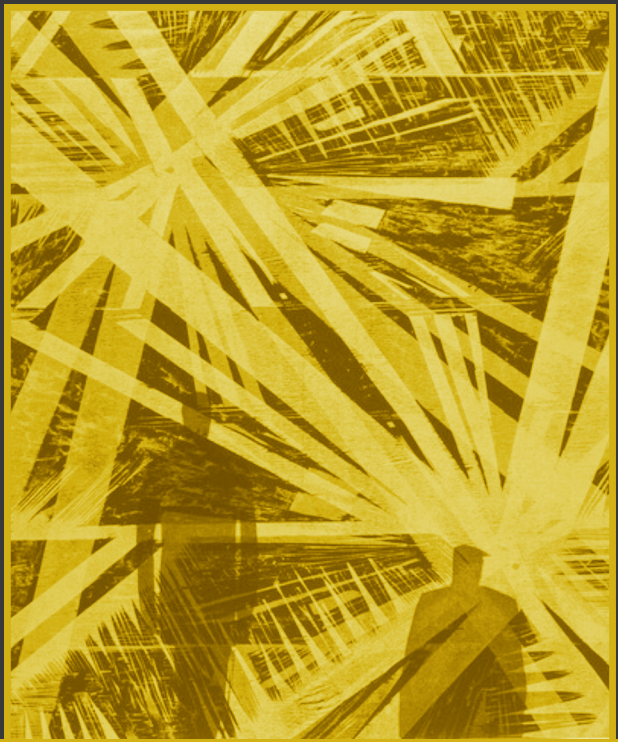
Enabling Access, Fostering Innovation

Towards a Digital Knowledge Agenda in Europe



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Edited by
Christophe Geiger & Bernd Justin Jütte

Enabling Access, Fostering Innovation

Towards a Digital Knowledge Agenda in Europe

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ON MATTERS CONSTITUTIONAL

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Christophe Geiger, Damian Boeselager

Shaping the EU Digital Knowledge Agenda

Why Reform is Key for Access to Information Online

In our very tense global geopolitical context, the European Union urgently needs to develop policies that foster innovation and creativity to compete in the global knowledge economy and to establish a true European knowledge society.[1] First, innovation is needed to ensure the survival of our European "social market economy", as the EU Treaty calls it (Article 3 TEU). Most European countries are poor with respect to natural resources and expensive when it comes to labour. The EU has no choice but to innovate if it wants to maintain its advanced level of social protection.[2] Second, innovation and creativity are needed to safeguard democratic participation and fundamental rights. Access to knowledge is crucial for citizens to stay informed and make democratic decisions. For individuals, it is also fundamental for their personal self-realisation and growth – a truth that has held for generations.

The digital revolution has multiplied the potential for research and learning, which are preconditions for innovation and development. Research and development are often listed among the top priorities for EU policy makers. Nonetheless, the legal framework governing access and use of knowledge dates back to the analogue age. Last year former Italian Prime Minister Enrico Letta urged the EU to implement a "fifth Freedom",[3] dedicated to the free movement of research, innovation, knowledge, and education. His argument: The four freedoms of the European Single Market "fall short in addressing the shift from an economy based on ownership to a new one, based on access and sharing".

Removing the hurdles of access to knowledge

For this purpose, research and education must be prioritised, and the well-known regulatory hurdles urgently need ambitious reform. This is particularly true for copyright law, which poses many barriers for researchers and educators when using protected material in the digital environment.[4] It starts from the fact that we still have a very fragmented market with 27 different copyright regimes, which makes it very complicated for knowledge providers to navigate. In a context where the online world has abolished physical geographical boundaries, this creates a huge competitive disadvantage for the EU in the movement of and access to knowledge. Let's be clear: Unified rules in the form of an EU copyright law are needed to create a true European digital knowledge society and a functioning digital single market![5]

But that is not all: Outdated copyright legislation also constitutes a significant barrier to access and use of information for research and education purposes.[6] Based on the principle of exclusivity in copyright law, any publication results in the transfer (licence) of a researcher's copyright to a publisher – and that for the next 70 years after the author's death. From this moment on, access is controlled by publishers who can dictate conditions and prices for access – on top of that, potentially under 27 different legal regimes, given the territoriality of copyright law. This has the curious effect that knowledge is privatised by publishers,[7] even though it has often been produced in public universities with public funds (this has been the case in the EU in particular for research funded under Horizon 2020 and Horizon Europe, and will be the same without

proper legislative change under the future MFF). The same public institutions and researchers that created the knowledge in the first place have to pay high fees (again with public funds) to be able to use it in their scientific articles or provide access in their libraries or schools. While certain rules exist that allow reuse of copyrighted material, they are clearly insufficient to guarantee broad access to knowledge.[8] In digital environments, knowledge is often hidden behind paywalls because a few big market players use their technical means and strong bargaining powers to limit access – or at least to prevent access on fair terms.

Proposals for a needed reform

How did we arrive here? For one, copyright legislation in the past has been too often shaped by the activities of interest groups and lobbyists, rather than by a clear societal project and the public interest. This needs to change. In fact, for over two decades, several scholars have advanced proposals of reforms to create a more research- and education-friendly copyright law. In its most recent opinion entitled "An EU Copyright Framework for Research",[9] the European Copyright Society, a platform for critical and independent scholarly thinking on European copyright law and policy, has emphasised the urgent need to adapt the EU copyright framework, calling "for immediate action on the EU copyright framework to address the most pressing challenges it raises for European researchers and their institutions". The various proposals for reform are on the table: Broadening research and educational exceptions to copyright and making them safe from contractual and technological overrides, allowing researchers to republish their draft articles in public reposi-

tories and archives (so called "second publication rights"), creating institutional access and price control for research institutions and schools, implementing a digital lending right for libraries, and many others.

Restoring the social contract while securing fundamental rights and the EU's core values

These reforms to copyright law are necessary to restore copyright to its original purpose: to incentivise access to knowledge.[10] In this context, it is important to recall that copyright emerged in the 18th century and had its origins in the ideas of the Enlightenment. The thinkers of the Enlightenment pleaded for the recognition of intellectual property in order to assure the authors the fruits of their works. However, they thereby pursued not just a strictly individual but also a social ideal, i.e., the dissemination of Enlightenment ideas.[11] This knowledge dissemination-driven purpose, which reflects copyright's social function,[12] has been perverted – by restricting and oftentimes excluding access rather than facilitating it. The EU regulatory copyright framework should reflect the fundamental values of the European Union as set out in the Treaties and the Charter of Fundamental Rights of the EU: Article 3 states that the Union aims to "work for sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment". Innovation is inevitably intertwined with scientific, economic, and cultural development. It is therefore urgent to align the innova-

tion policies with the sustainable development goals[13] – this is relevant for copyright law in particular. If we take the generally accepted Bundtland-definition of sustainability (based on the homonymous 1987 UN Commission) as slightly developed by Van Hees in his foundational article,[14] according to which "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", it is obvious that forward-looking research- and education-friendly policies are a must to secure the establishment of a sustainable copyright system in the EU.[15]

Our fundamental rights framework creates similar imperatives. The European Court of Human Rights identified freedom of expression and the right to information as "one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man".[16] The emergence of new fundamental rights in this field – such as the right to research – should lead to ambitious policies better enabling access to knowledge in a digital environment.[17] Research- and education-friendly intellectual property regimes can foster creativity and innovation in the online world and a sustainable framework for knowledge production, including knowledge sharing. In a fundamental rights and value-based approach to the Digital Single Market, copyright rules must be designed in such a way as to enable cultural participation and the enjoyment of scientific progress.[18] In this context, copyright needs to work as a facilitator, an inclusive rather than an exclusive right.[19] For this purpose, the fundamental rights to

research and to education and freedom of expression and information need to take centre stage in the future rules that govern our knowledge society.

Towards a Digital Knowledge Agenda establishing a Digital Knowledge Society

A "Digital Knowledge Agenda" should position the EU as a global leader for innovation and new knowledge production. To give shape to this agenda, a conference was held in the European Parliament in Strasbourg on July 10, 2025 by the Innovation Law and Ethics Observatory (ILEO)[20] together with Volt Europa and its members in the European Parliament – with the support of various institutions such as the University College Dublin Center for Digital Policy, the Program on Information Justice at American University Washington College of Law, Communia, Knowledge 21, and the Center for European and International Studies at the University of Strasbourg.

The event aimed to identify the main pillars of a research- and education-friendly copyright system and define the key issues that a legislative reform would need to address. Thus, the Digital Knowledge Agenda – as a legislative project for the current EU legislature – must ensure that researchers, innovators, and knowledge institutions can access and work with protected works to enable scientific and cultural progress. Time is of the essence. We need to remove copyright barriers that restrict access to knowledge for innovators and prevent institutions from fulfilling their public-interest role. This is a crucial step toward creating an innovation ecosystem that reduces inequalities and creates a level playing field both online and

offline. We are deeply convinced that it is high time that European policy makers and academics engage in an open dialogue to address and advance these issues.

Fundamental rights are at the core of Europe's DNA. Values-based innovation regulation must become a political priority. It cannot just be discussed behind closed doors between powerful actors. It is too relevant to the world we live in – and paramount to the innovative world we leave to future generations.

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Bernd Justin Jütte

Rooting Access in the Union's Constitutional Norms and Values

Removing Copyright's Restrictive Effect on Accessing Information Requires Openness, Flexibility, and Individual Autonomy

The European Union is currently experiencing epochal shifts. They range from new threats of armed conflicts, societal inequality, environmental threats, and a stark downturn in the transatlantic relationships. Addressing (at least some of) these challenges requires creative and innovative answers. Key to addressing these challenges is harnessing the innovation potential of the "old continent" by rediscovering the intellectual roots of an open, free, and progressive society and translating them into the normative fabric of the EU's Single Market. With the advent of digitisation, copyright law has generated chilling effects on innovation and creativity. Removing them is essential for exploiting Europe's potential for creativity and innovation.

Copyright is not necessarily the obvious lever that comes to mind when tackling global problems. However, this particular set of rules has the potential to hamper innovation, creativity, and human and societal development, although it is meant – and should accordingly be designed – to promote them. Unfortunately, copyright in the EU has developed into somewhat of a stumbling stone (at least) since the adoption of the 2001 Directive on Copyright in the Information Society (Directive 2001/29/EC). Especially when copyright becomes a strategic aspect of transatlantic relations,[1] its importance cannot be further denied. By being able to determine the conditions for access to information – of all sorts –, copyright is a powerful and often problematic tool. Rebalancing certain rules and mechanisms of copyright law will be essential for empowering educators and students and enabling researchers to address today's and tomorrow's challenges.

This contribution outlines some of the barriers copyright law poses to education and research and proposes a set of non-exhaustive principles that should guide the rebalancing of

substantive copyright law. These principles are based on constitutional imperatives that are rooted in the aims and objectives of the European Union and build on copyright's conceptualisation as an access right,[2] rather than one that restricts access to information.

