 *Pelham and Others*, C-476/17, EU:C:2018:1002, para. 98 and AG Szpunar, Opinion of 6 June 2018 *Bastei Lübbe*, C-149/17, EU:C:2018:400, para. 38, and *Coty Germany* supra (n 97), para. 35. See for example Koen Lenaerts, *Limits on Limitations: The Essence of Fundamental Rights in the EU*, 20 GER. LAW J. 779 (2019), and on a discussion of the essence of intellectual property and with further references; Martin Husovec, *The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter*,

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.”<sup>99</sup> 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.<sup>100</sup> In the EU legal order, proportionality constitutes an important analytical mechanism to determine the permissibility of limiting certain rights and interests, including fundamental rights. The test often comes to bear when two or more fundamental rights as they are guaranteed and protected under the ECHR and the EUCFR come into conflict.<sup>101</sup>

In the practice of the European courts, the proportionality test is divided into three steps.<sup>102</sup> First, a court will determine whether the measure that potentially infringes a right is appropriate to achieve the aim it is adopted for. For that purpose, a relevant measure must pursue a legitimate aim and must be suitable to achieve that aim.<sup>103</sup> 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 state is also referred to as ‘proportionality *strictu sensu*’, and it is the stage where the actual balancing of interest takes place.

In copyright law, proportionality has already become almost synonymous with the notion of a ‘fair balance’.<sup>104</sup> It has, for example been used to calibrate

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20 GER. LAW J. 840–863 (2019).

<sup>99</sup> Lenaerts, *supra* (n 98) [**Limits on Limitations: The Essence of Fundamental Rights in the EU**], 793.

<sup>100</sup> 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 IIC 889, (2014); Jonas Christofferson, *Human Rights and balancing: The principle of proportionality*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 19 (Christophe Geiger ed., 2015); Peter Teunissen, *The balance puzzle: the ECJ’s method of proportionality review for copyright injunctions*, 40 E.I.P.R. 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, Riccio Giovanni Maria & Bassini Marco eds., 2020).

<sup>101</sup> As a mechanism that resolves conflicts between fundamental rights, the proportionality test has, as a result of its function, helped to define the scope of specific fundamental rights by showing their limits, by defining their inviolable core, see Christofferson, *supra* (n 11), 19.

<sup>102</sup> For an early application of the proportionality test in EU law see CJEU, Judgment of 13 November 1990 *Fedesa*, C-331/88, EU:C:1990:391, paras. 12-18.

<sup>103</sup> 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, see DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, EUROPEAN UNION LAW 387-388 (2019).

<sup>104</sup> See for example Teunissen, *supra* (n 11), 581, Christofferson, *supra* (n 11), 35, and Peter Oliver & Christopher Stothers, *Intellectual Property under the Charter: are the Court’s scales properly calibrated?*, 54 C.M.L. REV. 517, 546 (2017), all of which refer to *Sky Österreich* *supra* (n 97), paras. 50-68; see also Caterina Sganga, *A decade of fair balance doctrine, and how to fix it: copyright versus fundamental rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online*, 41 E.I.P.R. 683 (2019).

the rules for online copyright enforcement by intermediary service providers.<sup>105</sup> In this context, the CJEU has used proportionality to define the limits of enforcement obligations by balancing several fundamental rights with each other. Here, proportionality works as a tool to determine the interpretation of existing norms in the light of fundamental right.<sup>106</sup>

The complex nature of the test<sup>107</sup> has resulted in its creative application by the CJEU and the ECtHR. 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.<sup>108</sup> It is not only applied by the courts, but, as a general principle of EU law, also guides the legislature as well as the executive branches in the EU,<sup>109</sup> and the Member States in implementing EU law. Accordingly, acts of the institutions, such as secondary legislation, and the Member States are subject to judicial review in the light of the principle of proportionality.<sup>110</sup>

Whilst in the practice of the CJEU, proportionality has been used to interpret existing rules with existing fundamental rights,<sup>111</sup> we will attempt to

<sup>105</sup> Christophe Geiger, Giancarlo Frosio and Elena Izyumenko, *Intermediary Liability and Fundamental Rights*, in THE OXFORD HANDBOOK OF INTERMEDIARY LIABILITY ONLINE 138 (Giancarlo Frosio, ed., 2020).

<sup>106</sup> 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, Fischman Afori, supra (n 11), 900, 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 for example with a comprehensive summary Teunissen, supra (n 11), critically also Mylly, supra (n 11).

<sup>107</sup> Christofferson, supra (n 11), 19.

<sup>108</sup> Cf. Christofferson, supra (n 11), 24.

<sup>109</sup> Instructions for the EU institutions on the application of the proportionality principle are laid down in a special protocol to the TFEU: Consolidated version of the Treaty on the Functioning of the European Union - PROTOCOLS - Protocol (No 2) on the application of the principles of subsidiarity and proportionality [2008] OJ C 115/206. 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 (n 97), 583.

<sup>110</sup> Cf. Takis Tridimas, THE GENERAL PRINCIPLES OF EU LAW 655 (2007). Proportionality as a ground for judicial review was introduced in CJEU, Judgment of 17 December 1970 *Internationale Handelsgesellschaft*, C-11/70, EU:C:1970:114 and has since been a general principle of EU law. In 2009, it was expressly recognized in Article 5(4) TFEU and the EUCFR refers to proportionality as a tool to justify *prima facie* violations of the Charter rights (Article 52(1) EUCFR). Article 5 of the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality requires the EU legislature to subject legislation to a subsidiarity and proportionality test.

<sup>111</sup> 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 (Irina Stamatoudi ed., 2016). The ECtHR also refers regularly to proportionality in cases concerning

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.

## 2. *European Values and the Objectives of the Union: 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. The values include the respect for human dignity, respect for human rights, non-discrimination and solidarity.<sup>112</sup> These values are programmatic,<sup>113</sup> they inspire and guide the action of the Union and its Member States, which share these values with the EU as a supranational institution.<sup>114</sup> The “ever closer Union”<sup>115</sup> 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.<sup>116</sup> These values common to all Member States constitute an untouchable core of the legal order that is the EU.<sup>117</sup>

The aims and goals of the Union have grown in number over time and

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intellectual property, for example is assessing whether criminal sanction for large-scale copyright infringements online are appropriate (ECtHR (5th section) *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v Sweden* App no 40397/12 (ECtHR, 19 February 2013) under D.); see for comments: Jütte, *supra* (n 76), 15. More generally on the use of the proportionality principle by the ECtHR in copyright cases, see Christophe Geiger & Elena Izyumenko, *Shaping Intellectual Property Rights through Human Rights Adjudication: The Example of the European Court of Human Rights*, 46 MITCHELL HAMLINE LAW REVIEW 527 (2020); 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 (Oreste Pollicino, Giovanni Maria Riccio & Marco Bassini eds., 2020).

<sup>112</sup> TEU, art. 2 reads: “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.”

<sup>113</sup> Marcus Klamer and Dimitry Kochenov, ‘Article 2’, para. 6 in *THE EU TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS. A COMMENTARY* (Manuel Kellerbauer, Marcus Klamer & Jonathan Tomkin eds., 2019).

<sup>114</sup> TEU, art. 2, second sentence.

<sup>115</sup> TEU, art. 1 states that the “Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe”. Reference to this political mantra can also be found on the respective preambulatory parts of the TEU and the TFEU.

<sup>116</sup> *Adhésion de l’Union à la CEDH* *supra* (n 89), paras. 167-169.

<sup>117</sup> See on the origins of the values and its initially implied nature: Marcus Klamer and Dimitry Kochenov, ‘Article 2’, paras. 1-5 in Kellerbauer et al., *supra* (n 113).



their nature has changed with the maturing of the Union into a constitutional legal order.<sup>118</sup> Article 3 TEU defines the aims of the Union. It shall promote peace, its values and the well-being of its people.<sup>119</sup> One of the most prominent, and more concrete aims is the establishment of an internal market. 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*.”<sup>120</sup> Sustainability had found its place in the TEU in already in the 1992 Treaty of Maastricht, which established the European Union.<sup>121</sup> Article B of the Treaty of Maastricht stated that that Union 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”. Environmental protection was merely included as an aspiration to which the EU claimed to be determined to. The EU Charter, proclaimed in 2000, and which entered into force in 2009, includes an obligation to include “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.<sup>122</sup> Accordingly, the TEU was changed into 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.<sup>123</sup>

The aims of the Union are binding on its institutions, but they neither create direct obligations for the Union to act, nor do they create competences for Union action.<sup>124</sup> The aims set out in Article 3 TEU “merely lay down a programme” which the EU institutions and the Member States must implement.<sup>125</sup> The aims of the Union therefore have a 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.<sup>126</sup>

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<sup>118</sup> Joris Larik, *From Speciality to a Constitutional Sense of Purpose: on the Changing Role of the Objectives of the European Union*, 63 INT COMP LAW Q 935, 936 (2014)).

<sup>119</sup> TEU, art. 3(1).

<sup>120</sup> Emphasis added.

<sup>121</sup> Treaty on European Union [1992] OJ C 191/1.

<sup>122</sup> EUCFR, art. 37.

<sup>123</sup> Rudolf Streinz, ‘Artikel 3 EUV’, para. 1 in EUV/AEUV (Rudolf Streinz ed., 3<sup>rd</sup> edn, 2018).

<sup>124</sup> Cf. AG Sharpston, Opinion of 21 December 2016 *Accord de libre-échange avec Singapour*, 2/15, EU:C:2016:992, para. 495.

<sup>125</sup> CJEU, Judgement of 2 November 1999 *Portugal v Council*, C-149/96, EU:C:1999:574, para. 86.

