



# The Emergence of a Fundamental Right to Research and its Implications for Copyright Law

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# The crucial role of research for innovation and progress

- Research is a critical enabler for innovation and a vehicle for cultural and scientific progress, crucial to address current economic and non-economic challenges
  - Pandemic-response through research on vaccines
  - Post-Pandemic Economic Recovery
  - Future-ready research environment to react to emerging technologies and new social practices
  - Data/ Knowledge-based innovation

Ex the BlueDot project that discovered the novel coronavirus outbreak, for example, analyzed “a variety of information sources, including chomping through 100,000 news reports in 65 languages a day” to recognize patterns between health outbreaks and travel (**Flynn, Geiger, Quintais et al. 2020**); “Panama Papers”, democratic issues such as information and whistle blowing (freedom of information)!



<https://singularityhub.com>

# Rethinking copyright as a barrier to research

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- Addressing regional and global challenges can be made difficult/impossible by **copyright barriers**, for example legal/technological limits to TDM, in particular for AI development **(Flynn et al. 2020)**
- **Rethinking copyright** is a global challenge for territorial rights that also brings **opportunities** to clarify its human rights/constitutional foundations as justifications
- **Conceptualizing a "Right to Research" can address global and intergenerational challenges towards a more sustainable future**

# Research as Responsibility for Future Generations/ Towards a Sustainable Copyright

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“**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.**”

*(Van Hees, 2014)*



# Sustainability as a EU Key Objective

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**Aims and Objectives: Article 3(3) TEU + Article 37 EUCFR**

The Union shall establish an internal market. It shall work for the **sustainable development of Europe** based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a **high level of protection and improvement of the quality of the environment**. It shall **promote scientific and technological advance**.

→ Research is prominently positioned among the EU's objectives & 'research results' are included in EU Charter of Fundamental Rights (EUCFR)

# More fundamentally: Right to research as new Paradigm for IP protection

Without research, there is no creativity/ innovation.

Without creativity, there is no IP!

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*Question: How should copyright law protect rights to produce and access research materials?*

Need of a broader perspective: proposing research as a **(new) paradigm to revisit and understand copyright law**. In fact, for a creator, copyrighted works are research material in its creation phase. A researcher in cinema will have to be able to access movies, a musicologist will need to access music, a scholar in literature will need to access novels etc...

What matters ultimately in the research purpose. ***The Right to Research helps us to conceptualize copyright as an “access right “to copyright protected work for research and creativity purposes***

**(Ch. Geiger, “Copyright as an access right: Securing cultural participation through the protection of creators’ interests”, in: R. Giblin & K. Weatherall (eds.), What if we could reimagine copyright?, (ANU Press 2017), 73)**

# Research as counterpart/ enabler for the protection of the moral and material interest of creators

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Research and other 'creative' activities are **programmatic goals in international human rights law**

The author is entitled “to the protection of the moral and material interests resulting from any scientific, literary or artistic production” (Art. 27 (2)) as an **enabler for cultural participation, the enjoyment of the arts and the share in scientific advancement and its benefits** (Art. 27 (1)).

# Research as a rationale for copyright protection: access and protection, two sides of the same coin



Free participation in cultural life  
enjoyment of arts and sharing in  
scientific advancement and its  
benefits

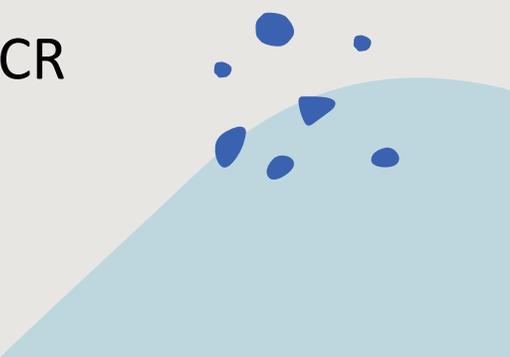
the protection of the moral and  
material interests resulting from  
any scientific, literary or artistic  
production

Expressed in:

Article 1, Section 8, Clause 8 of  
the US-Constitution

“... to **promote the progress of  
science and useful arts...**”

Article 15 ICESCR



# Converging goals and interdependency

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- The programmatic goals of **innovation and progress** and **copyright** converge
  - The protection of copyright (actually the protection of the moral and material interest of creators as natural persons) is framed together with the right to culture and science (Art. 27 UDHR, Art. 15 ICESR)
  - Research as a guarantee of Copyright's **social function** (*Ch. Geiger, 2013/2017*)
- It is not about opposing copyright with research rights but seeing research rights as a vehicle to realize copyrights goals and to secure its legitimacy!

# Conceptualizing a Right to Research

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Constitutional Foundations

# Foundations of a Right to Research

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- EU/Int'l human rights documents and Charter lack an explicit 'fundamental' right to [perform research](#)
- Separate and express anchoring of R2R would strengthen position of researchers/research institutions/industry to develop critical innovation  
→ health, environment, technology
- R2R could support the formulation and interpretation of research-enabling copyright rules: inform reform agenda for copyright
- 'constitutionalization' of EU copyright law resulted in broader, more effective interpretation of copyright limitations & exceptions (e.g. in C-201/13 *Deckmyn*) and exclusive rights to some extent (e.g. in C-476/17 *Pelham*)

# Foundations of a Right to Research (Int'l)

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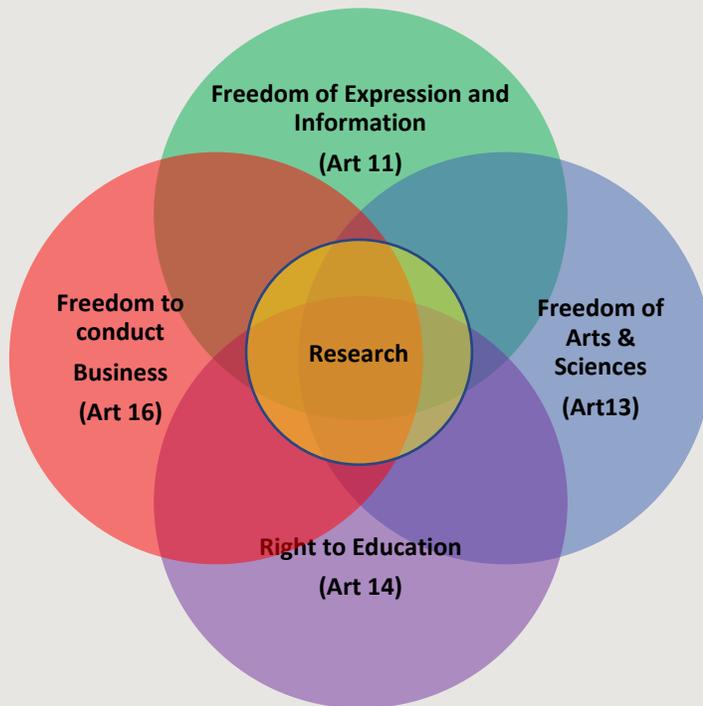
**Freedom of Expression & Information (Article 19 UDHR)**

**Right to Culture & Science (Articles 27 (1) UDHR & 15 (b) ICESCR)**

**Author's Moral and Material Interests (Articles 27(2) UDHR & 15 (c) ICESCR)**

# Realizing a Right to Research

## 1. Construction of a right to research out of existing fundamental rights



- Shaped by courts into a composite right
- Gradual development in the light of societal and scientific progress
- Digitization of Research mandates a constitutionalization in form of a right to research under the heading “**Digital Constitutionalism**” (cf. *Ch. Geiger/B.J. Jütte, 2021*)