Copyright's restrictive effects

Copyright law determines how information is created, shared, and used, but it does not protect the information itself. It protects the medium that carries the information. The subject matter of protection under copyright law is expression – and sometimes mere fixation – as opposed to ideas or information. Copyright grants exclusive rights for literary, dramatic, musical, and artistic creativity, for an "*author's own intellectual creation*", which is not knowledge itself but how knowledge is "*packaged*". The packaging – in copyright terminology – is concrete expression, and this is what copyright law protects. However, information can only be communicated, shared, and transmitted in packaged form. Copyright-like protection is also assigned to other types of subject matter, such as *sui generis* databases and other related rights. The exclusive rights granted under copyright law are therefore powerful tools to restrict access to information. The different rights given to authors and rightsholders complicate access to information and knowledge because they enable controlling the media that carry information. However, access to information of different types is essential for innovation, scientific and technological progress and more generally for creative solutions against local, regional and global challenges. Therefore, just like other production factors, information must move freely within the EU's Single Market.

Copyright as a barrier to a fifth Freedom

In her political guidelines,[3] Ursula von der Leyen, the current President of the European Commission, recognised *"world-class researchers and universities"* as key assets for European competitiveness. To harness the potential of these assets and to leverage strategic advantages to close the competitiveness gap at the global level vis-à-vis other economies, the EU must educate and innovate, build a strong, flexible, and innovative workforce that is able to drive innovation and competitiveness. Without the free flow of information and unrestricted access to knowledge for research and education, the innovation potential of the European Research Area and, more generally, that of the Union, will be difficult to realise. This concern is echoed in the 2024 Letta-Report which calls for exploring a new dimension of the European Single Market, namely that of a

> *"fifth Freedom to the existing four, to enhance research, innovation and education in the Single Market [which] entails embedding research and innovation drivers at the core of the Single Market, thereby fostering an ecosystem where knowledge diffusion propels both economic vitality, societal advancement and cultural enlightenment".*[4]

This fifth Freedom would include not only the free movement of researchers. Research data, research outputs, and research results must be able to move freely within the EU's Single Market. Similar to the other fundamental freedoms – though not (yet) expressly defined as such –, freedom to access information would become a constitutional value. Equally, education

resources must be part of this fifth Freedom, as a means to achieve other constitutional aspirations of the Union. The need to provide world-class, diverse education and equal opportunities for all learners, provides compelling arguments that weigh against measures that restrict the free flow of information and knowledge resources.

Research and education as informational fundamental rights

The free-movement analogy is, however, only one convincing argument for a more flexible, access-based copyright framework. Even in entirely internal situations, copyright poses significant barriers to the use of information for educational and research purposes. These rules are largely harmonised by EU law and therefore do not fully escape the constitutional imperatives of the EU. Accessing information, as an expression of a fundamental right, is at its very core protected by the right to freedom of expression, a right to receive and impart information, and helps to achieve some of the expressly formulated aims and objectives of the Union. Even more fundamentally, while education is recognised as a fundamental or human right, research is not expressly recognised. Its scope can be constructed as a composite of other recognised rights, such as the right to freedom of expression (e.g., Art. 11 EUCFR), but also the right to enjoy the benefits of scientific progress and its applications (Art. 15(1)(b) ICESCR).[5]

Whilst copyright is not the only barrier to creativity and innovation, it poses critical barriers for researchers and educators, individually and for institutions, in the European (Digital)

Single Market. Removing these barriers is essential to create and educate a qualified workforce that can adapt to technological change and drive innovation itself – and therefore also for bolstering Europe's potential for critical and cutting-edge industries. A healthy innovation ecosystem is, not least, essential for promoting and realising the EU's aims and objectives,[6] as laid down in Art. 3(3) TEU, including "an internal market [that works] for the sustainable development of Europe [and which promotes] scientific and technological advance".

Copyright, education, and research

Three factors in particular contribute to the increased intensity of control rightsholders can exercise over protected works, and therefore, the use of the information contained in these works.

First, digitisation, with all its benefits, enables rightsholders to extend the sphere of control over works. Compared to analogue scenarios, the effects of copyright's exclusive rights, especially the right of reproduction and communication to the public, are much more severe and equip rightsholders with a high degree of control over information and knowledge.

Second, the multiplication of access sources increases access costs for individual and institutional users. The purchase of physically embodied digital media, such as books, magazines, and audio-visual media, creates one-off acquisition costs; access to digitised media, however, creates recurring costs. Subscription models for scientific or educational resources require periodic payments to maintain access, and access modalities are furthermore subject to private ordering through terms and conditions. Accessing a balanced mix of (essential) resources further increases costs and may lead to losing access if subscrip-

tion fees become unaffordable for individual or institutional users. Specifically for universities and libraries, these costs and consequential uncertainties are not insignificant.

Third, the commodification of information resources, especially in the scientific sector, drives prices and multiplies access costs for users and knowledge institutions. Research outputs, as well as educational material, are licensed by their authors to knowledge intermediaries, such as publishers, who then set the price and modalities for access. For example, publishers resort to practices like bundling and metering to maximise profits. This makes it difficult for knowledge institutions to provide their users with the best possible offers, but it also divests producers of information of control over their productions. For example, a scientific or educational book, for which the author has granted an exclusive licence to a publisher, cannot be shared by the author without violating the terms of the licence. Moreover, it is the publisher that decides when and if reprints or publications in other venues are permitted. If nothing else, contractual layers on the use of information resources, which even legal experts struggle to negotiate, lead to legal uncertainty and result in chilling effects for research and related activities.

Principles and objectives for European education and research (copyright)

Promoting research and education in a European Single Market that is home to a world-leading European Research Area requires addressing these structural deficits. The fact that these congruent spaces are still governed by national, only partially

harmonised copyright laws, is one of the aspects that require legislative intervention. First and foremost, more effective harmonisation is an imperative for removing barriers to education and research. These harmonisation efforts must aim at removing inherent conflicts between exclusivity and access, starting with designing broad and clear exceptions for use in the context of research and education activities.

The principles and main objectives of a copyright framework that enables and facilitates education and research will be given more shape by concrete proposals in further contributions to this edited volume. They are based on principles such as openness, flexibility, and individual informational autonomy.

As a general rule, information should be freely accessible when using and sharing it serves the promotion of research and education, as drivers of innovation and creativity. Reasonable and proportionate restrictions to the principle of openness are, by its very nature, established by copyright law. For example, it is not unreasonable that authors of educational textbooks or scientific works have the possibility to generate revenue from their works. However, these exclusive rights, and the subject matter of copyright more generally, do not guarantee maximum economic profits to rightsholders.[7] Certainly, pure economic interests should not lead to a monopolisation of information, thereby jeopardising the purpose of copyright and its underlying social contract. When openness is not built into copyright, copyright law must provide exceptions to the exclusivity paradigm that can be flexibly adapted to new methodologies and research techniques, specifically those that are enabled by technological advances. But it also requires other tools and mechanisms to ensure accessibility of essential information.

Individuals who produce knowledge must maintain a degree of control over this information and the works in which it is contained. Not for the purpose of restrictive control, but for the purpose of encouraging the self-determined sharing of essential information. Reducing the extent of control of knowledge intermediaries, such as publishers, over research outputs, particularly such outputs supported by public funding, is vital to enable scientific communication and the type of knowledge transfer that drives innovation.

This principle of informational autonomy must be positioned in a multi-territorial (Digital) Single Market. Mechanisms that enable the cross-border sharing and exchange of information and knowledge must be central to efforts to reform existing copyright rules. The current rules of the EU copyright acquis already contain good examples,[8] but these do require horizontal adoption to promote education, research and, as the ultimate goal, innovation and creativity.

Finally, knowledge institutions, as access enablers, must be empowered to build diverse, resilient, and sustainable repositories that learners, teachers, and researchers alike can tap into. To fulfil their public service missions, libraries must be able to obtain academic works necessary to build stable and diverse knowledge repositories to empower learners on a non-discriminatory basis and to provide researchers with resources that can be accessed and used without significant technological and contractual limitations. Under certain circumstances, the public interest in building and maintaining knowledge repositories must also justify positive obligations to be imposed on rightsholders to enable access to knowledge resources.[9]

Building a competitive and innovation-friendly Digital Single Market requires recognising a fifth Freedom of informa-

tional mobility. For that purpose, copyright must adapt to allow information to be used, consumed, analysed, and shared within educational and research communities, by removing restrictions on its free movement across EU Member States. And again, the old market logic can serve as an inspiration. Control should not be the general rule, and restrictions on the free movement of knowledge and information require convincing and proportionate arguments.

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Jonathan Renaux

Access to Knowledge on the Move(ment)

How a Fifth Freedom for Research, Innovation, and Education Could Enhance the Right to Access Knowledge

Strasbourg, 10 September 2025. In her annual State of the Union address before the European Parliament, the President of the European Commission set the tone for the year ahead.[1] Against the backdrop of global uncertainty, she made one thing clear: Europe's independence in an increasingly multipolar world depends on its ability to compete with continental heavyweights, such as the United States and China. Among the key priorities she outlined, one unmistakably stood out as a core objective: strengthening the EU Single Market. And there it was again – resurfacing with growing political weight – the call for a "fifth Freedom": the free movement of knowledge and innovation.

This idea was famously articulated by former Italian Prime Minister Enrico Letta – although in slightly different wording – in his 2024 report "Much More than a Market".[2] Letta contended that the traditional concept of the Single Market – built around the four Freedoms of movement for people, goods, services, and capital – has shown its shortcomings in addressing the challenges of the 21st century. He proposed adding a *fifth Freedom to enhance research, innovation, and education* within the EU treaties, thereby creating an ecosystem where knowledge diffusion drives economic vitality, societal advancement, and cultural enlightenment. Among the anticipated benefits he identified were the creation of a European Knowledge Commons, the development of European data spaces in key sectors, greater mobility for researchers and innovators, and the improvement of digital skills and literacy across the Union.

Following the guiding thread of this edited volume, this contribution examines the legal implications that a new Freedom of movement – formally incorporated in the EU Treaties – could have on the *right to access knowledge in the fields of*

research and education. This requires paying particular attention to the digital dimension of this right and therefore a broad understanding of access to knowledge as encompassing "the right to participate in the creation, distribution, and acquisition of raw information, secondary analyses of data, and knowledge-embedded tools and services".

Realising the freedom to access (digital) knowledge requires viewing it through the dual lens of fundamental rights protection and internal market law.

Access to knowledge in the European fundamental rights realm

Access to knowledge can already be understood as falling within the scope of existing fundamental rights protections under both the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (the Charter), as argued by Geiger and Jütte.[3] However, this protection remains fragmented and indirect. The absence of an explicitly codified right to access knowledge – particularly in the domains of research and education – limits both the legal certainty and normative force that such a recognition could provide within the European legal order.