<sup>126</sup> See Nicolas de Sadeleer, *Sustainable development in EU law: still a long way to go*,

The aims of the Union 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 Union, for the purposes of our argument, is that aims of the Union 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.

Amongst the aims of the EU are sustainability and technological advancement, two aims that also feature prominently in the international development agenda.<sup>127</sup> 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 international level where the homonymous 1987 UN Commission introduced the so-called *Bundtland*-definition. According to this definition, sustainability means “meeting the needs of the present whilst ensuring future generations can meet their own needs.”<sup>128</sup> Sustainability, under 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. 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”.<sup>129</sup> Further, in the 2016 Communication “Next steps for a sustainable future”, adopting and further refining the *Bundtland*-

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6 JINDAL GLOBAL LAW REVIEW 39, 58 (2015), who refers to sustainability as a “binding constitutional objective.”

<sup>127</sup> General Assembly (2015) Resolution 70. Transforming our world: the 2030 Agenda for Sustainable Development, 70th Session, A/Res/70/1.

<sup>128</sup> World Commission on Environment and Development (WCED), *Our Common Future*, 1987, Chapter 2, para. 1. See for a critical discussion and arguing for a wider, more detailed notion of sustainability, Sander R.W. van Hees, *Sustainable Development in the EU: Redefining and Operationalizing the Concept*, 10 UTRECHT LAW REVIEW 60, 75(2014). The author defines sustainable development as follows: “Sustainable development means stimulating and encouraging economic development (e.g. more jobs, creativity, entrepreneurship and revenue), whilst protecting and improving important aspects (at the global and European level) of nature and society (inter alia natural assets, public health and fundamental rights) for the benefit of present and future generations.”

<sup>129</sup> Commission, *Europe 2020. A strategy for smart, sustainable and inclusive growth*, Brussels 3.3.2020, COM(2010) 2020 final, p. 5, in another Communication the Commission highlights that a post-pandemic recovery “must guide and build a more sustainable, resilient and fairer Europe for the next generation” and underlines 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.” (Commission, *Europe's moment: Repair and Prepare for the Next Generation*, Brussels, 27.5.2020, COM(2020) 456 final, p. 1 and 6).

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”.<sup>130</sup> 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. These areas range from “youth unemployment to ageing populations, climate change, pollution, sustainable energy and migration.” 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. What is more important however, certainly for the purposes of our argument, is creating a link to technological development. The 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.*”<sup>131</sup> This essential connection is also apparent in other policy documents, in which the Commission interconnects sustainability, innovation, research and other, broader goals of the Union.<sup>132</sup>

Because of its overarching nature as one of the major policy goals, the EU relies on sustainability throughout its policy areas, including its external trade policy.<sup>133</sup> 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 stresses the importance of intellectual property to “boost recovery and resilience” in order to “offer valuable and sustainable jobs to society”.<sup>134</sup>

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<sup>130</sup> Commission, Next steps for a sustainable European future. European action for sustainability, Brussels, 22.11.2016, COM(2016) 739 final, p. 1.

<sup>131</sup> *Ibid* (emphasis added).

<sup>132</sup> See for example Commission, Energy 2020 A strategy for competitive, sustainable and secure energy, Brussels, 10.11.2010, COM(2010) 639 final, p. 15: “EU researchers and companies need to increase their efforts to remain at the forefront of the booming international market for energy technology and, where it is mutually beneficial, they should step up cooperation with third countries in specific technologies.”, and Commission, State of the Energy Union 2015, Brussels, 18.11.2015 COM(2015) 572 final, p. 13: “Research, innovation (R&I) and competitiveness are paramount to accelerate the EU energy transition and to reap its benefits in terms of jobs and growth that the Energy union can bring.”

<sup>133</sup> European Commission, Trade Policy Review. An Open, Sustainable and Assertive Trade Policy, (Luxembourg 2021), available at: [https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc\\_159541.0270\\_EN\\_05.pdf](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” (p.5). The document also highlights the importance of intellectual property in this context (p. 6). See also Samatha Velluti, *The Promotion and Integration of Human Rights in EU External Trade Relations*, 32 UTRECHT J. INT. EUR. LAW 41, 57-61 ((2016).

<sup>134</sup> Commission, Making the most of the EU’s innovative potential. An intellectual

However, sustainability does not appear as a general theme throughout the policy document, but only appears occasionally in very specific contexts.<sup>135</sup>

The relevant policy documents frequently refer to research as a necessary driver for innovation and sustainability.<sup>136</sup> Intellectual property, in these contexts, is presented as an enabler. For example, the “Intellectual Property Action Plan” focusses on pooling of resources and easier licensing solutions to “facilitate access to critical IP in the times of crisis” and the facilitation of compulsory licensing at national level.<sup>137</sup> Specifically in relation to 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.<sup>138</sup> These actions relate largely to an intellectual property infrastructure as opposed to substantive changes to an inherently restrictive intellectual property system. Albeit the relatively weak link between intellectual property and sustainability, which is much more pronounced in the literature at international level,<sup>139</sup> regular references to research,

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property action plan to support the EU’s recovery and resilience Communication, Brussels, 25.11.2020, COM(2020) 760 final, p. 1 (emphasis omitted).

<sup>135</sup> For example, in relation to geographical indications “part of Europe’s cultural heritage and contribute to the social, environmental and economic sustainability of the rural economy” and with reference to the EUs “Farm to Fork” strategy (Commission. A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system, Brussels, 20.5.2020, COM(2020) 381 final; 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 (Commission, The European Green Deal, Brussels, 11.12.2019, COM(2019) 640 final). The European Green Deal also reminds of the horizontal nature of sustainability in its introduction when it states: “The 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.” (p.2)

<sup>136</sup> See only COM(2019) 640 final, p. 9 and COM(2020) 381 final, pp. 15-18.

<sup>137</sup> COM(2020) 760 final, p. 11.

<sup>138</sup> COM(2020) 760 final, p. 12.

<sup>139</sup> Most of these contributions build on the United Nation’s Sustainability Goals, see 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 (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 argue that despite extensive multilateral discussions in various fora on a range of issues, which, 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 importance in the context of the response to the COVID-19 crisis):” See further Freedom-Kai Phillips, *Intellectual Property Rights in Traditional Knowledge: Enabler of Sustainable Development*, 32 UTRECHT J. INT. EUR. LAW 1 (2016); Ioannis E. Nikolaou & Konstantinos I. Evangelinos & Walter Leal Filho, *Intellectual property and environmental innovation: an explanation using the institutional and resource-based theories*, 6 INT. J. FORESIGHT AND INNOVATION POLICY 268 (2010); Elisabeth Eppinger et al., *Sustainability transitions in manufacturing: the role of intellectual property*, 49 CURRENT OPINION IN ENVIRONMENTAL SUSTAINABILITY 118 (2021) .

intellectual property and sustainability as drivers of an innovative and sustainable European economy and society must be understood as a responsibility and mission to also examine current intellectual property legislation in the light of these aims.<sup>140</sup>

Sustainability is only one of the aims of the Union, but certainly one that can help to re-evaluate and rethink 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 TEU. Taking sustainability as a starting point with its fairly slim definition as “meeting the needs of the present whilst ensuring future generations can meet their own needs”, it is possible to formulate as a mission of the EU to develop a sustainable EU copyright system: Copyright should foster innovation and technological advance (as another, interrelated aim of the Union), 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). A balanced copyright system geared toward sustainability that allows for flexibility and ease of access<sup>141</sup> to necessary information and research resources, the Union could ensure that the canon of values it sets out as guidelines for its constitutional order can be progressively realized.

While this is a first attempt to develop the idea of a ‘sustainable copyright’, the direction of a development towards a reshaping of copyright norms must be one towards an enabling framework. We posit here that a right to research, anchored in the constitutional framework of the EU, could serve to reflect and represent the aims of the Union.

### *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. They benefit from a rich and

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<sup>140</sup> See more detailed Christophe Geiger and Bernd Justin Jütte, *The Right to Research as Guarantor for Sustainability, Innovation and Justice in EU Copyright Law*, in *Rethinking the Role of Intellectual Property Rights in the Post Pandemic World: An Integrated Framework of Sustainability, Innovation and Global Justice* (Taina Pihlajarinne, Jukka Mähönen and Pratyush Upreti, eds., forthcoming 2023), available at SSRN: <https://ssrn.com/abstract=4140627>.

<sup>141</sup> Sheridan, *supra* (n 4), the author frames her critique of modern copyright around an “access rights model” that defines access in “quality and quantity of access” (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.” (104); see Geiger, (n 4).

extensive body of case law in which the CJEU and the ECtHR<sup>142</sup> 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. 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'euro péenne*.

### 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. 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<sup>143</sup> and extends to natural and legal persons.<sup>144</sup> It obliges Member States not only to refrain from restricting the right to freedom of expression, but also to provide for a framework that protects the exercise of this right in certain circumstances. The Court 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.<sup>145</sup> The right is subject to limitation set out in Article 10(2). 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". In the jurisprudence of the ECtHR these interests of others have been interpreted to include the right of rightholders.<sup>146</sup>

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<sup>142</sup> See specifically on the gradual development of the interrelation between intellectual property and other fundamental rights ECtHR Laurence R. Helfer, *The New Innovation Frontier Revisited: Intellectual Property and the European Court of Human Rights*, in *INTELLECTUAL PROPERTY LAW AND HUMAN RIGHTS* 29 (Paul L.C. Torremans ed., 2020), and Geiger & Izyumenko, *supra* (n 111).