# Foundations of a Right to Research

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- **Gathering and sharing of information (Article 11): Right to information resembles the right to research**
  - by extension C-469/17 - *Funke Medien NRW* → **access** to confidential information for reporting of current events is not dissimilar in its FR-quality to **access to research data** and other ‘necessary’ information **to advance research**, contrast with C-476/17, *Pelham*
- **Freedom to conduct business (Article 16). Provide **incentives** and constitutionally grounded rights to obtain and process information (protected by copyright) **to conduct economically viable and valorizable research** (Right to research for commercial purposes!)**
  - Competition law problem internalized in copyright law (see e.g. C-418/01 - *IMS Health*)

# Foundations of a Right to Research

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Use research results in training in formal and non-formal educational contexts (Article 14)

- Right to education must also include the right to have **access to relevant scientific publications of a certain quality** → education is inextricably linked to fostering future generations of researchers (indirect intergenerational benefits)

# Foundations of a Right to Research

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**Largely unimpeded research-conducive copyright framework (Article 13)**

- A right to research, strongly formulated, can support arguments for i.a. **research-friendly exceptions** or flexible/limited exclusive rights
- Unconstrained ‘sciences’ need the right to experiment based on **comprehensive access** to ‘prior arts and sciences’ → referential culture in art AND in sciences (recognized e.g. in C-476/17 - *Pelham*)

# Foundations of a Right to Research

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## 2. Integrating more coherently into EU Charter

- Underlining social function of IP as counterbalance to absolutistic formulation in Article 17(2) EU Charter (inherent limits to promote the “general interest” of Art 17(1) apply (constant position of the CJEU))
- More radical approach: Revision of the provision on IP in the EU Charter (*see Geiger 2022*)  
→ **integrating IP within the Freedom of Arts and Science (to mirror the international HR protection)**

# IP Protection under the Freedom of Arts and Sciences: *(cf. Ch. Geiger, 2022)*

## Current clause

*Article 13*

### Freedom of the arts and sciences

The arts and scientific research shall be free of constraint.  
Academic freedom shall be respected.

## Suggested Clause

*Article 13*

### Freedom of the arts and sciences

1. Everyone has the right to benefit from the achievements of scientific progress, to enjoy the arts, **to conduct research** and to participate in the cultural life of the community.
2. Creators of scientific, literary or artistic production shall have the right to the protection of the moral and material interests resulting from their creative activity. The rights granted are regulated by law in so far as is necessary to guarantee the rights in the preceding paragraph and the general interest.
3. The arts and scientific research shall be free of constraint.  
Academic freedom shall be respected.

# A 'new' Right to Research

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## Creation of a Right to Research *ex nihilo/de novo*

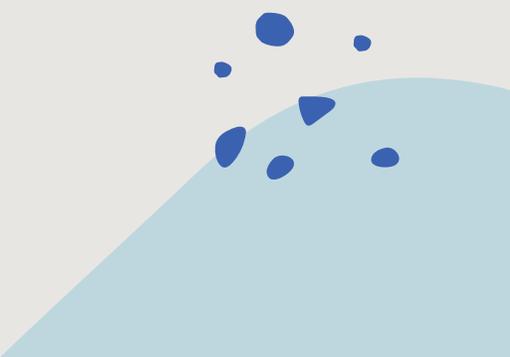
- Self-standing R2R as new independent right in the systematic structure of EU Charter (and ECHR?): **Signal function** of a truly new fundamental right
- *To be included in the proposals of the Conference on the Future of Europe?*
- R2R will have to be balanced with or against other fundamental rights (difficulty: multiplication of rights might lead to 'Rights Talk', **cf C. Craig, 2017** and to a weakening of the legal strength?) However, this fear is not justified, constitutions are "living instruments" (ECtHR), unless you are an "originalist"). **New rights emerge over time (ex freedom to conduct business in the EU is very recent!)**
- Reflective of EU/Int'l policy and therefore applicable to commercial and non-commercial research ('internal market', necessity for development agenda)



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# Copyright Barriers

Starting Points for Reform



# Current Copyright Barriers to Research

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## Broad Exclusive Rights

Recent extensions of the scope of exclusivity via the development of specific neighbouring or *sui generis* rights and the legal protection of technical protection measures have **amplified the potential monopolization of information by intellectual property** (for example, in the EU, Article 7 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20-28 (Database Directive)).