The right to access knowledge *for educational purposes* is neither in the Charter nor in the ECHR explicitly recognised as a standalone right. Arguably, it could be inferred from the right to education, enshrined in Article 2 of Protocol 1 to the ECHR and Article 14 of the Charter. Relevant case law, however, remains limited. The right to education has been mainly seen as the right for individuals to access educational institutions. Yet, the

European Court of Human Rights (ECtHR) considers the "transmission of knowledge" to fall within the scope of that right.[4]

Similarly, the right to access knowledge *in the field of research* – often framed as the right to academic research – is not explicitly enshrined in binding human rights instruments. Nonetheless, other recognised fundamental rights could provide a "solid foundation"[5] for a right to research.

The first is the freedom of expression. Both the ECHR (Article 10) and the Charter (Article 11) stipulate that the freedom of expression includes the right "to receive and impart information and ideas without interference by public authority". The informatory function of the freedom of expression can play an important role in protecting access to knowledge in the field of education and research. The ECtHR does recognise the necessity of a high level of protection for academic researchers, but primarily when they act as public watchdogs,[6] not when it comes to knowledge sharing in general. The link between access to knowledge and freedom of expression can be illustrated by the example of copyrights, which regularly restrict access to knowledge. The ECtHR[7] and Court of Justice of the European Union (CJEU) Advocate General Szpunar consider copyrights as "bound to clash with freedom of expression".[8]

The second is the freedom of the arts and sciences, explicitly enshrined in Article 13 of the Charter. Being essential for advancing knowledge and a precondition for the right to participate in scientific progress, the freedom of scientific research constitutes an important ground on which access to knowledge can be protected. As pointed out by Galloux, it encompasses access to the necessary means and conditions for its effective exercise, but also the freedom to inform the public and disseminate research findings as openly and independently as possible.[9]

Finally, academic freedom – formally included in Article 13 of the Charter and recognised in the case law of the ECtHR – also constitutes a legal ground in which access to knowledge can be protected, both in the field of research and education, as academic freedom guarantees "freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction".[10]

In sum, European fundamental rights already offer meaningful grounds to protect access to knowledge, and there is scope to further develop this right, especially as the increasing digitalisation of society challenges and redefines the scope of fundamental rights.

Switching realm: The added value of a fifth Freedom for access to knowledge

Additionally, the Single Market could act as a powerful "normative corridor"[11] in which access to knowledge could thrive. By shifting from the sole realm of fundamental rights to the realm of free movement law through the recognition of a fifth Freedom for innovation, research, and education in the Treaties, access to knowledge – in its fundamental right form – can be both (i) better protected and (ii) enhanced.

First, access to knowledge could be *better protected* because the Treaty Freedoms can serve as vessels for the application of the Charter. The CJEU considers that when a Member State restricts one of the four Treaty Freedoms based on an EU-recognised ground of general interest, its justification for doing so must be assessed in light of the rights guaranteed by the Charter. More precisely, it considers that "the use by a Member State

of exceptions provided for by EU law in order to justify an obstruction of a fundamental Freedom guaranteed by the Treaty must [...] be regarded as 'implementing Union law' within the meaning of Article 51(1) of the Charter".[12]

This "constitutional finesse"[13] was employed by the Court in the context of higher education in its judgement of 6 October 2020, *Commission vs. Hungary* (C-66/18[14]), to achieve two objectives: First, to invoke the application of the Charter through the violation of the freedom of establishment under Article 49 TFEU; and second, to strike down – for violations of Articles 13, 14 (3) and 16 of the Charter – a Hungarian law requiring, *inter alia,* foreign universities, including those established in another Member States, to offer education activities in their state of origin.

It is therefore clear that the right to access knowledge – in its various forms and as indirectly protected by several provisions of the Charter – would play a stronger role in EU judicial review if a "fifth Freedom" were incorporated in the Treaties, in sharp contrast to the application of other fundamental rights where the CJEU has been far more hesitant.[15] This effect could gain in strength if, as suggested by Advocate General Sánchez-Bordona,[16] the respect for the Charter would be directly integrated into the interpretation of the Treaty Freedoms, rather than applied only at the stage of reviewing the validity of potential restrictions on them.

Secondly, a fifth Freedom could *enhance* access to knowledge in two ways. On the one hand, the Freedom of research, innovation, and education would interact with the rights enshrined in the Charter. It is foreseeable that the CJEU, applying a teleological interpretation of the Charter, might interpret the rights identified above in the light of the new fifth Freedom, thereby

shaping the broader landscape of the relevant fundamental rights.

On the other hand, while the Treaty Freedoms do not themselves create direct legal bases that automatically confer new powers or competences beyond those granted by the Treaties, their significance cannot be underestimated. Beyond establishing a legal framework to prevent unjustified or disproportionate restrictions on certain EU constitutional principles, the Treaty Freedoms also serve as major political lodestars, having inspired numerous EU legislative initiatives aimed at advancing an ever closer Union. Undoubtedly, introducing a fifth Freedom would prompt the Commission to adopt an action plan to make it a reality. This would in turn include the promotion of better access rights for researchers and educators.

Concluding thoughts

A legal framework (broadly defined) ensuring better access to knowledge for researchers and educators is essential to realise the newly defined Single Market that promotes the free movement of knowledge.

However, implementing such a framework also requires addressing the opportunities and risks digitalisation brings to the accessibility and integrity of knowledge. Once this new paradigm is embraced, it quickly becomes apparent that serious risks may arise that may limit online access and enable governments to significantly shape public opinion by manipulating access to knowledge. Recent events across the Atlantic have shown how universities and educators can quickly become the target of an authoritarian shift.[17] In this context, fundamental rights play a crucial role in safeguarding democratic society.

When it comes to the fundamental Freedoms, their common goal is to establish a European common space through the protection of a transnational right to mobility.[18] This space, while primarily economic in nature, also encompasses financial, social, and democratic dimensions. The legal nature of the free movement rights has evolved in parallel with the transformations of European society. Following goods, services, people, and capital, ensuring the free movement of *knowledge* would certainly be an important step toward creating a more innovative and democratically resilient European Union.

While the four traditional Freedoms were originally designed to serve a pre-digital economy, the proposed freedom of research, innovation, and education could address the digital and technological challenges of our time. This is especially relevant for access to knowledge as it is increasingly mediated through digital technologies. Universities and educators, therefore, must be among the primary beneficiaries of this new Treaty Freedom.

The views expressed in this publication are solely those of the author and do not represent the official position of the European Parliament.

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Martin Senftleben

Reconciling EU Copyright Protection With the Right to Research

Why We Need a General Research Exemption (Now!)

In today's data-driven information society, the freedom to access and (re-)use diverse knowledge resources – from literary and artistic works to data collections – is indispensable for research.[1] As digitisation pervades more and more societal subsystems, researchers can only analyse developments and provide new insights, if a sufficiently broad and representative spectrum of knowledge resources is available. However, information required for research is often subject to specific regulations that limit access and (re-)use. For instance, copyright and *sui generis* database rights can pose substantial hurdles. Once information is embedded in a protected work of authorship, access and (re-)use may be conditioned by the exclusive rights of reproduction and communication to the public set forth in the 2001 Information Society Directive (ISD, Directive 2001/29/EC). The 1996 Database Directive (DBD, Directive 96/9/EC) grants similar protection against unauthorised data extraction and re-utilisation once substantial investment in the obtaining, verification or presentation of database contents has taken place.

Considering the rapid evolution of digital technology and changing research approaches, it is doubtful whether the current EU copyright acquis offers sufficient support for research that requires access to protected knowledge resources. With the text and data mining (TDM) provisions in the 2019 Directive on Copyright in the Digital Single Market (CDSMD, Directive (EU) 2019/790), EU legislation has taken a first step in the right direction. However, the TDM rules are very specific. They concern a specific research method and set forth specific access and use conditions.[2] To this day, a general research clause is missing that allows researchers to do their job in the current information society and contribute to the improvement

of societal conditions – regardless of constantly changing technologies and access routes to knowledge resources.[3] The time is ripe to devise this umbrella clause. The following analysis traces its conceptual contours.

Existing research provisions

A central element of the existing copyright/research interface is Article 5(3)(a) ISD:

> *"Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 [the reproduction right and the right of communication to the public] in the following cases: (a) use 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 [...]."*

Evidently, Article 5(3)(a) is not confined to specific forms of research, or specific research tools and methodologies. It deals with scientific research in a broad, general manner. The same can be said about the corresponding provision in Article 9(b) DBD. Nonetheless, a closer look reveals several conceptual problems.

Problem areas

First, Article 5(3)(a) ISD is a "may" provision. Member States are not bound to implement the exemption of use for scientific research purposes in a standardised form. Countries may refrain

from adopting the research privilege altogether. Countries may also take a cautious approach and add further conditions for invoking the use privilege at the national level.[4] The regulatory framework for use in scientific research contexts is thus highly fragmented.[5] In the absence of a fully harmonised umbrella clause at EU level, national research provisions differ in relation to beneficiaries, works covered, the scope of permitted use, the exclusive rights covered (reproduction and/or communication to the public), conditions of applicability, remuneration requirements and safeguards against contractual override. Quite clearly, this diversity is not conducive to cross-border research activities in the internal market. Research use that is permissible in one Member State may amount to infringement in other Member States that have followed a more restrictive implementation strategy.

Second, legal uncertainty with a corrosive effect on research activities can arise from conceptual inconsistencies. In particular, it is unclear whether the illustration requirement only concerns teaching or is intended to cover use for research purposes as well. On the one hand, Article 5(3)(a) ISD may be understood to generally permit "use for the sole purpose of [...] scientific research". On the other hand, it can be argued that the provision only covers "use for the sole purpose of illustration for [...] scientific research". Divergent national implementation practices show that both interpretations have informed lawmaking in EU Member States.[6]

Third, the requirement of use for a "non-commercial purpose" enhances the legal complexity. It has become a source of legal uncertainty and appears outdated, especially in light of the evolving nature of research practices that increasingly involve collaborations with private partners and public-private

partnerships, often encouraged and even required by European and national research funding schemes. Recital 42 ISD offers the following clarification with regard to the gatekeeper criterion of non-commercial use:

> *"When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect."*

This guideline can easily lead to a scrutiny of each individual research project in the light of the "non-commercial purpose" requirement. If the criterion is, moreover, applied strictly, the mere possibility of research yielding results that can be exploited commercially may already bar researchers from invoking the research exception. As a result, even the commercialisation of research output by technology offices of publicly funded research organisations may create legal complications for researchers who initially – while conducting the research – relied on the research exemption under the assumption of non-commercial use and learnt only afterwards – when the project was completed – that the results would be exploited commercially. While more flexible approaches are conceivable,[7] substantial legal uncertainty remains in the light of decisions of the Court of Justice (CJEU) that take a strict interpretation as a starting point.[8]

Fourth, the copyright acquis surrounding Article 5(3)(a) poses additional hurdles. The overarching requirement to

ensure compliance with the three-step test laid down in Article 5(5) ISD gives rise to the question whether researchers must explain – potentially even with regard to each individual project – that the intended use of resources enjoying protection constitutes a "special case".[9] Moreover, they may have to rebut allegations that the use carried out in a research project has a corrosive effect on the normal exploitation of protected works and/or unreasonably prejudices legitimate rightsholder interests.