<sup>143</sup> ECHR, art. 10(1). The ECtHR has interpreted Article 10 also to apply in situations in which the right guaranteed under the provision are effectively interfered with by private parties in the course of employment relationships (ECtHR, *Fuentes Bobo v. Spain*, Appl. no. 39293/98, 29 February 2000, para. 38.) stemming from a positive obligation of the state (ECtHR, *Young, James and Webster v. The United Kingdom*, Appl. nos. 7601/76; 7806/77, 13 August 1981, para. 55).

<sup>144</sup> ECtHR, *Çetin and Others v. Turkey*, Appl. nos. 40153/98 and 40160/98, 13 February 2003, para. 57.

<sup>145</sup> ECtHR, *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, Appl. no. 33014/05, 5 May 2011, para. 64.

<sup>146</sup> ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden*, Appl. no. 40397/12, 19 February 2013, under D: "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

The EUCFR guarantees the same right under Article 11.<sup>147</sup> The provision itself does not contain a limitation that corresponds to Article 10(2) ECHR. However, Article 52 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.”

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 constitute exercised of the right of freedom of expression and the exclusive rights of rightholders are restrictions to this right. In *Ashby Donald*<sup>148</sup> and *The Pirate Bay*<sup>149</sup> 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.<sup>150</sup>

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.<sup>151</sup> In the 2019 landmark ruling in *Pelham v*

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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 [...]”

<sup>147</sup> See the explanatory note to Article 11 EUCFR which states: “Article 11 corresponds to Article 10 of the European Convention on Human Rights” (Explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303/17).

Article 52(3) further provides that “[in] so far 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 (EUCFR, art. 52(3), second sentence)

<sup>148</sup> ECtHR, *Ashby Donald and other v France*, Appl. no. 36769/08, 10 January 2013.

<sup>149</sup> ECtHR, *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden*, Appl. no. 40397/12, 19 February 2013.

<sup>150</sup> See for example with comments on both cases: Geiger, *supra* (n 4), 85-86; Christophe Geiger & Elena Izyumenko, *Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression*, 42 IIC 316 (2014); Dirk Voorhoof, *Freedom of expression and the right to information: Implications for copyright*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 331 (Christophe Geiger ed., 2015); Jütte, *supra* (n 76).

<sup>151</sup> Bernd Justin Jütte & Joao Pedro Quintais, *The Pelham Chronicles: sampling, copyright and fundamental rights*, 16 J. INTELLECT. PROP. L. PRACT. 213–225, 222 (2021);

*Hütter and Schneider-Esleben*<sup>152</sup>, the CJEU ruled that the owner of a right in a sound recording cannot prevent the use of sample of that recording if the user integrates the sample in a new work “in a modified form unrecognisable to the ear”.<sup>153</sup> According to the Court, such a use does not amount to a reproduction within the meaning of Article 2(c) InfoSoc Directive. Moreover, in *Funke Medien v Bundesrepublik Deutschland*<sup>154</sup> and *Spiegel Online v Volker Beck*,<sup>155</sup> 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)-(3) 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”<sup>156</sup> and the extent of the reproduction must be proportionate, i.e. it “must not be extended beyond the confines of what it necessary to achieve the informatory purpose”<sup>157</sup> of the reproduction.

In all three cases, the CJEU balanced the proprietary interest of rightholders against the right to freedom of expression in its different facets.<sup>158</sup> 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 closely examined. The Court here recognized the importance of a free press, arguing that “the purpose of the press, in a democratic society governed by the rule

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Geiger & Izyumenko, supra (n 76), 285.

<sup>152</sup> *Pelham and others* supra (n 79), see for comments Jütte & Quintais, supra (n 151); Martin Senftleben, *Flexibility Grave – Partial Reproduction Focus and Closed System Fetishism in CJEU, Pelham*, 51 IIC 751 (2020).

<sup>153</sup> See on the judgment Bernd Justin Jütte & João Pedro Quintais, *Advocate General turns down the music - sampling is not a fundamental right under EU copyright law: Pelham v Hutter*, 41 E.I.P.R 654 (2019); Jütte & Quintais, supra (n 151); Senftleben, supra (n 152).

<sup>154</sup> *Funke Medien NRW* supra (n 79).

<sup>155</sup> *Spiegel Online* supra (n 79).

<sup>156</sup> *Funke Medien NRW* supra (n 79), para. 74.

<sup>157</sup> *Spiegel Online* supra (n 79), para. 83.

<sup>158</sup> See on all three decisions Geiger & Izyumenko, supra (n 76), 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 461, (Paul Torremans ed., 2020); Teunissen, supra (n 11); 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 IIC 176 (2019); Caterina Sganga, *A decade of fair balance doctrine, and how to fix it: copyright versus fundamental rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online*, 41 E.I.P.R 683 (2019); specifically on *Funke Medien* see Bernd Justin Jütte & Giulia Priora, *Leaking of secret military reports qualifies as reporting of current events*, 15 J. INTELLECT. PROP. LAW PRACT. 681 (2020), on *Spiegel Online* see Giulia Priora & Bernd Justin Jütte &, *No copyright infringement for publication by the press of politician’s controversial essay*, 15 J. INTELLECT. PROP. LAW PRACT. 583 (2020).



of law, justifies it in informing the public, without restrictions other than those that are strictly necessary”.<sup>159</sup> It is this informatory purpose that enables us to create a connection to a right to research.

It is interesting to note that the Advocate General in *Funke Medien* took a completely different approach. Instead of arguing on the permissibility of using works protected by copyright, in this case periodic briefing reports which were classified as confidential and only provided to select members of the German Parliament, AG Szpunar suggested that such document, potentially failing the required standard of originality, should not attract copyright protection.<sup>160</sup> 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.<sup>161</sup>

The informatory function of the right to freedom of expression as 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.<sup>162</sup> Privilege is given to expression, unless the expression of an opinion undermines the foundations of a democratic society.<sup>163</sup> Parallels can be drawn to the development of the substantive scope of academic freedom at international level,<sup>164</sup> which is also a broad right accommodating a wide array of expression and opinions, including pseudo-science.<sup>165</sup>

The Strasbourg Court determined that access to information or its collection is a privileged act, for example for journalists<sup>166</sup> and researchers

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<sup>159</sup> *Spiegel Online* supra (n 79), para. 72.

<sup>160</sup> Cf. AG Szpunar, Opinion of 25 October 2018 *Funke Medien NRW*, C-469/17, EU:C:2018:870, para. 62

<sup>161</sup> *Funke Medien NRW* supra (n 160), para. 64.

<sup>162</sup> See only ECtHR, *Handyside v. the United Kingdom*, Appl. no. 5493/72, 7 December 1976, para. 49 and *Axel Springer AG v. Germany*, Appl. no. 39954/08, § 90, ECHR, paras. 78 and 90.

<sup>163</sup> This is implicit in the permitted limitation to the right to freedom of expression under the ECHR: “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).

<sup>164</sup> See infra under I. C. 2.

<sup>165</sup> General Assembly (2020) Report on academic freedom and the freedom of opinion and expression, 75<sup>th</sup> Session, A/75/261, para. 29, 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.

<sup>166</sup> ECtHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Appl. no. 931/13, 27 June 2017, para. 128; *Magyar Helsinki Bizottság v. Hungary*, Appl. no. 18030/11, 8 November 2016, para. 130; *Guseva v. Bulgaria*, Appl. no. 6987/07, 17 February 2015, para. 37; *Shapovalov v. Ukraine*, Appl. no. 45835/05, 31 July 2012, para. 68. See for a systematic comparison between the right to access to information and data

more generally in relation to activities in the public interest, noting in *Gillberg v. Sweden* that a negative right to access also exists.<sup>167</sup> Academic research is also privileged, but the justifications for an elevated right to access to information are different.<sup>168</sup> It is also instrumental to look at the rich jurisprudence of both European courts on intermediary liability for online copyright infringement<sup>169</sup>, 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<sup>170</sup>.

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. Already in its earlier case law, the Court has limited the obligations that can be imposed on online intermediaries with reference to competing fundamental rights.<sup>171</sup> These limitations extend to the provision of personal data of internet users to identify infringers in *Promusicae v Telefonica*,<sup>172</sup> to the scope of blocking and filtering injunctions in *SABAM v Netlog*<sup>173</sup> and *Scarlet Extended v SABAM*,<sup>174</sup> and to the obligation of operators of open wireless networks in *Mc Fadden v Sony Music*.<sup>175</sup> Common to all these cases is that the Court 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 Court particularly highlighted that the right to receive information of internet users in general would be critical in assessing the scope of injunctions.<sup>176</sup>

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protection and its parallel to copyright law Annelies Vandendriessche & Bernd Justin Jütte, *Responsible Information Sharing Converging boundaries between private and public in privacy and copyright law*, 10 JIPITEC 310 (2019).

<sup>167</sup> ECtHR, *Kenedi v. Hungary*, Appl. no. 31475/05, 26 May 2009, *Gillberg v. Sweden*, Appl. no. 41723/06, 03 April 2012, *Roşianu v. Romania*, Appl. no. 27329/06, 24 June 2014, *Shapovalov v. Ukraine*, Appl. no. 45835/05, 31 July 2012.

<sup>168</sup> ECtRH, *Başkaya and Okçuoğlu v. Turkey*, Appl. nos. 23536/94 and 24408/94, 8 July 1999, paras. 61-67; *Kenedi v. Hungary*, Appl. no. 31475/05, 26 May 2009, para. 42; *Gillberg v. Sweden*, Appl. No. 41723/06, 3 April 2012, para. 93.