# Current Copyright Barriers to Research

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## Database Right

- Broad protection for original and unoriginal databases
- **BUT:** research friendly interpretation of exclusive rights of database rightholders (C-762/19, *CV-Online Latvia*)
- Expected reform would benefit from stronger fundamental rights arguments (***E. Derclaye/M. Husovec 2021***)

# Current Copyright Barriers to Research

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## Research Exceptions

- General research exception (Article 5(3)(a) InfoSoc), and other applicable exceptions, suffer from **lack of harmonization, fragmentation** (e.g. in Database Directive (Articles 6(2)(b); 9(b), Software Directive (Articles 5, 6), InfoSoc )
- Different national legal systems **impede cross-border collaborative research** and sharing of research results

# Current Copyright Barriers to Research

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## Flexible Exceptions?

- Generally excluded by C-476/17, *Pelham*, etc.
- Difficulties to adapt to ‘digitization’ of education and research (see e.g. C-117/13, *TU Darmstadt*)  
→ **legal uncertainty**

# Current Copyright Barriers to Research

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## Text and Data Mining Exceptions

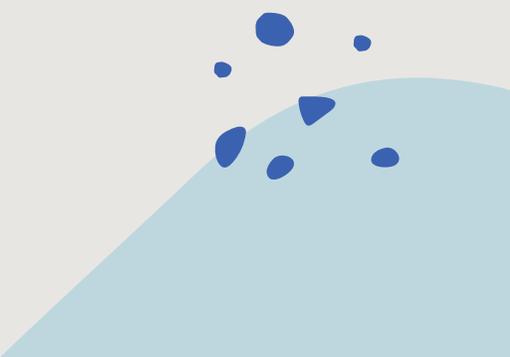
- A Text and data mining exception only applicable to cultural heritage institutions and research organizations is **limited in scope** (Article 3 CDSM Directive) and condition to “lawful access” (excludes most online sources).
- A Broader research exception, but subject to “opt out” from rightholders (Article 4 CDSM Directive)
- Both exceptions are subject to the “three step test” and technological override (Article 7 CDSM Directive)



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# Conclusions

A Human Rights Imperative



# Conclusions (1)

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Fundamental rights-based arguments can provide **sound policy basis** to improve legal framework for research but also help judges to push the boundaries of the current rights and exceptions by a fundamental right-compliant reading (*cf. Helfer 2007*): **from a combined reading of several fundamental rights emerges a fundamental right to research**

But: Fundamental rights framework for research needs to be improved!  
**Towards a self standing R2R in the future!**

# Conclusions (2) R2R for copyright reform

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## Where can right to research create positive effects and inform reform?

- Broad interpretation of existing research exceptions in 2001 InfoSoc Directive → new exceptions OR 'open' clause in EU copyright law? (Fair Use informed by FR reasoning/ proportionality)? **AND** limitation of (scope of) exclusive rights
- Text and data mining
- Open access policies of private and public research institutions or for individual researchers
- Access to public sector information and beyond (public sector rightholders should not be allowed to "opt out" of TDM exception?).
- Remunerated Access (statutory licenses)

# Conclusions (3)

Fundamental Rights

Research

Aims and objectives of  
EU/Int'l Community

Research enables exercise of FR and achievement of aims and objectives (AO)

AO help to realize FR

→ Research that leads to realization of FR and achievement of AO should be privileged – **constitutional imperative**

**Problem:** Uncertainty of research outcomes/applications

**Solution:** *in dubio pro research*

## Based on two forthcoming papers

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- Chapter forthcoming in: Taina Pihlajarinne, Jukka Mähönen and Pratyush Upreti (eds.), *“Rethinking the Role of Intellectual Property Rights in the Post Pandemic World: An Integrated Framework of Sustainability, Innovation and Global Justice”*, Edward Elgar, 2022
- Conceptualizing the Right to Research and its Implications for Copyright Law, An International and European perspective, *American University International Law Review* 2022, Volume 38 (forthcoming)