Fifth, legal uncertainty and use restrictions can follow from technological protection measures that serve as electronic fences preventing access and use for research purposes.[10] Article 6(4), subparagraph 4, ISD amplifies the corrosive effect of this additional legal issue. According to this provision, contractual terms prevail over the research exemption in Article 5(3)(a). This decision of the EU legislature exposes researchers to contractual clauses that may exclude use for research purposes altogether.

Perceptions of researchers, research organisations, and publishers

A survey conducted in 2023 (pp. 889-893) to shed light on experiences of researchers (962 responses), research-performing organisations ("RPOs", 583 responses) and scientific publishers (128 responses) demonstrated that the outlined legal issues are not mere theoretical concerns.[11] With regard to the need for sufficiently flexible research rules in EU copyright and *sui generis* database law, the results of the RPO survey are of particular interest. 47.8% of the respondents (239 out of n=500) indi-

cated a strong preference for the introduction of an open-ended umbrella clause that would generally permit the use of protected knowledge resources for all kinds of research purposes (p. 121). 33.6% of the respondents (168) stated that they would support ("rather favour") the introduction of such a general clause. Considering the high number of answers in this category (n=500), this is a clear statement in favour of an open-ended clause capable of supporting scientific research in general – without limiting privileged use to specific circumstances, such as specific research settings, research tools or research resources.

The survey also confirmed lawful access obstacles.[12] The researcher survey revealed that 80% of the respondents (n=635) faced significant access barriers due to a lack of subscriptions to copyrighted knowledge resources (p. 926). 59.6% of the researchers also indicated that they were unable to access protected knowledge resources on the internet because these materials were behind a paywall or electronic fence. This is a robust result based on a large number of responses (n=473). The RPO responses confirmed subscription shortage and paywall problems (p. 1013). RPOs were frequently (every week or month) or somewhat frequently (every three to six months) confronted with situations where researchers were unable to obtain access to protected knowledge resources because of a lack of subscriptions (69.9%, 324 out of n=464) or insurmountable paywalls (75.0%, 333 out of n=444). Not surprisingly, the access issue is high on the public policy agenda of RPOs. 47.3% of the respondents (232 out of n=491) were strongly in favour of giving researchers access to protected knowledge resources, even if they are behind a paywall, under strict public interest conditions defined by law. 34.4% (169 respondents) supported

("rather favour") the introduction of access rights in cases of overwhelming public interest (p. 121).

The RPO survey also offers some clarifications with regard to the invocation of research provisions in the case of public-private partnerships. While the majority of RPOs (60.3%, 179 out of n=297) did not report specific problems arising from industry collaborations (p. 1013), the remaining 39.7% indicated that it occurred very frequently (14.1%, 42 respondents) or somewhat frequently (25.6%, 76 respondents) that their researchers refrained from using protected knowledge resources because they collaborated with industry partners and felt that use permissions given in copyright law would no longer apply. Against this backdrop, the majority of RPOs expressed a preference for clarifying in the EU acquis that copyright exceptions for research cover not only non-commercial research but also research conducted in the framework of public-private partnerships (p. 1017).[13]

Turning to academic publishers, it becomes clear that the views of rightsholders and the research community differ considerably. In the group of commercial publishers, 75.7% would not at all support the introduction of an open-ended umbrella clause that permits scientific research use (p. 1126). 10.8% would rather reject it. With regard to the more specific issue of paywalls and electronic fences, the survey results revealed notable opposition from academic publishers. Particularly, commercial publishers (78.9%, 30 respondents) expressed serious concerns about modifying the current approach that lets technological protection measures prevail over the research exception in Article 5(3)(a) ISD (p. 1127).[14] Finally, the survey showed that publishers are predominantly against a departure from the traditional non-commercial use requirement. The

opposition was particularly strong among commercial publishers – with 74.4% (29 respondents) strongly opposing, or generally rejecting, a more flexible approach (p. 1126).[15]

Contours of a reform agenda

These results show that a careful balancing of interests is necessary. Ideally, amendments of existing research rules offer stronger support for scientific research while safeguarding the legitimate interests of academic publishers. A balanced approach[16] could:

- clarify that the requirement of use as an "illustration" in Article 5(3)(a) ISD and Article 9(b) DBD only concerns the teaching branch of the use privilege and does not relate to scientific research;
- abandon the outdated requirement of use for a "non-commercial purpose" and, instead, follow an approach that offers room for public-private partnerships,[17] such as the approach taken in Article 3(1) CDSMD;
- recalibrate lawful access criteria. Instead of requiring access permissions of each individual research institution participating in a transnational research project in the internal market, it could be deemed sufficient that one participating consortium partner has a subscription[18] or can rely on a national copyright exception;[19]
- clarify that, regardless of the volume of use, scientific research constitutes a "special case" in the sense of the three-step test of Article 5(5) ISD because of the fundamental rights underpinning following from Articles 11(1) and 13 of the EU Charter of Fundamental Rights;[20]

- declare the fourth subparagraph of Article 6(4) ISD inapplicable to use for the purposes of scientific research, as already done in Article 7(2) CDSMD, and grant researchers the right to circumvent technological protection measures in case rightsholders fail to ensure that the use privilege for scientific research remains effective when technological protection measures are applied;[21]
- declare any contractual provision contrary to use privileges for scientific research unenforceable, as already stated in Article 7(1) CDSMD.

In contrast to the current, optional research exceptions in Article 5(3)(a) ISD and 9(b) DBD, a more robust exemption with these conceptual contours should constitute a mandatory "shall" provision to ensure a harmonised application across the internal market and comparable conditions for research teams in all Member States.[22]

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Giulia Dore

Beyond Copyright

The Secondary Publication Right as a Shield for Fundamental Rights

The digital era has profoundly reshaped scholarly communication, presenting both unprecedented opportunities and significant legal challenges. While technology allows for the widest public engagement, the dissemination of knowledge often remains limited or in the hands of a few private entities. In most cases, researchers who lack contractual retention of their rights will sign contracts that transfer all their rights to the publisher. From that point, they lose control over their work unless they find ways to regain these rights. One way to do this is through the Secondary Publication Right (SPR), which is the author's right to republish in OA and communicate to the public their scientific works, typically of publicly funded research, previously published in a non-OA venue.[1] As such, SPR becomes a vital mechanism for restoring the authors' autonomy, directly addressing the tension[2] between the growing global praise for open access (OA) and the endurance of traditional publishing's models.[3] OA is seen as a terrific opportunity for researchers to spread knowledge at unprecedented speed and increase society's wider participation in cultural life.[4] In contrast, traditional publishing models, with their rigid market dynamics, are aimed at rewarding rightsholders but feature visible contractual asymmetries that put researchers' freedoms at stake, an imbalance that the SPR aims to redress.

Contractual vs legislative strategies to hold the author's rights

SPR facilitates greater availability of research that is supported through public funds. Crucially, it also empowers scientific authors to regain their autonomy and academic freedom, thus

enabling the public to benefit from the knowledge they contributed to advance. Indeed, as one may contend, SPR is not the sole means in the hands of the author. Another strategy for achieving OA via the Green route (author's self-archiving) is a contractual one. This involves authors retaining their rights through publishing agreements or amendments, a key part of initiatives like Plan S, the OA publishing initiative supported by the international consortium cOAlition S, which mandates that publicly funded scientific publications be published in OA-compliant journals or platforms. However, this approach is limited by the author's typically weak bargaining power and the close link between publishing and academic career progression. Contractual agreements are therefore insufficient to correct this power imbalance. Also, publishers often strongly oppose it, fearing a significant disruption to their business models. Additionally, the bargaining imbalance is further intensified by the pressure to publish in specific outlets driven by research evaluation metrics.[5]

Some concerns about SPR in action

Furthermore, arguments in support of SPR may face at least two main objections, especially from publishers. First, some could allege that SPR undermines copyright and traditional academic publishing. Second, some could deny that SPR is a matter for constitutional law, but rather of contract law. However, both objections are elusive. The former misunderstands SPR, which does not eradicate copyright, but it creates a non-waivable, legal right for authors to self-archive their work. Publishers remain the initial publisher of record and a key player for quality control and peer review. SPR, therefore, is not inconsistent with

the structure and logic of the publishing industry, just as OA and toll access can coexist.[6] Concerning the latter objection, while a copyright transfer is a contractual act, the underlying rights at stake are constitutional. When a publicly funded institution or researcher signs a copyright transfer agreement that curtails academic freedom or the public's right to information, that raises strong constitutional concerns. The secondary publication right thus requires a legislative intervention that cements essentially constitutional rights to ensure that contractual arrangements cannot be used to undermine fundamental rights and interests.

The promise of SPR across Europe: How Germany led the way

The SPR is one of the promising legal measures to strike a fair balance in scientific research, allowing researchers to regain their freedoms and rebalancing the bargaining powers in the publishing industry. Several European countries have already pursued this approach.[7] In 2013, Germany was the first country to do so, granting authors of publicly funded research the non-waivable right to make their accepted manuscripts available twelve months after initial publication for non-commercial purposes.[8] It also posed very stringent requisites, such as a minimum percentage of public funding, certain types of versions only, applicable embargos, and non-commercial purposes precincts, granting authors of publicly funded research the non-waivable right to make their accepted manuscripts publicly available twelve months after initial publication for non-commercial purposes. The German model later influenced other countries, which adopted it with both similarities and variations: The Netherlands (2015) applied the right to

all short scientific publications, even if only partially publicly funded;[9] Austria (2015) imposed further limitations regarding the author's status;[10] France (2016) emphasised the primacy of public interest over private contracts;[11] Belgium (2018) highlighted the retroactive application to prevent the right from being undermined by past or future agreements;[12] Bulgaria's (2023) legislation chose not to require any embargo period;[13] and Slovenia's (2025) took a bold step by resolving to apply the SPR to all research results, also without an embargo.[14]

Scholarly communication and fundamental rights at stake

The debate about SPR, and more broadly OA, has often been confined to discussions on copyright law and academic policy. However, as scholarly and political discourse increasingly reveals, it goes beyond theoretical concerns. Whereas research is funded publicly, for example by university personnel, or through public research funds involving private companies, the resulting knowledge may be often locked behind paywalls, accessible only to those with institutional subscriptions or the means to pay. This creates a *de facto* knowledge monopoly, controlled by a handful of for-profit entities, which elevates the issue from a matter of intellectual property to one of public interest. It is no longer merely a matter of intellectual property or educational procedures, but a constitutional concern involving fundamental rights that ought to be protected against the encroachment of pure commercial interests. As such, the emerging legal principle of SPR is not even just a policy tool for OA or a technical fix for a flawed publishing model. It is rather a crucial legislative measure to reassert academic freedom, freedom of expression, and the public's right to information. This is a perspective that

is now being debated at the highest levels of European governance.[15]

A call for reform: The EU's challenge to balancing rights

Above all, the current publishing setting undermines the efforts to create a favourable and balanced environment for scientific research in the EU, which implies addressing the obstacles and challenges to access and reusability of publicly funded research. To tackle the distortions of the current ecosystem of scientific communication, especially within the framework of the European Research Area strategy,[16] there have been growing calls in academic circles for legislative reform[17] to make the framework "fit for research" that is based on a fundamental rights approach.[18] The debate mostly focuses on striking a delicate balance among different fundamental rights, all equally protected by the Charter of Fundamental Rights of the European Union. These include the right to property (Art. 17.2), the freedom of expression and information (Art. 11.1), and the freedom of the arts and science (Art. 13).