<sup>169</sup> See Geiger and Jütte, supra (n 76).

<sup>170</sup> See on this topic Christophe Geiger and 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).

<sup>171</sup> See Jütte, supra (n 158), 17-19; CHRISTINA ANGELOPOULOS, EUROPEAN INTERMEDIARY LIABILITY IN COPYRIGHT. A TORT-BASED ANALYSIS 108-143 (2016),.

<sup>172</sup> *Promusicae* supra (n 97).

<sup>173</sup> *SABAM v Netlog* supra (n 95).

<sup>174</sup> *Scarlet Extended* supra (n 95).

<sup>175</sup> *Mc Fadden* supra (n 95).

<sup>176</sup> *SABAM v Netlog* supra (n 95), para. 48; *Scarlet Extended* supra (n 95), para. 50; CJEU, Judgment of 27 March 2014 *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, para. 62, *Mc Fadden* supra (n 95), para. 93, In his Opinion in *Mc Fadden*, AG Szpunar took an even more restrictive position and argued who argued: "More generally, I would observe that

On website blocking in general the ECtHR ruled that restricting access to websites constitutes an infringement of the right to receive an impart information, even if the blocking of a particular website is only an incidental. 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 information.<sup>177</sup>

The expression of this balance is not only reflected, as interpreted by the Court in the cases described above, in Article 15 E-Commerce Directive,<sup>178</sup> it has also been carried over into the sector specific CDSM Directive,<sup>179</sup> which prohibits imposing obligation on specific platforms to install general monitoring or filtering mechanisms to enforce copyright on their services. It was the adoption of the CDSM Directive that 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. This position was, slightly nuanced but in principle equivalent, shared by the European Commission and most national legislators.<sup>180</sup>

Similarly, the Court has also ruled that the employment of technological protection measures, which enjoy protection under Article 6 InfoSoc Directive and Article 7 Software Directive, must not prevent uses that are lawful. 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.<sup>181</sup>

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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.” (AG Szpunar, Opinion of 16 June 2016 *Mc Fadden*, C-484/14, EU:C:2016:170, para. 148.)

<sup>177</sup> ECtHR, *Observer and Guardian v. the United Kingdom*, Appl. no. 13585/88, 26 November 1991, para. 59(b), with further references summarizing its prior case law; Series A no. 216, and *Guerra and Others v. Italy*, App. No. 14967/89, 19 February 1998, para. 53. See also further on this topic Christophe Geiger and Elena Izyumenko, *Blocking Orders: Assessing Tensions with Human Rights*, in Frosio (n 105) 566.

<sup>178</sup> Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), [2000] OJ L 178/1.

<sup>179</sup> Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market, [2019] OJ L 130/125 (CDSM Directive).

<sup>180</sup> The Advocate General 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.” (para. 187) Therefore, “adopting such preventive measures would [...] risk causing ‘irreparable’ damage to freedom of expression” (para. 216)

<sup>181</sup> In *Nintendo v PC Box* the Court put it slightly differently. After 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, the Court went on to state “that legal protection [for technological protection

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

## 2. *Academic Freedom and scientific research*

A right to academic freedom as such does not exist in the ECHR but is implicitly subsumed under the right to freedom of expression.<sup>182</sup> The EUCFR gives concrete expression to freedom of the arts and sciences and academic freedom as express rights in Article 13. The pooling of these separate rights in one provision can be explained with their common roots in the right to freedom of expression, and it is also an indication of their related nature.<sup>183</sup> 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.<sup>184</sup> Intellectual property concerns do not play a prominent role in these documents.<sup>185</sup> The freedom of scientific research is limited, but also affirmed in principle by the Oviedo Convention on Human Rights in

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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.” (CJEU, Judgment of 10 September 2013 in *Nintendo v PC Box*, Case C-355/12, EU:C:2013:581, paras. 30-31).

<sup>182</sup> Explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303/17, Explanation on Article 11 — Freedom of expression and information: the explanation states that “Article 11 corresponds to Article 10 of the European Convention on Human Rights”.

<sup>183</sup> Debbie Sayers, ‘Article 13’, para 13.01 in Peers et al. supra (n 74).

<sup>184</sup> Recommendation No. R (90) 3 of the Committee of Ministers of 6 February 1990 concerning Medical Research on Human Beings; Recommendation 1100 (1989) of the Parliamentary Assembly of 2 February 1989 on the use of human embryos and fetuses in scientific research; Recommendation 1762 (2006) of the Parliamentary Assembly of 30 June 2006 on ‘Academic freedom and university autonomy’; European Parliament, Defence of academic freedom in the EU’s external action, [2018] C 363/173.

<sup>185</sup> The Recommendation No. R (2000) 8 of the Committee of Ministers of 30 March 2020 on the research mission of universities “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 [...]” (9.8)

Biomedicine and its four protocols.<sup>186</sup>

The non-binding UNESCO Recommendation concerning the status of Higher Education Teaching Personnel<sup>187</sup> sets out a list of elements that constitute academic freedom, amongst them certain individual freedoms of the teacher.<sup>188</sup> 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”. Research within the context of higher education is defined 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 and/or resolution of the problems, and when within an institutional framework, supported by an appropriate infrastructure”. 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”<sup>189</sup> and dissemination of research results should be encouraged “with a view to promoting the advancement of science, technology, education and culture generally.”<sup>190</sup>

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, or the balance between academic freedom, 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

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<sup>186</sup> Convention on Human Rights and Biomedicine (ETS No 164); 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 (ETS No. 168); Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin (ETS No. 186); Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research (CETS No. 195); Additional Protocol to the Convention on Human Rights and Biomedicine concerning Genetic Testing for Health Purposes (CETS No. 203).

<sup>187</sup> United Nations Educational, Scientific and Cultural Organization (UNESCO). 1997. *Recommendation Concerning the Status of Higher Education Teaching Personnel* [hereinafter ‘UNESCO Recommendation’].

<sup>188</sup> Cf. Debbie Sayers, ‘Article 13’, para. 13.29 in Peers et al. *supra* (n 74).

<sup>189</sup> UNESCO Recommendation, IV.11.

<sup>190</sup> UNESCO Recommendation, IV.12.

CJEU on the right to freedom of expression, freedom of scientific research and the freedom of arts.<sup>191</sup> 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 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.<sup>192</sup> At individual level, academic freedom largely falls under a qualified right to freedom of expression, which grants researchers specific freedoms. Therefore, academic freedom covers areas of artistic expression and scientific research<sup>193</sup> by providing freedoms similar to those of journalists but also charges researchers with specific responsibilities due to their special position not only as researchers but also as educators.<sup>194</sup> 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 freedom.<sup>195</sup> 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.<sup>196</sup> 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".<sup>197</sup>

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

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<sup>191</sup> 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, cf., 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, 535-538 (2016).

<sup>192</sup> CJEU, Judgment of 6 October 2020 *Commission v Hungary (Higher Education)*, C-66/18, EU:C:2020:792, para. 227, see Cf. Debbie Sayers, 'Article 13', para. 13.41 in Peers et al. supra (n 74).

<sup>193</sup> Debbie Sayers, 'Article 13', para. 13.60 in Peers et al., supra (n 74).

<sup>194</sup> Cf. Debbie Sayers, 'Article 13', para. 13.55 in Peers et al., supra (n 74), see also *Hertel v. Switzerland*, 59/1997/843/1049, 25 August 1998, para 22; in relation to 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." see *Magyar Helsinki Bizottság v. Hungary*, Appl. no. 18030/11, 8 November 2016, para. 159.

<sup>195</sup> Beiter et al., supra (n 25) , 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, *ibid* 110.

<sup>196</sup> ECtHR, *Mustafa Erdoğan and Others v. Turkey*, Appl. no. - 346/04 and 39779/04, 27 May 2014, para. 40, as adopted by *Commission v Hungary (Higher Education)* supra (n 192), para. 225.

<sup>197</sup> ECtHR, *Mustafa Erdoğan and Others v. Turkey*, Appl. no. - 346/04 and 39779/04, 27 May 2014, para. 40.

interpretation and balancing of the right to scientific research and academic freedom.<sup>198</sup> More recently, the 2021 Digital Europe Programme aspired to “accelerate the digital transformation of the European economy, industry and society”<sup>199</sup> and to “foster better exploitation of the industrial potential of policies on innovation, research and technological development”.<sup>200</sup> The Programme Digital Europe makes reference to the Paris Agreement,<sup>201</sup> 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.”<sup>202</sup>

### 3. *Freedom to Conduct a Business*

The freedom to conduct a business is one of the economic fundamental rights of the EUCFR. It is closely connected, 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). It guarantees the freedom of entrepreneurs as an individual rights and is

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<sup>198</sup> The TFEU foresees a specific chapter on research policy (arts. 179-190), 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”. (art. 179) The ERA has been consistently shaped by high-level policy programs, which includes mandatory open access requirements for EU funded research (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 (“The European Open Science Cloud aims to build infrastructures to provide seamless access to FAIR data and interoperable services for the scientific community” (<https://ec.europa.eu/research/openscience/index.cfm?pg=open-science-cloud>), recently confirmed in Note from Permanent Representatives Committee to Council, Conclusions on research assessment and implementation of open science, Brussels, 25 May 2022 (9515/22). See also: Commission, A European strategy for data, Brussels, 19.2.2020, COM(2020) 66 final, Appendix under 10; see also Commission, Cloud Initiative - Building a competitive data and knowledge economy in Europe, Brussels, 19.4.2016, and Commission Staff Working Document - Implementation Roadmap for the EOSC, Brussels, 14.3.2018, SWD(2018) 83 final.)