The right next step: Introducing an EU-wide SPR

Existing national legislative actions have been a fair response to the legal barriers and structural deficiencies of the system. They represent a deliberate effort by Member States to recalibrate the balance between private property rights and the public good. Nevertheless, variation among Member States creates legal uncertainty and challenges to invoking SPR for OA across borders. To align more closely with OA goals, an EU-wide SPR provision is utterly needed, possibly with the fewest restrictions

(e.g., in terms of type and version of work, embargo period and manner of use). As demanded by many, harmonisation can help to overcome national differences.[19] It is a huge opportunity to strengthen the impact of EU research, especially increasing researchers' awareness and easing cross-border collaboration.

The constitutional upholding of SPR legislation

Even more, the legislative SPR models emerging across Europe are not just policy choices; they are constitutional affirmations. Their mandatory, non-waivable, and, in some cases, retroactive nature underscores that private contracts cannot override fundamental rights. They also provide a robust example of a state actively intervening to restore a constitutional balance that has been lost. National SPR models reassert the state's role in protecting fundamental rights against private encroachment. In this vein, the potentials of an EU-wide SPR as a firm and binding solution to shield the author's and the public's freedoms are countless. It can strengthen the principle that, while publishers have a legitimate commercial interest, this should not outweigh others' fundamental rights. SPR ensures scholars can fulfil their academic duty to disseminate knowledge for the public good without unwarranted commercial interference. On the contrary, when publicly funded research is hidden behind paywalls, it undermines the public's right to information, which is essential for any informed and democratic society, especially since the public has already paid for it.

A final note on the power of SPR to restore the balance

The current state of scientific publishing is at odds with the original intent of copyright law. The resulting power imbalance is not a simple market outcome; it's a direct challenge to the constitutional imperative to protect academic freedom and ensure public access to knowledge. In this context, SPR emerges as a crucial counterforce to the commodification of knowledge and a key mechanism for achieving the alignment of European research with the principles of open science, ensuring that the findings of publicly funded research are made available for the benefit of all. By granting scientific authors a non-waivable right to republish their work, the law can strengthen the authors' ability to disseminate their work, becoming a formidable shield for academic freedom. Likewise, by reinforcing the public's right to access this knowledge and, as a result, establishing a new virtuous cycle for scholarly communication.

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Katharina de la Durantaye

Unlocking Potential

Why and How We Should Revise Copyright Exceptions for Educational Purposes in the EU

EU copyright law's teaching exceptions do not deserve a perfect grade. The law unduly privileges classical teaching practices by traditional educational institutions over more informal ways of teaching, it grants too much power to publishers, and it allows for differences in transposition which hinder cross-border teaching projects and negatively impact the common market. Each of these elements should change. In the following, I will explain why – and how.

For a long time, EU copyright law allowed but did not require Member States to provide for a teaching exception to the reproduction right and the right of communication to the public (Art. 5(3) (a) InfoSoc Directive, Directive 2001/29/EC). Virtually all Member States enacted such an exception, but the content and scope of the provisions varied.[1] In order to raise the level of harmonisation and legal certainty, the EU decided to tighten the grip. In 2019, it obliged Member States to allow the use of works in digital and cross-border teaching activities (Art. 5 CDSM Directive, Directive (EU) 2019/790). When the COVID-19 pandemic hit the continent, most Member States were still in the process of transposing the CDSM Directive into national law.[2]

In the following months, with schools, universities, libraries and bookstores closed, digital teaching was all that was left. The pandemic brought about fundamental and lasting changes in the way we teach and learn, and it forced us to make massive use of digital tools which had long been at our disposal but to which only few had given any real attention. When using these tools, many of us realised both their potential and their limitations: A combination of analogue and digital teaching elements is king. Nowadays, most classrooms are hybrid.

The pandemic did not only force us to reconsider our teaching practices. It also allowed us to test the adequacy of Art. 5 CDSM Directive on a scale which the EU legislator had not envisioned. The verdict is: there is room for improvement.

Broaden the scope of permitted teaching activities

According to Art. 5(1) (a) CDSM Directive, teaching activities must be conducted "under the responsibility of an educational establishment", and "on its premises or at other venues, or through a secure electronic environment accessible only by the educational establishment's pupils or students and teaching staff". As the pandemic has shown, both requirements lead to an undue limitation of the scope of the exception.

Focus on the activity, not the institution

The CDSM Directive does not define the term "educational establishment" (cf. Art. 2). Recitals 20 and 22 indicate that the term is to be understood broadly. The establishment's organisational structure and its means of funding should not be decisive; exams and activities taking place in cultural heritage institutions should be covered as well. And yet, the term is to include only "educational establishments recognised by a Member State" (Recital 20 s. 2): Teaching activities conducted either by establishments whose primary focus is not teaching, such as NGOs, or by people who provide educational services privately, are not included,[3] no matter whether they operate *pro bono* or not. Even non-commercial educational activities that (public) schoolteachers conduct outside of their day job do not fall within the scope of Art. 5 CDSM Directive – despite the fact that those teaching activities do not necessarily hold lesser social

value than those conducted in formal educational settings. In fact, they might engage audiences for whom conventional educational institutes are less accessible, and might be innovative, both in terms of the content they cover and in their use of technology. As long as these informal activities are non-commercial in nature, they do not pose a greater threat to the interests of rightsholders than teaching activities by (big) institutional actors.

The drafters of the InfoSoc Directive might have been aware of that fact. Art. 5(3) (a) InfoSoc Directive does not require that (offline) teaching be conducted in affiliation with an educational establishment. As such, the CDSM Directive provides for stricter requirements than its older sister. Educators who work outside classical institutions as well as non-educational entities which operate in countries with liberal transpositions of Art. 5(3) (a) InfoSoc Directive, thus have more room to manoeuvre if they teach offline than they do if they opt for online activities. Those differences are not warranted, and they could hamper blended teaching activities. To change this state of affairs, the EU could turn the nature of the educational activity into the sole decisive factor: non-commercial teaching activities should be privileged.

Allow for open classrooms

Over the past two decades, classrooms have become bigger and more amorphous. With the help of digital technologies, educators have been able to assemble people from around the world in one virtual classroom. Pioneers of such Massive Open Online Courses (MOOCs) are Harvard and MIT with their online learning platform edX. edX is used by over 86 million people worldwide (while Harvard has an enrolment of roughly 20,000 degree

candidates, and a little over 360,000 alumni). Many of Harvard's courses on edX are available free of charge. Such courses allow people who don't have the means or the resources to attend the likes of Harvard to broaden their knowledge and mindset and are especially valuable in times of growing disinformation and increasing scepticism towards scientific knowledge.

And yet, in the EU, teachers of MOOCs may not use copyrighted material without permission – except for quotations complying with Art. 5(3) (d) InfoSoc Directive. Depending on the interpretation of Art. 5(1) (a) CDSM Directive, this might be true even for providers of MOOCs connected to an educational establishment. By definition (*open* online course), a MOOC does not provide "a secure electronic environment accessible only by the educational establishment's pupils or students and teaching staff", unless the term "student" is to be understood as a person who studies the contents of the course in question. When the Commission started its work on what would become the CDSM Directive, it explicitly decided that MOOCs should not profit from the teaching exception. Nine years later, this decision against the broad diffusion of knowledge seems wrong. The Commission was worried that "users would be allowed to copy protected content and make it widely available online through education blogs or websites"[4]. That, however, is no reason to categorically exclude large, open educational projects from the scope of Art. 5 CDSM Directive. The Commission's worries can be addressed by limiting the privilege to courses which require authentication by participants before they are granted access to copyrighted material (cf. Recital 22 s. 3). One should be mindful that the restrictions on the scope of allowed uses (Recital 21 s. 3, 4), and/or the requirement that the use be compensated (Recital 24) work as additional safeguards for rightsholders.

Tighten the scope of licence carve-outs

Art. 5(2) CDSM Directive allows Member States to decide whether works may only be used, or only be used for certain purposes, if rightsholders do not offer suitable licences tailored to the needs of educational establishments. If Member States make use of that option, they have to ensure that the licences are "available and visible in an appropriate manner for educational establishments". The EU wanted to strike a balance: allowing Member States to maintain existing licence arrangements (Recital 23 subpara. 1 s. 5) designed to incentivise the creation of high-quality educational resources without putting too high a burden on educational establishments; the carve-out for licences should "not hamper the effective application of the exception or limitation or cross-border uses" (Recital 23 subpara. 1 s. 3).

While the intention might be laudable, the EU has, in practice, given too much leeway to Member States. According to Art. 5(2) CDSM Directive, Member States may allow licences for educational resources and sheet music to take preference over their teaching exception or limitation. However, the carve-out does not have to be limited to these areas. Thus, Member States can bow to pressure from publishers and provide that a licence offer is given preference over a national exception or limitation even if it is not restricted to educational materials but covers mainly other content as well. Those broad licence carve-outs are not warranted; the market for content not primarily intended for educational purposes does not suffer if parts of such content are used for teaching purposes.

Educational establishments, meanwhile, are burdened with finding possible licence offers and negotiating individually.[5] The EU does not give Member States too much guidance as to the conditions that must be fulfilled in order for a licence to be "suitable", "available" and "visible". It encourages Member States to base licensing schemes on collective or extended collective licensing (Recital 23 subpara. 2 s. 4) but does not require them to do so. Consequently, the scope of licence carve-outs and the requirements that licences must fulfil in order to gain preference over the limitation or exception vary significantly between the various Member States.[6]

Raise the level of harmonisation

The EU has given too broad a margin of appreciation to the Member States, thereby creating stumbling blocks for those cross-border teaching activities that Art. 5 CDSM Directive is designed to foster. The varying size of the licensing carve-out is but one example. Member States may specify, for different types of works, how big a portion of a work may be used; in most cases, only the use of "parts" or "excerpts" will be justified (Recital 21 s. 3, 4). Different Member States have understood these terms differently and have found different ways of transposing them into their national laws. The same is true for the option that uses should only be allowed if rightsholders are granted fair compensation (Recital 24). Accommodating national traditions by granting Member States various options for limiting the scope of an exception may have the unintended consequence that Member States introduce new limiting requirements in addition to the ones that were already in place – with the strange effect that since the transposition of the

CDSM Directive, educators must navigate stricter requirements than when Art. 5(3) (a) InfoSoc Directive was the only law of the land.[7]

The country-of-origin rule, which Member States must provide for (Art. 5(3) CDSM Directive), mitigates some of these negative effects. And yet, differences abound, and these differences can hamper those teaching projects which are jointly conducted by teaching establishments from different member states or by teachers who move between Member States, thereby impacting the single market. In addition, they can impede the diffusion of knowledge which creates tension with Art. 14 CFR and might produce serious social costs.

The teaching exception, then, is but one more area of EU copyright law that calls for a more forceful approach: We need a European Copyright Act – a regulation, not a directive – infused with the realisation that copyright law forms the master switch for the way we teach and learn and thus for Europe as a democratic knowledge society.

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Thomas Margoni

Thou Shalt Not E-Lend

How a CJEU Decision Caused a Legal, Technological and Market Gridlock

In Europe, public libraries need to obtain permission, or pay compensation, for the act of lending books to the public. It is not sufficient for a library to buy a copy of a book from a bookshop or from a publisher's website. This is the case in many countries around the world, most notably the US, but not in the EU.

This state of affairs dates back to the 1992 (codified in 2006) Rental and Lending Directive (RLD, Directive 2006/115/EC), whereby authors acquired a new and transferable legal entitlement, a right to authorise or prohibit the act of public lending. Libraries interested in public lending must now – i.e., after the entry into force of the Directive where a similar right did not already exist under domestic law[1] – acquire permission from authors, or more frequently, as the AG in the *VOB* Opinion pointed out at 34,[2] rightsholders.

Crucially, however, the 1992 EU legislator, aware of the fundamental role of public libraries for cultural and educational policies, foresaw the possibility for Member States to derogate from the exclusive right to public lending "provided that at least *authors* obtain a remuneration for such lending" (Art. 6.1 RLD, emphasis added). This is a very important provision, as it not only empowers libraries to support national cultural policies, but also creates a direct stream of revenue for authors.

In other words, the act of lending by public libraries, an act with recognised fundamental public value[3] for large shares of the population became an activity under the control of the relevant rightsholder,[4] unless national legislators, acknowledging the importance of libraries' agency and autonomy, derogate to such an exclusive right and create a national remuneration scheme benefitting at least authors, or exempt certain categories of libraries entirely (as allowed by Art. 6.3 RLD).

Public lending, commerce, and culture

The RLD defines public lending as "the making available for use of a work for a limited period of time, *not for direct or indirect commercial advantage* through public accessible establishments" (emphasis added). The nearly equivalent commercial version of this activity (i.e., rental) is also regulated by the same directive but receives a rather diverse treatment precisely because of the fundamental difference in scope: non-commercial and usually in the public interest by publicly accessible establishments the former, commercial the latter.

It is only within the special case of public lending that it is possible for Member States to move from an exclusive to a remuneration right. This derogation does not only have important monetary repercussions (e.g., who decides how much to pay). A remuneration right allows public libraries to decide how to best pursue their own cultural, educational and learning objectives. Remuneration schemes mean that libraries do not need to seek "permission" or negotiate a licence. They just buy the books that they want and lend them. Thereafter, authors are compensated via the relevant national remuneration scheme. But it is the library who performs decisions directly affecting its public institutional mandate. It is not someone else (an author, a right holder, or more frequently a publishing platform) who decides whether, when, for how much, or how many times libraries can lend books to their patrons.[5]

This general scheme, and its national implementations, worked relatively well to this point and struck a balance between the fundamental function of libraries in promoting culture and education on the one hand with the policy objective

to offer a high level of protection to authors, usually via remuneration, on the other. At least when it comes to physical books.

From lending to e-lending

The RLD was enacted more than 30 years ago. During this time technology has advanced significantly. Regarding the specific case of books, technological advancement has contributed to a shift in the way in which the knowledge therein contained is conveyed. The information that was traditionally printed on the paper of pages is increasingly transmitted via their digital equivalent: eBooks.

As it often happens with the advent of new technologies, the question is whether the "old" law still applies. In other words, can the lending of digital copies, i.e., e-lending, be performed on the same legal basis as traditional lending? This is an important question because it implies that Art. 6 RLD, which offers Member States the possibility to move from an exclusive right (authorisation first) to a remuneration right (pay later) directly benefitting authors, also finds applicability.

For many years the answer to this question wasn't completely clear, but the majority opinion was negative: E-lending is not a form of lending[6] but rather a form of communication to the public, a different exclusive right in the field of copyright.[7] This means that the communication to the public taking place when performing the act of e-lending must be authorised separately by the rightsholders, absent a specific exemption equivalent to that of Art. 6.1 RLD, an exemption that is absent in the EU copyright acquis.

Accordingly, e-lending in the EU has been operating on the basis of licensing e-books from publishers or e-lending plat-

forms.[8] This is a crucial passage: If e-lending, legally speaking, is not a form of lending, it also cannot benefit from the derogation contained in Art. 6 RLD which has the double function of empowering libraries and directly remunerating authors.

Understanding technology

Digital technologies are powerful instruments. They may allow the spreading of the knowledge contained in one book to as many readers as one can think of, thereby removing previously insurmountable physical barriers. Think of the one-to-one limitation of traditional book lending: One physical book can be lent only to one user at a time. But a digital copy can be sent to as many users as necessary. Several examples could show how market practices that relied on physical constraints are subverted by new technologies. However, the economic impact of these new possibilities should not be underestimated: If one single book can lead to hundreds of digital copies the demand for physical copies of that book may decrease and so would revenues for rightsholders.

Seen from the supply side, digital technologies also promise immense advantages. They afford much more granularity to the mechanisms regulating the exploitation of products. For instance, by employing specific access and control technologies (APIs, DRM, TPMs), it is possible to regulate (digital) uses in ways simply not feasible or practical with physical counterparts. Digital lending permits control over how long the lending can last, how many times a single copy can be lent, and also how many times a copy can be read and by whom. Not that certain acts were not possible before: As any library user has experienced once or twice in their life, the maximum duration of lend-

ing is not too difficult to surpass, and there is an enforcement mechanism (e.g., fines) attached to that. But holding a physical copy allows its user to read it, even if exceeding the set maximum number of days.

With digital technologies this is brought to an entirely new level: If you exceed the maximum number of days, the digital copy may simply vanish. This much more pervasive form of control takes place in various moments or phases of the exploitation of books, not only in relation to duration.[9] A digital copy could suddenly become inaccessible because of how many users have opened that copy, or how many times that copy was read, or on how many devices. And of course, readership and attention data (what titles are read the most, how long does it take to read them, how much time do you spend on each page, or where do you take a pause) become very valuable commercially.

However, as seen above, public lending is a non-commercial cultural activity in the public interest. Subjecting it to pure market logic implies – despite evident privacy concerns – the application of the same rule to two very different situations. These fundamental differences in nature, function, and scope with commercial acts (e.g., rental) are the very same reasons that justified the derogation contained in Art. 6 RLD for physical lending. Why should it not apply to digital lending as well?

This question was answered in the seminal 2016 *VOB* case (*Vereniging Openbare Bibliotheken v. Stichting Leenrecht*[10]). In this decision the CJEU stated that the RLD applies also to e-lending when performed following certain conditions.[11] When lending is performed by publicly accessible libraries, for a limited period of time, in a way that is functionally equivalent

to physical lending, particularly when digital copies are lent on the basis of the "one-copy-one-user" principle, the RLD applies.

The Court, however, specified another condition, one that is particularly relevant. In light of previous case law such as *ACI Adams*[12] (private copy exception), the Court established that e-lending can only take place when the public library employs a lawful source. While apparently a common-sense provision well integrated in the EU acquis, the issue of lawful source has proved highly problematic to the point of essentially nullifying the ruling in *VOB*, i.e., the possibility for public libraries to rely on the RLD.

Where can libraries obtain lawful sources of books?

A first logical option is obviously digitising their vast physical collections. But it is far from clear that this would be a legal source. The digitisation of physical copies in copyright parlance corresponds to the exclusive right of reproduction and therefore must be authorised by rightsholders (contract) or the law (exceptions). Whereas the law allows libraries to digitise works in certain cases, this is usually for a very limited scope (preservation, for example, or use on local dedicated terminals). This means that libraries most likely cannot make digital copies of their collections for the purpose of e-lending.[13]

It is important to note that in a different case the CJEU partially opened the door to the possibility of Member States implementing certain exceptions in a way that, applied to the present case, could be used to justify the digitisation of libraries' collections as a proper lawful source for the purpose of e-lending.[14] That said, however, not only the notorious risk aversion of libraries, but also the fact that no Member State has

yet acted in this direction – that is, has construed a national copyright exception in a way that links digitisation done on the basis of, for example, Art. 5.3. (n) InfoSoc Directive (ISD, Directive 2001/29/EC) to the act of e-lending as interpreted by the CJEU in *VOB* – has constrained this option mainly to the area of academic speculation.

Accordingly, the only other way to have a lawful digital version of a book (an eBook) is to buy it from the publisher or publishing platform.[15] Except that publishers do not sell eBooks, they license them.[16] This means that the only *actual* option for libraries to have a "lawful digital copy" is to license it from rightsholders who, quite logically for a private actor institutionally mandated to seek profit, employ the same business models described above. Paradoxically, this is precisely the situation that the court in *VOB* – and the legislator in the RLD – wanted to avoid.

Solving the issue of e-lending

The CJEU in the *VOB* case has offered ample support for the need to include e-lending in the scope of the RLD. This interpretation not only recognises the public interest of society at large in accessing knowledge necessary for cultural, technological and economic development, but also supports authors who, thanks to the derogation of Art. 6 RLD, are entitled to specific remuneration. As the AG in *VOB* pointed out, excluding eBooks from the RLD has really only one beneficiary: digital publishing platforms.

However, the Court missed the techno-regulatory turn in this story. Requiring a lawful source in a market dominated by a handful of digital platforms and subjecting such a requirement

to the initial consent of rightsholders is tantamount to a surreptitious yet sweeping refutation of the preceding line of argumentation in what can only be categorised as a (techno-regulatory) logical fallacy.

The fallacy can be solved. Chiefly, by clarifying on the legislative or interpretative levels (EU and/or national) that within the meaning of public (e-)lending the digitisation of physical copies held by libraries represents a form of lawful source. This will allow libraries to leverage their impressive and already lawfully acquired physical collections, while maintaining the one-copy-one-user rule. Additionally, it would be of equal fundamental importance to intervene in areas that bridge copyright law with contract, competition, and consumer law. This approach would be functional to the reestablishment of a degree of fairness in copyright contracts between big digital platforms and libraries. These interventions should include Fair, Reasonable and Non-Discriminatory (FRAND) provisions, pricing transparency, protections against contractual and digital override, and a limitation of anticompetitive acts such as bundling, refusal to license, and other abusive practices.