<sup>199</sup> Regulation (EU) 2021/694 establishing the Digital Europe Programme and repealing Decision (EU) 2015/2240 [2021] *OJ L 166/1*, art. 3.

<sup>200</sup> *Ibid*, art. 9, see also rec. 16.

<sup>201</sup> Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

<sup>202</sup> *Ibid* rec. 61, The Programme also encourages open source-solutions with the aim to improve the sustainability of funded projects (rec. 54)

reflective of the EU's economic constitution as an open market economy with free competition.<sup>203</sup>

The freedom to conduct a business as an individual fundamental right<sup>204</sup> 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.<sup>205</sup> Amongst the elements that constitute this right most crucial for copyright is the right to contract, which can only be limited under certain circumstances.<sup>206</sup>

Its scope is broad and covers every economic activity and guarantees the right of a business to dispose freely of its resources of an economic, technical and financial character.<sup>207</sup> 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.<sup>208</sup> The scope however is easily restricted by national or EU measures. Early in its case-law on Article 16 EUCFR, the CJEU therefore 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”.<sup>209</sup>

This case is also of particular relevance for arguing for a right to research in the sense of an access right. In this case, the CJEU had to rule on the legality of a national rule implementing Directive 2010/13,<sup>210</sup> obliging broadcasters to give access to their broadcasts on fair reasonable and non-

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<sup>203</sup> See art 119(1) TFEU, see Michelle Everson and Rui Correira Gonçalves, ‘Article 16’, paras. 16.11-12 in Peers et al. supra (n 74).

<sup>204</sup> Cf. Everson/Correira Gonçalves, ‘Article 16’, paras. 16.05-06 in Peers et al. supra (n 74).

<sup>205</sup> *Nold* supra (n 85), paras. 12-13. Already in *Nold*, the CJEU qualified 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.” (para. 14).

<sup>206</sup> CJEU, Judgment of 16 January 1979 *Sukkerfabriken Nykøbing*, C-151/78, EU:C:1979:4, see also CJEU, Judgment of 5 October 1999 *Spain v Commission*, C-240/97, EU:C:1999:479.

<sup>207</sup> *UPC Telekabel Wien* supra (n 176), para. 49. On the relation between intellectual property and freedom to conduct a business see Gustavo Ghidini & Stazi Andrea, *Freedom to conduct a business, competition and intellectual property*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 410 (Christophe Geiger ed., 2015).

<sup>208</sup> CJEU, of 27 April 1994 *Almelo and Others v. Energiebedrijf IJsselmij*, C-393/92, EU:C:1994:171, para. 32 and *Sky Österreich* supra (n 97), paras. 42-43.

<sup>209</sup> *Sky Österreich* supra (n 97), paras. 44-46; with reference to the right to property the judgment states that “the freedom to conduct a business is not absolute, but must be viewed in relation to its social function [...]”.

<sup>210</sup> Directive 2010/13/EU 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] OJ L 95/1.



discriminatory conditions. This obligation to grant 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.<sup>211</sup> The rule clearly constituted a violation of the right to property under Article 17(2) EUCFR in form of a compulsory license, and it was argued before the Court that the obligation to contract would also constitute a violation of Article 16. The CJEU found that the limitation of both fundamental rights was proportionate. The Court stressed that licensing broadcasts on an exclusive basis, conserving contractual freedom for rightholders, would prevent the public from gaining access to information on current events.<sup>212</sup> The Court 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 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.”<sup>213</sup> 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.<sup>214</sup>

Considering *Sky Österreich* it is undoubtable that copyright can be made subject to limitations and exceptions that restrict the right to contractual freedom of rightholders. 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) EUCFR. For that purpose, limitations to the any fundamental right must be foreseen by law, respect the essence of the right affected and comply with the principle of proportionality.<sup>215</sup> 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.<sup>216</sup>

#### 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 EUCFR. 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 property as “the peaceful enjoyment of [...]”

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<sup>211</sup> See Articles 15(1) and (6) of Directive 2010/13/EU.

<sup>212</sup> *Sky Österreich* supra (n 97), para. 65.

<sup>213</sup> *Sky Österreich* supra (n 97), para. 66 (emphasis added).

<sup>214</sup> *Sky Österreich* supra (n 97), paras. 63-64.

<sup>215</sup> Cf. *Sky Österreich* supra (n 97), para. 48.

<sup>216</sup> See Geiger & Jütte, supra (n 76), 525-526.

possessions”.<sup>217</sup> A more express protection of intellectual property provides the EUCFR by stating that “[i]ntellectual property shall be protected”.<sup>218</sup> The protection is, of course, not absolute, especially considering the utilitarian or social function of copyright in particular. Neither European fundamental rights catalogue provides for a definition of the scope of protection, or what intellectual property is for the purposes of the Charter or the Convention. However, both instrument state that the right to property can be subject to limitations. 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.<sup>219</sup> Under the EU Charter, the general norm to limit fundamental right under Article 51 EUCRF applies to limitations of the 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 Union, the internal market,<sup>220</sup> 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.<sup>221</sup> Even before the introduction of the EU Charter, the Court denied the applicability of Treaty restrictions of the free movement of goods on grounds

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<sup>217</sup> 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 ECtHR *Anheuser-Busch Inc. v. Portugal*, Appl. no. 73049/01, 11 January 2007; *British-American Tobacco Company v The Netherlands*, Appl. no. 19589/92, 20 November 1995; in relation to copyright see *AsDAC v. Republic of Moldova*, Appl. no. 47384/07, 8 December 2020, see also *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden*, Appl.no. 40397/12, 19 February 2013 and *Ashby Donald and other v France*, Appl. no. 36769/08, 10 January 2013; see Torremans, ‘Article 17(2)’, paras. 17(2).30-33 in Peers et al. supra (n 74).

<sup>218</sup> EUCFR, art. 17(2); commenting critically are 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 E.I.P.R. 113, 116 (2009); Jonathan Griffiths & McDonagh Luke, *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 (Christopher Geiger ed., 2013); 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, 28 (Oreste Pollicino, Giovanni Maria Riccio & Marco Bassini eds., 2020); Torremans, ‘Article 17(2)’, paras. 17(2).39-41 in Peers et al., supra (n 74), suggesting that the protection of intellectual property rights as private rights must be inherently weaker as opposed to broader public interest must be resolved by balancing these rights against each other by way of a reconciliation of the various rights and interests.

<sup>219</sup> Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 9, art. 1(1).

<sup>220</sup> See above under I. B. 2.

<sup>221</sup> For example, in *Deutsche Grammophon* the Court limited the exercise of the right of phonogram producers to prevent the sale of phonogram copies in an EU Member States after the copies had already been lawfully sold in another Member State, CJEU, Judgment of 8 June 1971 *Deutsche Grammophon*, 78/70, EU:C:1971:59, paras. 12-13.

of “the protection of industrial and commercial property”.<sup>222</sup> 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.”<sup>223</sup> This ‘essence’ of the various intellectual property rights has been constructed, albeit not in a systematic manner, by the CJEU.<sup>224</sup> It becomes clear from the CJEU’s case-law that 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.<sup>225</sup>

Accordingly, the right to property is not an absolute right and can be subject to restrictions.<sup>226</sup> 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.<sup>227</sup> 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.<sup>228</sup> While the EUCFR does not distinguish between ‘real’ and intellectual

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<sup>222</sup> TFEU, art. 36.

<sup>223</sup> *Deutsche Grammophon* supra (n 213), para. 11. However, in *Mc Fadden* the Court ruled 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, *Mc Fadden* supra (n 95), para 95; see also *UPC Telekabel Wien* supra (n 176), para. 62.

<sup>224</sup> See Husovec, supra (n 95), notably in *FAPL/Murphy* supra (n 79) the CJEU stated that “the 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 of the protected subject-matter.” (para. 108). See also the Advocate General in *YouTube/Cyando*, when he stated that the exclusive right of communication to the public as harmonized by Article 3(1) InfoSoc Directive “does not necessarily have to be interpreted in a manner which ensures *maximum protection* for rightholders.” (emphasis added) (AG Saugmandsgaard Øe, Opinion of 16 July 2020 *YouTube/Cyando*, C-683/18, EU:C:2020:586, paras. 238-239).

<sup>225</sup> Cf. *Bastei Lübbe* supra (n 97), para. 46. However, it has been argued that Article 17(2) EUCFR “is void of any inviolable core understood as a red line which cannot be bridged by any considerations of proportionality” and that “any reference to essence in the case-law of the CJEU only points towards a higher level of scrutiny, but not towards an untouchable core of rights that may not be abolished by the legislator”, Husovec, supra (n 95), 855.

<sup>226</sup> See e.g. *Pelham and others* supra (n 79), para. 33; *Funke Medien NRW* supra (n 79), para. 72; *Spiegel Online* supra (n 79), para. 56; *Mc Fadden* supra (n 95), para. 90; *GS Media* supra (n 76), para. 45; *Deckmyn* supra (n 76), para. 26; *UPC Telekabel Wien* supra (n 176), paras. 46-47; *SABAM v Netlog* supra (n 95), paras. 41-42; *Scarlet Extended* supra (n 95), para. 44; *Promusicae* supra (n 97), para. 65.

<sup>227</sup> See reference in *Luksan* supra (n 76), para. 68; see Sganga, supra (35).

<sup>228</sup> See the CJEU’s judgements in *Funke Medien NRW* supra (n 79); *Pelham and others*

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 UDHR and Article 15 ICESCR, copyright could, and arguably must be subject to restrictions that enable it to perform its inherently social function.<sup>229</sup> At least in Europe, this balancing must primarily be performed by the legislator.<sup>230</sup>

## II. THE CONTOURS OF A FUNDAMENTAL RIGHT TO RESEARCH

As we have seen, the imperative to strengthen arguments in favour 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 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 to the emergence of new threats to human dignity and well-being.”<sup>231</sup> Concretely, a right to research

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supra (n 79); *Spiegel Online* supra (n 79), although the Advocate General in *Pelham* suggested that in exceptional cases an external review of existing copyright law could be warranted: “That 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 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.” (references omitted), *Pelham and Others* supra (n 98), para. 94, see, Jütte, supra (152), 468.

<sup>229</sup> See Geiger, supra (4), 77-80, the social function as a balancing mechanism reaches further than ‘pure’ property relations, but permeates private law relations to the effect that “[the] right of the individual are not seen as an absolute right but rather as rights limited in social terms.”. See further Caterina Sganga & Silvia Scalzini, *From abuse of right to European copyright misuse: a new doctrine for EU copyright law*, 48 IIC 405, 426 (2016).; the authors distil 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; see further CATERINA SGANGA, *PROPERTIZING EUROPEAN COPYRIGHT* 227 ff. (2018).

<sup>230</sup> 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* supra (n 79), para. 47.

<sup>231</sup> Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78

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.

### *A. Personal*

The right to research should not be limited to a particular institutional context to 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. 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, read in the light of the UN's Sustainable Development Goals, which require research not only by publicly funded institutions. Instead, technological progress and scientific discoveries in theory and in practice must be supported in the public and private sphere, and ideally at the intersection of public and private research. As we will expand further below, research-enabling copyright rules should not distinguish in their general application between public and private or commercial and non-commercial users.<sup>232</sup>

### *B. Substantive*

A right to research should be aimed at facilitating access to information. Compared to the right to freedom of expression, thereby partially distinguishing it from its scope, the right to research has its focus 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 important 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 EUCFR is a right to receive and impart information, a right to research is a right to access

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AM J INT LAW 607, 609 (1984) .

<sup>232</sup> Compare application of research exception under Article 5 InfoSoc and Article 3.-4 TDM exception

and use copyrighted protected work to collect and analyze information<sup>233</sup>. Or to put it in other words, Article 11 protects a right to actively and passively communicate, whereas a right to research would guarantee for researchers a right to obtain, process, store and share information for research purposes, including when this requires copyright relevant actions.

### C. Geographic

Research today is not conducted hermitically by individual researchers but is an interconnected activity with interpersonal and international dimensions. A right to 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 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,<sup>234</sup> and potentially, also an aspiration to support global exchange of information for research purposes as a counterweight not only to the exclusivity of copyright, but also its territorial nature. 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 to the benefits of society if it enable the exchange of information between researchers in different jurisdictions.

## 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, certainly not in the EU legal order,<sup>235</sup> but also in the international human rights framework.<sup>236</sup> A good example is the ‘freedom to conduct a business’ which

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<sup>233</sup> See on this issue, the references supra note...

<sup>234</sup> Cf. for example Laurence R. Helfer, Molly K. Land & Ruth L. Okediji, *Copyright Exceptions Across Borders: Implementing the Marrakesh Treaty*, 42 E.I.P.R. 332 (2020), highlighting the importance of congruent exceptions at national level to enable the cross-border exchange of works (333).

<sup>235</sup> Emily Hancox, *The Relationship Between the Charter and General Principles: Looking Back and Looking Forward*, 22 CYELS 233–257 (2020), in particular the development of fundamental rights out of general principles, which also maintain an important position in the constitutional order of EU law, leaves room for new emerging fundamental rights at this level.

<sup>236</sup> See Alston, supra (n 231), 611-614, 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. The Declaration on the Right to Development (GA Res. 41/128 (1986)) states that “[t]he right to development is an inalienable human right by virtue of which every

has been developed by the European courts and which eventually found its way as a concretely expressed fundamental right into the EUCFR.<sup>237</sup> 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 Olymp 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.<sup>238</sup>

We argue that an express recognition of an individualized a 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.<sup>239</sup> 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 sits in the middle of a fundamental rights Venn diagram of existing fundamental right.

One could reasonably argue that a *de facto* existing right deserves its own label, and the question is of course also 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

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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.” (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.” (art. 3) Prior instances in which the right to research was mentioned, without any further specification of its substance, included GA Res. 34/46 (1979) (“the right to development is a human right”, identical in GA Res. 35/174 (1980), GA Res. 36/133 (1981) “the right to development is and inalienable human right”), identical in GA Res. 37/199 and as a participatory right in GA Res. 37/200 (““everyone 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 on the human right to development: Putting the cart before the horse?*, 38 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 84 (2020), the author further remarks 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 contains in a number of fundamental rights included in global and regional human rights treaties (92).

<sup>237</sup> See also on the gradual development of the right to data protection in the EU: Marie-Pierre Granger & Irion Kristina, *The right to protection of personal data: the new posterchild of European Union citizenship?*, in CIVIL RIGHTS AND EU CITIZENSHIP 279, (Sybe de Vries, Henri de Waele & Marie-Pierre Granger eds., 2018).

<sup>238</sup> Cf. Carys J. Craig, *Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks*, 33 AM. U. INT’L L. REV. 1 (2017).

<sup>239</sup> See for comparison the argument for a right to development as a “cluster right” that is composed out of existing fundamental right, 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 organisation, are a cluster of rights that together form a ‘human right to development’”, Schrijver, *supra* (n 236), 92.

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-catalogues is of secondary concern, but of equal importance. Once the decisions to give concrete expression to a right, 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 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. A positioning of this newly formulated right as binding principle for legislator would safeguard that it unfolds its beneficial effects on copyright law. In the EU, where copyright is largely within the Union’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 a ‘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 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 international level a revision of Article 15(1)(c) 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) ICESCR. Instead, a purpose-bound obligation in form of a concrete instruction to ensure an appropriate level of protection of the moral and material interests of rightholders would be inserted into the second paragraph.

A reformulated Article 15 would look as follows:

Current Text	Proposed Text
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<p>1. The States Parties to the present Covenant recognize the right of everyone:</p> <p>(a) To take part in cultural life;</p> <p>(b) To enjoy the benefits of scientific progress and its applications;</p> <p>(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>1. The States Parties to the present Covenant recognize the right of everyone:</p> <p>(a) To <b>actively</b> take part in cultural life;</p> <p>(b) To enjoy the benefits of scientific progress and its applications;</p> <p><del>(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.</del></p> <p><b>c) to actively conduct research for cultural advancement and scientific progress</b></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, <b>which shall include an appropriate protection for authors in relation to their moral and material interests resulting from any scientific, literary or artistic production.</b></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 as means, rather than an individual right would shift the balance within Article 15 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 explicitly right to positive action, a right to participate actively and without barriers for a specific set of purposes including research could be added.

At European level the integration of an express right to research is a bit more complicated. No provision of the ECHR or the CFREU currently hosts an obvious provision for integrating a new right to research. 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. One option is to integrate a right to research as a limitation to the right to intellectual property under Article 17(2) EUCFR. Another option would be to include a broader right to access information expressly in the right to freedom of expression under Article 11 EUCFR. Finally, the freedom of the arts and sciences could serve as a host for a research-specific qualification.<sup>240</sup> 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 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. 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. 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;"><i>Article 11</i></p> <p style="text-align: center;"><b>Freedom of expression and information</b></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;"><i>Article 11</i></p> <p style="text-align: center;"><b>Freedom of expression and information</b></p> <p>1. Everyone has the right to freedom of expression. This right shall include:</p> <p>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>b. the right to seek information and to conduct research to promote the progress of science and technology, culture and learning</p>

<sup>240</sup> See for a detailed explanation of similar options for a more balanced and ethical foundation for intellectual property in European fundamental rights: Christophe Geiger, *Building an Ethical Framework for Intellectual Property in the EU: Time to Revise the Charter of Fundamental Rights*, in REFORMING INTELLECTUAL PROPERTY LAW [forthcoming] (Gustavo Ghidini & Valeria Falce eds., 2022), available at SSRN: <https://ssrn.com/abstract=3938873>.

	2. The freedom and pluralism of the media shall be respected.
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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 to Article 10 ECHR. The insertion elevates ‘research’ to the status of a full fundamental right as 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) 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. For our purposes, 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. In particular, if the respect of a certain degree of the rights of authors is written into the constituent documents of international human rights law and the European fundamental rights canon, they are not conceived as inflexible and absolute entitlements to control remuneration and access,<sup>241</sup> or the latter for the purpose of the former. A

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<sup>241</sup> See Marcella Favale, *The Right of Access in Digital Copyright: Right of the Owner or Right of the User?*, 15 JWIP 1, 14 (2012), who 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 WCT. 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 UDHR and Article 15 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’ (see for an explanation of the term Animesh Ballabh, *Paracopyright*, 30 E.I.P.R. 138 (2008)) see Intergovernmental Copyright Committee, ‘The new challenges of striking the right balance between copyright protection and access to knowledge, information and culture’,

fundamental right granted should not be taken away, but it can be reconceived or altered to give full effect to other rights.

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 in 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.<sup>242</sup> We depart in our consideration from the notion of copyright as an access right, that promoted access to information, instead of prevention and exclusivity as main drivers of copyright rule-making and -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.<sup>243</sup> Common to this understanding of copyright as a right to manage access to works, and eventually information is the understanding that copyright serves a purpose. The extent to which copyright grants protection and the extent to

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IGC(1971)XIV/4, Paris, 8 march 2010, available at: <https://unesdoc.unesco.org/ark:/48223/pf0000187683>.