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Christophe Geiger, Bernd Justin Jütte

Synallagmatic Copyright

Or Why Copyright Law Must Provide for Concrete Obligations to Enable the Exercise of Access Rights

The world's first copyright act, the 1710 Statute of Anne, was "[a]n act for the encouragement of learning". The US Constitution of 1787 empowers the US legislator to "promote the Progress of Science and useful Arts" by granting time-limited exclusive rights for writing and inventions. In France, one of the first two copyright decrees of 1793 was elaborated by the Committee of Public Instruction, recalling the close link between copyright and the dissemination of knowledge that existed from its outset when copyright emerged in the 18th century.[1] At the international level, Article 27 of the Universal Declaration of Human Rights of 1948 first provides for 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" before pronouncing in the second paragraph of said provision 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". Copyright, which provides the exclusive rights that allow authors to control the use of their works, is based on a societal bargain – a social contract – that grants rights in exchange for purpose-bound access to the works protected.[2] In the EU (as elsewhere), this contract has become imbalanced. On the substantive level, the EU copyright acquis has granted ever stronger rights to rightsholders while users of protected works (including creators of new works such as researchers) must rely on weak and vague exceptions. But also at the enforcement level, rightsholders retain the upper hand. Copyright, in order to honour its social contract, must empower users and follow-on creators to enforce the limited rights they have by providing them with efficient enforcement tools. Moreover, with persistent substantive imbalances reflected in the law, rightsholders must incur positive

obligations to enable access for purposes that reflect copyright's underlying social contract, most notably for research and education.

Exceptions are not only "exceptions" to a rule, but user rights

Copyright exceptions are key to fulfilling copyright's mission and securing the fundamental rights of users and tomorrow's creators who need access to protected works to create new ones.[3] The very purpose of copyright, to generate creative and informative works, is indeed expressed through limitations and exceptions to exclusive rights. At the EU level, the Court of Justice of the European Union (CJEU) has gradually moved away from an exceptionalist understanding of the user's side of the social bargain towards a rights-based understanding of copyright as an enabling mechanism. In its early case-law[4] on the interpretation of copyright exceptions, the CJEU still followed a rights-vs-exceptions dogma, interpreting rights broadly and exceptions strictly, a differentiation suggested by Recital 4 of the Directive on Copyright and Related Rights in the Information Society (InfoSoc Directive, Directive 2001/29/EC). In subsequent rulings, however, the Court added that in order to ensure the effectiveness of exceptions,[5] they must be interpreted in light of fundamental rights.[6] Eventually, the CJEU recognised exceptions as users' rights.[7] In the context of online uses on social media platforms, Article 17(7) of the Directive on Copyright and Related Rights in the Digital Single Market (CDSM Directive, Directive (EU) 2019/790) clearly states that users enjoy a "right to the exempted use", which Member States need

to secure and provide redress mechanisms as a guarantee. While rhetorically the Court and the legislature seem to have considerably strengthened the position of exceptions vis-à-vis exclusive rights, the practical tools to enforce these user rights, however, still remain unclear to this day, as we will see. Their substantive scope also remains unsatisfactory, in particular for educational and research practices, and it remains very unclear how to secure the needed flexibility of the copyright system to adapt to technological advances.[8]

Imbalanced enforcement tools

The substantive discrepancies between rights and exceptions are further exacerbated by missing enforcement mechanisms for users who want to exercise exceptions and, more broadly, require access to protected works for purposes relating to research and education. Here, copyright's imbalance stands out most strongly, and the social contract breaks down. Whereas rightsholders can utilise effective enforcement tools, such as injunctions, to block and remove content online, and can further rely on the support of intermediaries to enforce their exclusive rights, users lack tools to give effect to their own rights. This enforcement contrast appears particularly problematic in relation to "ordinary" media, such as audiovisual entertainment material, whose online enforcement regime has already raised significant concerns as to its compatibility with fundamental rights.[9] To remove (potentially) infringing content, rightsholders benefit from concrete obligations incurred by intermediaries: For copyright, the CDSM Directive provides for such obligations vertically, and the Digital Services Act (Regulation (EU) 2022/2065) horizontally. Both enforcement frame-

works oblige certain online platforms to remove content from their services, either pursuant to a notice or even as a self-standing obligation to exercise best efforts to avoid the upload of (possibly) unlawful user uploads.

Users do not possess such an arsenal of enforcement tools, and certainly not a horizontally applicable set of tools that can be used to ensure their rights. While users do enjoy (on certain online platforms) specific safeguards against the removal of their uploads, and the CJEU has pointed out the importance of these safeguards to ensure the balance within copyright law and the compatibility of EU copyright law with the fundamental right to free expression,[10] these safeguards are, in practice, either still lacking or rather ineffective.[11]

Moreover, rightsholders can increase the scope of protection for their works through private ordering through terms and conditions and employ technological protection measures that can even make lawful use more difficult to exercise.[12] Granted, the EU legislator has anticipated certain frictions with the lawful use of protected works and has, thus, foreseen prohibitions on contractual overrides in relation to a few selected recently introduced exceptions, and also obliged Member States (not rightsholders) to provide systems that make works protected by digital locks accessible. Again, the implementation of these obligations remains insufficient.[13]

Countering control over access models: the missing pieces of the synallagma

The design of access models is currently the most efficient means of control rightsholders can exercise, leaving users with-

out any effective remedies. Indeed, the decision, if and how to provide lawful access to protected works lies with rightsholders: Exclusive rights allow them to control under which conditions users can access these works and thereby also how they can use the content. For example, rightsholders can decide to sell a book only in analogue form and provide access to an e-book version subject to a licence. Instead of individual licences, certain titles are made available to libraries only as part of larger subscription packages, which increases the price for obtaining access but also prevents libraries and other cultural heritage institutions from building permanent digital collections.

This immense level of control, paired with technological and contractual restrictions over access to information, requires counterweights in the form of obligations that rightsholders incur as part of the social contract underlying copyright law. As a result, at least the exercise of certain exceptions that are essential for teaching and research activities – for example, those expressly mentioned in Article 6(4) InfoSoc Directive and those shielded from contractual override under Article 7(1) and Article 17(7) CDSM Directive – must be supported by positive access obligations, or a right to access. For this specific use, which reflects the object and purpose of copyright and is essential for the exercise of fundamental rights, obstructive and restrictive access models must be countered with a right to access that is safeguarded by positive obligations. In other words, rightsholders must ensure and guarantee access to protected works under certain conditions if access to and use of these works is essential for education and research. The "essentiality" criterion cannot, however, be understood in a strict competition law sense as referring to (indispensable) essential facilities that objectively constitute an absolute condition for

market access.[14] Whether a knowledge resource is essential must be assessed by the user, i.e., a teacher, researcher, or a knowledge institution. In this spirit, a presumption of a right to access must work in favour of certain, institutionally-bound actors, such as educators and researchers.[15] Positive human and fundamental rights of access to information, including the right to research, speak strongly in favour of such obligations.[16]

Realising the social contract

A contract, even an implied one reflecting ordinary law, must make both parties satisfied. A significant imbalance in the distribution of rights and obligations creates dissatisfaction, disillusion, and eventually makes at least one party lose faith in the set of obligations created by said contract. Translated into the social contract that underlies copyright law, this means that apparent imbalances make users doubt the legitimacy of copyright as a normative framework. This is a phenomenon that can currently be witnessed in relation to the spread of large-language models which have the capacity to generate outputs capable of displacing human works, and thereby threaten the sustainability of creative value chains.[17] To regain trust, exceptions must be better formulated to reflect the object and purpose of copyright, which have been discussed elsewhere in this edited volume.[18] In addition, the misshapen "rights" that users enjoy require strong and effective enforcement mechanisms that are at least as effective as the mechanisms rightsholders can rely on to enforce their exclusive rights. User rights must be supplemented by positive obligations to guarantee access on fair and reasonable terms (comparable to the FRAND conditions under patent law) to protected works.

Article 17 of the CDSM Directive was introduced to close the value gap – the discrepancy between the volume of online uses of protected works and the economic benefits derived by rightsholders – by imposing obligations on certain online platforms to help rightsholders to ensure fair participation in the exploitation of their works online. For this purpose, it even imposes on platforms an obligation to negotiate in good faith with rightsholders.[19] New rules and mechanisms are now needed, including positive obligations for rightsholders, to close the knowledge gap. Such obligations must also be introduced to promote access to knowledge: In short, when it comes to research and education, policy makers should focus less on the value gap and more on the knowledge gap. Negotiating access requests between rightsholders and users could, for example, be embedded in an institutional framework that helps develop fair licensing solutions and keeps the additional transaction burden on rightsholders at a proportionate level.[20] More fundamentally, a reflection on how best to safeguard fundamental rights in the online world needs to be conducted. Access to knowledge is crucial for digital innovation and Europe's competitiveness, as well as for democratic participation. For this purpose, a re-examination of copyright's social bargain in light of digital constitutionalism seems to be the right way forward.[21]

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Ula Furgał

News, Information, and Knowledge

Press Publishers' Right Impact on Researchers

The EU adopted the press publishers' right in 2019 to strengthen the bargaining position of press publishers towards online intermediaries, big tech in particular. The expected licensing fees were supposed to help to sustain the European press sector, allowing publishers to continue producing quality journalistic content and to foster public debate in our democratic societies. Presented in this way, the press publishers' right is a clear ally of freedom of expression, fostering exchanges of information and knowledge.

Still, as the press publishers' right is an intellectual property right giving publishers control over information flows, by its nature it interferes with freedom of expression. Concerns about the restrictions it could impose on users sharing press content online were expressed early on during the legislative process.[1] The discussion on the potential impact of the press publishers' right on research and researchers centred on the exclusion of scientific and academic periodicals from the right's scope.[2] With the press publishers' right now part of Member States' laws, its (expanding) scope being investigated by the CJEU,[3] and negotiations between (some) press publishers and online intermediaries pending, the right's potential to interfere with information and knowledge flows is becoming more visible. Researchers, much like the general public, have an interest in being able to share, comment on and reflect upon matters of public interest brought forward by the press in online fora. As such, this contribution considers the press publishers' right's potential to curtail European researchers' activities.

The legal nature of the press publishers' right

The press publishers' right is a right related to copyright introduced by Art. 15 of the Copyright in the Digital Single Market Directive (CDSMD, Directive (EU) 2019/790). It benefits publishers of press publications in the context of online uses of their content by information society service providers (ISSPs). It is an exclusive right of a prohibitory nature, which means ISSPs wishing to use press publications in their services need to seek prior authorisation from publishers who, in turn, might refuse to give their consent. The immediate addressee of the new right was Alphabet as it was the use of links and short extracts of press publications in Google News and Google Search which motivated the EU legislator to act.[4] Press publishers argued that it is their content which makes intermediaries like Google attractive to audiences, entitling them to the payment, a share of the digital advertising revenues.

As the focus was on intermediaries, big tech reaping the lion's share of advertising revenues in particular, individual users were to be left undisturbed. Apart from specifying that the relevant online uses are those carried out by ISSPs and covered by the rights of making available and reproduction, Art. 15(1) CDSMD provides that the right "shall not apply to private or non-commercial uses of press publications by individual users", seemingly strengthening individuals' protection. The exclusion of scientific and academic periodicals from the scope of the new right, while at first included only in the recitals,[5] has found its way into the definition of the press publication in Art. 2(4) CDSMD during the legislative process. Considering both exclusions, researchers should be free to share and engage with press

publications online without seeking prior permission of the publishers or paying a licensing fee.