<sup>242</sup> See for example the proposal of a group of international intellectual property scholars for an international instrument on permitted uses in copyright law, in which they include research amongst the objectives of a social, political and cultural nature, for which the an exception, or more general, a permitted use, should be foreseen in national laws: Reto M. Hilty et al., *International Instrument on Permitted Uses in Copyright Law*, 52 IIC 62, 65 (2021).

<sup>243</sup> Geiger, *supra* (n 4) access, 189-109, see also in this sense: Geiger, *supra* (n 4); Christophe Geiger, *The future of copyright in Europe: striking a fair balance between protection and access to information*, I.P.Q. 1 (2010); CHRISTOPHE GEIGER (ED.), *INTELLECTUAL PROPERTY AND ACCESS TO SCIENCE AND CULTURE: CONVERGENCE OR CONFLICT?*, advocating against copyright maximalism is Tawfik, *supra* (n 39), 301.305; employing similar arguments, Chon suggests understanding intellectual property as part of “global knowledge governance”, see Chon, *supra* (n 139), 764, see for a different understanding of an ‘accessright’ instead of a ‘copyright’: *Simon Olswang, Accessright: an evolutionary path for copyright into the digital era*, 17 E.I.P.R. 215 (1995), see on 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 (2019) and Uma Suthersanen, *Creativity, Pluralism, and Fictitious Narratives: Understanding IP Law Through Karl Polanyi* (April 12, 2022). QUEEN MARY LAW RESEARCH PAPER NO. 381/2022, available at SSRN: <https://ssrn.com/abstract=4082273>.

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. The protection of copyright is not "an end in itself".<sup>244</sup> Instead it serves a particular purpose, which is to realize specific goals. Besides the objectives expressly mentioned in the UDHR, the ICESCR, the EU Charter and the ECHR, we must also consider larger societal objectives. They are expressed in the EU's founding treaties, as aims and objectives of internal market harmonization, but these goals are also to be found in international intellectual property discourses.

Whether it is sustainability, sustainable development,<sup>245</sup> or well-being,<sup>246</sup> 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.

### *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 of a rethinking in light of a right to research. They are also symptomatic of failures to properly consider the interest 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.<sup>247</sup>

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<sup>244</sup> Alexander Peukert, *Intellectual Property as an end in itself?*, 33 E.I.P.R. 67 (2011).

<sup>245</sup> Phillips, *supra* (139); Chon, *supra* (n 139); Abdel-Latif & Roffe, *supra* (n 139).

<sup>246</sup> Estelle Derclaye, *Happy IP: replacing the law and economics justification for intellectual property rights with a well-being approach*, 37 E.I.P.R. 197 (2015).

<sup>247</sup> Since the introduction of the InfoSoc Directive the systematic deficits of Article 5,

The pre-emptive effect of EU harmonization in the 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,<sup>248</sup> 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 – or more positively – 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. For the purposes of illustrating 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. This is particularly true in an area of the world which 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 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, it would also enable cross-jurisdictional cooperation between researchers who rely on the exchange of information. Copyright should not constitute an obstacle in

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which sets out a list of one mandatory and 20 optional exceptions, have been addressed regularly, as has the unclear role of the three-step test, which has been adopted expressly in art. 5(5). 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 E.I.P.R. 499 (2000); Christophe Geiger and 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 133 (Tatiana-Eleni Synodinou, ed. 2012); with specific focus on the three-step test see Christophe Geiger, *Right to Copy v. Three-Step Test*, 6 CRI 7 (2005); Christophe Geiger, *The Three-Step Test, a Threat to a Balanced Copyright Law?*, 37 IIC 683 (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 (2007); Herman Cohen Jehoram, *Is there a hidden agenda behind the general non-implementation of the EU three-step test?*, 31 E.I.P.R. 408 (2009); Jonathan Griffiths, *The “Three-Step-Test” in European Copyright Law – Problems and Solutions*, QUEEN MARY UNIVERSITY SCHOOL OF LAW, LEGAL STUDIES RESEARCH PAPER NO. 31/2009 1 (2009); Christophe Geiger, Daniel J. Gervais & Martin Senftleben, *The Three-Step-Test Revisited: How to Use the Test’s Flexibility in national Copyright Law*, 29 AM. U. INT’L L. REV. 581 (2014).

<sup>248</sup> Cf. *Pelham*, supra (n 79), para. 65.

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. 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”.<sup>249</sup> 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 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.

This concern links in with the second problematic condition of Article 5(3)(a), namely that the exception applies only to non-commercial research. This significant limitation overlooks the fact that most of the research is conducted by private companies for indirectly, but largely directly 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 progressive of science and technology to achieve the goals set out in Article 3 TEU and in particular those that relate to the realization of the internal market. A broad research exception should incentivize risk-taking, but these risks should be confined to potential outcomes of research endeavours and not in the form of potential legal liability. In other words, a

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<sup>249</sup> See Senftleben (n 1), suggesting, amongst other things, to clarify that the ‘illustration’ requirement only applies to teaching activities

broadly expressed research exception must enable researchers to work with data and information to contribute to scientific and technological advancement to work toward a more sustainable and socially just internal market in the EU, an eventually for global societies. And, of course, the idea of a broad research exception should eventually not be confined to the EU's internal market but should work to the benefits of researchers that cooperate with counterparts in the EU, or 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) InfoSoc Directive. It was indeed, introduced to “benefit the research community and, in so doing, support innovation.”<sup>250</sup> However, the new exception itself is not without flaws and underlines some of the existing systemic deficiencies of copyright law<sup>251</sup>. 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 CDSM Directive is mandatory but is limited to “research organisations and cultural heritage institutions”.<sup>252</sup> Only Article

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<sup>250</sup> CDSM Directive, rec. 8. For a comment see Christophe Geiger, Giancarlo Frosio & Oleksandr Bulayenko, *Text and Data Mining: Articles 3 and 4 of the Directive 2019/790/EU*, in PROPIEDAD INTELECTUAL Y MERCADO ÚNICO DIGITAL EUROPEO 27 (Conception Saiz Garcia & Raquel Evangelio Llorca, eds., 2019).

<sup>251</sup> See in this regard Christophe Geiger, Giancarlo Frosio & Oleksandr Bulayenko, THE EXCEPTION FOR TEXT AND DATA MINING (TDM) IN THE PROPOSED DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET - LEGAL ASPECTS, Study for the Directorate-General for Internal Policies of the Union, Department of Citizens' Rights and Constitutional Affairs, European Parliament, February 2018. For a critical evaluation of the Directive proposal, see also Christophe Geiger, Giancarlo Frosio & Oleksandr Bulayenko, *Text and Data Mining in the Proposed Copyright Reform: Making the EU Ready for an Age of Big Data?*, 49 IIC 814 (2018), Christophe Geiger, Giancarlo Frosio & Oleksandr Bulayenko *The EU Commission's Proposal to Reform Copyright Limitations: A Good but Far Too Timid Step in the Right Direction*, 40 E.I.P.R. 4 (2018); European Copyright Society, *General Opinion on the EU Copyright Reform Package*, 24 January 2017, p. 5, available at: <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf>; Reto M. Hilty & Heiko Richter, Part B: Copyright Exceptions and Limitations

Chapter 1: Text and Data Mining (Article 3 COM(2016) 593 final), in: (eds.), MODERNISATION OF THE EU COPYRIGHT RULES, POSITION STATEMENT OF THE MAX PLANCK INSTITUTE FOR INNOVATION AND COMPETITION 25 (Reto M. Hilty & Valeria 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 Etats membres, PROPR. INTELL. 25 (2018).

<sup>252</sup> The limitation of the broader of the two TDM exceptions to specific institutions is significant. The CDSM Directive defines ‘research organisation as “a university, including



4 of the Directive also applies to primarily commercial research, but this exception is more limited in its scope. While Article 3 allows that extractions and reproductions can be stored “with an appropriate level of security and may be retained for the purposes of scientific research, including for the verification of research results”,<sup>253</sup> Article 4 provides that data “may be retained for as long as is necessary for the purposes of text and data mining”.<sup>254</sup> 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 rightholder. CDSM Directive, art. 4(3).<sup>255</sup> Both exceptions also differentiate between the types of works subject to the exception.<sup>256</sup>

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.<sup>257</sup> However, the narrow scope of Article 3 and 4 creates uncertainties, and, through the opt-out 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 criticism<sup>258</sup> and a further development of TDM-freedoms in the EU would help to create a research-

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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” (art. 2(1)); a ‘cultural heritage institution’ is a “publicly accessible library or museum, an archive or a film or audio heritage institution” (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 CDSM Directive.

<sup>253</sup> CDSM Directive, art. 3(2).

<sup>254</sup> CDSM Directive, art. 4(2).

<sup>255</sup> CDSM Directive, art. 4(3).

<sup>256</sup> The exception under Article 3 applies to the reproduction right as harmonized by the InfoSoc Directive, as well as temporary reproductions of original databases under Article 5(a) Database Directive and extraction and re-utilization from and of sui generis databases under Article 7(1) of the same directive, and the reproduction right in relation to press publication granted by Article 15 CDSM Directive. The exception under Article 4 also applies to certain exclusive rights granted under Article 4(1)(a) and (b) of the Software Directive (Directive 2009/24/EC on the legal protection of computer programs, [2009] *OJL* 111/16)

<sup>257</sup> CDSM Directive, rec. 19.

<sup>258</sup> See for example Christophe Geiger, *The Missing Goal-Scorers in the Artificial Intelligence Team: Of Big Data, the Fundamental Right to Research and the failed Text and Data Mining Limitations in the CSDM Directive*, in *INTELLECTUAL PROPERTY AND SPORTS: ESSAYS IN HONOUR OF P. BERNT HUGENHOLTZ* 383 (Martin Senftleben et al. eds., 2021) and Sean Flynn, Christophe Geiger & João Pedro Quintais, *Implementing User Rights for Research in the Field of Artificial Intelligence: A Call for International Action*, 42 *E.I.P.R.* 393 (2020).

conducive environment for future technologies.<sup>259</sup>

### 5. *Statutory Remuneration Rights*

The idea of remunerated exceptions has been discussed in relation to derivative works, and statutory remuneration system already exist for other exceptions. For example, private reproductions under Article 5(2)(b) InfoSoc Directive enable the unauthorized reproduction while ensuring that rightholders do not suffer economic harm. 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 mandatory licensing mechanism under Article 5(2) CDSM Directive or subject to statutory remuneration under Article 5(4).

Statutory remuneration has the advantage of circumventing authorization requirement, and thereby to reduce transaction costs and the possibility of potential access refusals<sup>260</sup>. Similar proposals have been made in relation to facilitating the use of protected subject matter for derivative works,<sup>261</sup> but also for more general uses.<sup>262</sup> 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 national

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<sup>259</sup> See also Christophe Geiger, Giancarlo Frosio & Oleksandr Bulayenko, *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. COLLECTION CEIPI/ICTSD, GLOBAL PERSPECTIVES AND CHALLENGES FOR THE INTELLECTUAL PROPERTY SYSTEM 95 (Xavier Seuba, Christophe Geiger & Julien Pénin eds., 2018); Begona Gonzales Otero, *Machine Learning Models Under the Copyright Microscope: Is EU Copyright Fit for Purpose?*, 70 GRUR INT. 1043 (2021). 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”. 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”, Commission, *Fostering a European approach to Artificial Intelligence*, Brussels, 21.04.2021, COM(2021) 205 final, p. 2.

<sup>260</sup> See Christophe Geiger and Oleksandr Bulayenko, *Creating Statutory Remuneration Rights in Copyright law: What Policy Options under the International Framework?*, in INTELLECTUAL PROPERTY ORDERING BEYOND BORDERS (Axel Metzger and Henning Grosse Ruse-Khan, eds. forthcoming 2022); Christophe Geiger, *Promoting Creativity through Copyright Limitations, Reflections on the Concept of Exclusivity in Copyright Law*, 12 VAND. J. ENT. & TECH. L. 515 (2010).

<sup>261</sup> Christophe Geiger, *Freedom of Artistic Creativity and Copyright Law: A Compatible Combination*, 8 UCIL. REV. 413, 443 ff. (2018).

<sup>262</sup> Jane C. Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, 29 BERKELEY TECH. L.J. 1383 (2014).

level.<sup>263</sup>

More importantly, such limitations could give concrete expression to the social and innovation function of copyright and would be further justified by the Union'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 rightholders receive remuneration and keep 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 vehemently<sup>264</sup> since the adoption of the Database Directive.<sup>265</sup> Databases are either protected as original databases, if they display originality in the arrangement of the data,<sup>266</sup> or as *sui generis* databases, if the creation of the database required significant investment in the collection of the data.<sup>267</sup> It is the latter right that has borne the brunt of criticism. What started as a “unique policy experiment”<sup>268</sup> provides rightholders in such databases a broad scope of protection of unoriginal content in unoriginal form. What the right

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<sup>263</sup> In relation to the *sui generis* database right it has been suggested to introduce a system of compulsory licensing that would require rightholder to offer licenses upon request, and which would have to rely on a registration requirement to identify the relevant rightholders: European Commission, Directorate-General for Communications Networks, Content and Technology, Karanikolova, K., Chicot, J., Gkogka, A., et al., *Study in support of the evaluation of Directive 96/9/EC on the legal protection of databases: final report*, Publications Office, 2018, <https://data.europa.eu/doi/10.2759/04895>, at 34. At international level such compulsory licenses are foreseen, for example, in Article 9(2) Berne Convention. At EU level, compulsory licenses for information pre-*sui generis* database protection have been required under the competition rules in CJEU, Judgment of 6 April 1995 *RTE*, Joined cases C-249/91 P and C-242/91 P, EU:C:1995:98.

<sup>264</sup> BERNT P. HUGENHOLTZ, AGAINST ‘DATA PROPERTY’, IN KRITIKA: ESSAYS ON INTELLECTUAL PROPERTY 48 (Peter Drahos ed., 2018).

<sup>265</sup> Directive 96/9/EC on the legal protection of database, [1996] *OJ L* 77/20.

<sup>266</sup> CJEU, Judgment of 1 March 2012 *Football Dataco*, C-604/10, EU:C:2012:115, para. 38.

<sup>267</sup> In a series of case the CJEU has limited the broad scope of the *sui generis* right to a certain extent. In CJEU, Judgment of 9 November 2004 *The British Horseracing Board and Others*, C-203/02, EU:C:2004:695 the Court excluded from the scope of protection databases in which the investment constituted the creation of the data, instead it stressed that the protection is granted for investing in “the resources used to seek out existing independent materials and collect them in the database” (para. 42; in CJEU, Judgment of 9 September 2004 *Fixtures Marketing*, C-444/02, EU:C:2004:697 the Court stressed that protection under Article /1) of the database Directive required “investment independent of the investment in the creation of its constituent data” (para. 51); see also CJEU, Judgment of 9 September 2004 *Fixtures Marketing*, C-46/02, EU:C:2004:694, paras. 43-48 and CJEU, Judgment of 9 September 2004 *Fixtures Marketing*, C-338/02, EU:C:2004:696, paras. 31-37.

<sup>268</sup> Cf. Estelle Derclaye & Martin Husovec, *Sui generis database protection 2.0: judicial and legislative reforms*, 44 *E.I.P.R.* 323, 323 (2022).

protects, in other words, is gathering information, not creativity.

Protecting information contained in sets of data inevitable 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. This increase information and transaction costs, either because of the necessity to obtain licenses for the use of databases, or because of lengthy litigation.<sup>269</sup> The absence of sufficiently broad and relevant exception to the right is also a matter of concerns that should be addressed to enable downstream-innovation. The Database Directive itself only foresees a mandatory exception for lawful users to extract and re-utilize insubstantial parts of an unoriginal database<sup>270</sup> and three optional exceptions for the purposes of private use, illustration for teaching and scientific research and for the purposes of public security.<sup>271</sup> Extending the applicability of general copyright exceptions to original and non-original databases would be a first step in the right direction.<sup>272</sup>

Two reviews of the Database Directive<sup>273</sup> have not resulted in changes to the current regime, and only recently, legislative proposal have suggested minor changes to the *sui generis* right. The proposed Data Governance Act<sup>274</sup> 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”<sup>275</sup> which is 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.<sup>276</sup>

The proposed Data Act<sup>277</sup> limits the applicability of the *sui generis* database right by excluding databases “containing data obtained from or

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<sup>269</sup> Ibid.

<sup>270</sup> Database Directive, art. 8.

<sup>271</sup> Database Directive, art. 9 (a)-(c). The exceptions that correspond to those included in Article 5 of the InfoSoc Directive, are equally subject to a narrow scope, specifically the exception for the purposes of scientific research will have to be understood to be limited to research at universities or other research institutions for non-commercial purposes.

<sup>272</sup> Cf. Anette 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 IIC 551, 556-557 (2006).

<sup>273</sup> Commission, First evaluation of the Directive 96/9/EC on the legal protection of databases, Brussels, 12.12 2005 and Commission, Evaluation of Directive 96/9/EC on the legal protection of databases, Brussels, 25.4.2018 SWD(2018) 146 final.

<sup>274</sup> Commission, Proposal for a Regulation on European data governance (Data Governance Act) Brussels, 25.11.2020, COM(2020) 767 final.

<sup>275</sup> Data Governance Act, rec. 5.

<sup>276</sup> Data Governance Act, rec. 7.

<sup>277</sup> Commission, Proposal for a Regulation on harmonized rules on fair access to and use of data (Data Act), Brussels, 23.2.2022 COM(2022) 68 final.

generated by the use of a product or a related service.”<sup>278</sup> This exception, according to the relevant recital means to enable “users to access and use data and the right to share data with third parties”.<sup>279</sup>

The changes suggested by the two draft proposals will not address the main problem of the database right, that is 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* when 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.”<sup>280</sup> 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 on the balancing scales. It is for the European legislator to seize this opportunity to steer European database protection in the right direction.<sup>281</sup> This is particularly necessary because database owners would be able to opt-out of the TDM exception of Article 4 CDSM Directive, which also applies to commercial research.

## CONCLUSION

Research is a precondition to create a sustainable future. It is indispensable to realize substantive and programmatic human and fundamental rights, rights which 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 to create in order to meet the ambitious goals set out, for example, in EU policies and in the Sustainable Development Goals at 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

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<sup>278</sup> Data Act, art. 35.

<sup>279</sup> Data Act, rec. 84.

<sup>280</sup> CJEU, Judgment of 3 June 2021 *CV-Online Latvia*, C-762/19, EU:C:2021:434, para. 41. 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) Database Directive it must be demonstrated that such use adversely affects the investment of the maker of the database.

<sup>281</sup> Derclaye & Husovec, *supra* (n 268), 330.

international fundamental rights and which are an elementary part of the aims and objectives of the Union.

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 CFREU, as well as international human rights instruments, including the UCDHR, the ICCPR, and the ICESCR. A right to research as we construct 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 of 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 to avoid 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.