Not needing to obtain authorisation to share and reflect on the press publishers' content online is, however, not sufficient to safeguard researchers' access to information and knowledge if we consider where this sharing and reflecting takes place: on social media platforms.

The social media problem

Researchers and academics use social media in a variety of ways. While promotion of their own work,[6] be that in search of feedback from colleagues or in pursuit of impact, might be the most self-evident, social media also serves as a source of information and data. It allows for timely and accessible reflection on the news of the day and recent policy developments, fostering conversations (as well as disagreements) among researchers. When Twitter/X, for years the social medium of choice for academics, changed ownership and consequently its content policies, many mourned the loss of a forum it provided and moved to other platforms such as Mastodon, Bluesky, Threads, and increasingly LinkedIn, trying to recreate "academic Twitter".[7]

The fact that the regulation of online intermediaries has an indirect impact on their users is widely recognised. By imposing liabilities on intermediaries, legislators unavoidably affect the experience of users. The concerns about the restrictions of users' freedoms were at the forefront of the discussion on the new intermediary liability regime introduced by Art. 17 CDSMD since it implicitly requires intermediaries to engage in preemptive filtering of copyright content (an interpretation

confirmed by the CJEU in *Poland*[8]).[9] As already noted, the concerns over users' access to information in the context of the press publishers' right were expressed early on, but mostly with regard to bringing users' activities directly within the remit of the new right, rather than indirectly through the regulation of intermediaries such as social media.

The press publishers' right covers online uses by information society service providers, with such service defined as any service, normally provided for remuneration, at a distance, by electronic means, and at the individual request of the recipient.[10] Recital 54 of the CDSMD points to search engines and media monitoring services as examples of ISSPs covered. During the implementation of the CDSMD, Member States differed in their approaches as to whether to include social media within the press publishers' right scope, recognising that the nature of collection of content between search (on their own) and social media (from users) varies.[11] Press publishers trying to negotiate with social media for payments under Art. 15 CDSMD are usually met with opposition, with the notable exception of Meta entering into a licensing agreement with French press publishers but refusing to do so in other jurisdictions, including Italy.[12]

Meta case

Meta's objections to the Italian implementation of the press publishers' right have led to the first preliminary reference to the CJEU concerning Art. 15 CDSMD.[13] The *Meta* reference enquires about the compliance of the Italian implementation and the bargaining mechanism it introduces with Art. 15 CDSMD, the freedom of competition, and the freedom to

conduct business, both provided by the Charter.[14] While none of the questions explicitly concerns the question of whether the press publishers' right applies to social media, the issue featured prominently during the hearing and was addressed by AG Szpunar in his July 2025 opinion on the case.[15]

The arguments made by the parties during the February 2025 hearing focused on whether Facebook's activities can or cannot be considered as relevant online uses, covered by the exclusive right of making available to the public enjoyed by the publishers. The European Commission did not take a firm stand on the issue, pointing to different functions of social media, naming some as being relevant for the press publishers' right and others not. AG Szpunar on the other hand, took a definite stand, calling Facebook a "truly autonomous content provider" that actively suggests content to users. Consequently, according to AG Szpunar, it is Facebook which uses the press content, and not users who share it, thus bringing social media within the scope of the press publishers' right. Noticeably absent during the hearing and in AG Szpunar's opinion was the consideration of the exclusion of private and non-commercial uses from the scope of the press publishers' right and the difficulty of reconciling this exclusion with the inclusion of social media within the right's scope.

If brought within the scope of the press publishers' right, social media that would like to continue to allow their users to share press content would need to conclude licensing agreements with press publishers. This means that users would not be allowed to share press publications on social media unless such agreements were in place. This is hardly a situation in which private and non-commercial uses are left undisturbed, making their exclusion from the scope of the press publishers'

right meaningless. The push to include social media within the scope of the right illustrates the discrepancy between the aims of the right and its consequences: The flow of knowledge and information is not uninterrupted if it hinges on the (private) licensing agreements.

Pick-and-choose licensing

The licensing negotiations between press publishers and platforms are ongoing. With Art. 15 CDSMD providing only the legal basis for negotiations, the bargaining takes a variety of formats depending on the approach implemented by each Member State.[16] Publishers can negotiate individually, collectively, or be represented by a collective management organisation. They can also decide not to negotiate, either because they are not seeking remuneration or because they do not wish their content to be used by a particular online intermediary. An ISSP could also decide not to negotiate with press publishers and bring the use of press publications in their services to a halt.

There is no database which exhaustively indexes the licensing agreements reached between press publishers and online intermediaries. The knowledge we have on them comes from press reports and press releases and is by its nature incomplete. In the end, those are private agreements which come with no transparency obligations. Based on the limited information available, we can see that contracting follows a pick-and-choose pattern: Due to their bargaining power, online intermediaries choose with whom to negotiate and who to remunerate. Why does this matter for knowledge and information flows? Because without a licensing agreement in place, the content of a press

publisher will not be available in the online intermediary's service for researchers to share, comment on and reflect upon.

Researchers already encounter numerous paywalls when trying to read and keep up to date on current policy developments. What we could end up with is a situation where content remains available when its publishers have an established position on the market, and whose content online intermediaries cannot risk lacking from their services while the content of smaller and less established information providers becomes unavailable. In the long run, this could distort the image and the discussions we are having in online fora.

Conclusion

Press publishers' right is a provision which at first does not seem to be relevant to research and knowledge flows. It does not apply to academic and scientific publications and it offers built-in safeguards that allow individuals to share and reflect on the press content in online fora. Alas, the right is a perfect example of how a solution, which was not thought of as affecting research and academic discourses, has the potential to do so. While the right is limited in time (two years), academic discourses, especially those concerning policy developments, are time-sensitive. And it is on social media where informal discussions take place. Limiting the ability to share and discuss matters of public interest brought forward by the press in online fora does not foster academic freedom. The press publishers' right could be a cautionary tale: Taking into account the interests of researchers and academic institutions should become the norm when considering new legislative interventions, in the digital environment in particular.

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Tatiana-Eleni Synodinou, Giorgos Vrakas

Lawful Access as a Gatekeeper for TDM in the EU

An Analysis of the Scope of the Lawful Access Requirement under EU Copyright Exceptions

In today's digital research environment, knowledge is increasingly extracted not through traditional reading, but through computational methods capable of processing massive amounts of text and data. Text and Data Mining (TDM) has become indispensable across disciplines: from medicine, where mining scientific articles can reveal patterns for new drug discoveries, to the humanities, where algorithms explore centuries of literature at once.[1] Recognising this transformative potential, the EU legislator embedded mandatory TDM exceptions into its 2019 Copyright in the Digital Single Market Directive (CDSM, Directive (EU) 2019/790).

Yet, like many areas of copyright law, this enabling measure is hedged with conditions. Chief among them is the requirement that TDM can only be carried out on works to which researchers have "lawful access". At first glance, the condition may seem straightforward – surely researchers are either permitted to access content, or they are not. But the concept of lawfulness in relation to the copyright user's acts is anything but clear under EU copyright law.[2]

This lack of clarity matters. For research organisations and cultural heritage institutions, lawful access is not a technical detail but a gateway requirement: It determines the scope of what can legally be mined. If interpreted too narrowly, the exception risks being hollow, leaving academic institutions encumbered by contractual gatekeeping, legal uncertainty, and disproportionate compliance burdens. If interpreted too broadly, it risks clashing with established copyright principles.

This chapter examines the origins of the "lawfulness" condition in EU copyright law, its manifestation in the CDSM Directive's TDM framework, and the potential difficulties it creates for research institutions. Ultimately, it argues that only a more

coherent and flexible understanding of "lawfulness" can safeguard the promise of TDM for European science and innovation.

The origins of the lawfulness criterion in EU copyright law

Variations in terminology

The EU copyright acquis reveals a proliferation of terms relating to lawful use.[3] Directive 2009/24/EC on the legal protection of computer programs refers to the "lawful acquirer of a computer program". Directive 96/9/EC on the legal protection of databases speaks of the "lawful user of a database".

Meanwhile, Article 5(1) of the InfoSoc Directive (2001/29/EC) introduces the concept of "lawful use" in the context of the temporary copy exception. Recital 33 of the InfoSoc Directive defines "lawful use" as any use authorised by the rightsholder or not restricted by law. Under this reading, lawfulness should be understood as a flexible condition, tied either to the rightsholder's consent (via contract, licence, or implied authorisation) or to a statutory authorisation (an exception or limitation).

Expansion through CJEU jurisprudence

The Court of Justice of the European Union (CJEU) has gradually expanded the scope of lawfulness beyond legislative texts. In *ACI Adam* (C-435/12), the Court held that the private copying exception applies only to reproductions made from a lawful source.[4] The unlawfulness of the source – not the user's knowledge – was decisive. This reasoning was reaffirmed in *Vereniging Openbare Bibliotheken v. Stichting Leenrecht* (C-174/15), where the Court ruled that public lending exceptions cannot extend to digital copies obtained from unlawful sources.[5]

The *Copydan* case (C-463/12) further elaborated the notion of a lawful source, emphasising the rightsholder's consent as the central criterion.[6] This was arguably a restrictive interpretation compared to Recital 33 of the InfoSoc Directive, which suggested a broader scope of lawful use.

Taken together, this jurisprudence established a strong linkage between the condition of lawfulness and the legitimacy of the source or access point.

Lawful access as a criterion for TDM in the EU

Article 3 of the CDSM Directive introduces a mandatory exception allowing research organisations and cultural heritage institutions to carry out TDM, provided they have "lawful access" to the content. Yet, the Directive itself does not define lawful access. Recital 14 offers interpretative guidance, outlining three categories:

1. **Access through the rightsholder's consent** – for example, open access policies, subscriptions, or contractual arrangements with research organisations.
2. **Other lawful means** – a broad, catch-all category echoing the "not restricted by law" formula in Recital 33 of the InfoSoc Directive.
3. **Freely available online content** – a novel addition, extending lawful access to works available online without technical restrictions, seemingly on the assumption of an "objectified consent" by the rightsholder.

The concept of lawful access bears clear resemblance to earlier constructs. It shares with "lawful user" the emphasis on access based on authorisation or legal entitlement. At the same time, it evokes the "lawful source" doctrine of *ACI Adam* and *Copydan*.

However, the inclusion of freely available online content as a lawful basis marks a potential departure. Whereas the "lawful source" doctrine required affirmative rightsholder consent, the lawful access standard seems to presume authorisation when works are freely available, unless explicitly restricted.[7]

This is a conceptual evolution that reflects the CJEU's reasoning in *Svensson* (C-466/12) and *VG Bild-Kunst* (C-392/19), which recognised that making works freely available online without technical restrictions amounts to authorising access for the general public.[8]

The problems for academic and research institutions

Ambiguity of "freely available online"

For researchers, the most relevant and potentially problematic element of lawful access is the reference to freely available online content.[9] A literal reading would allow TDM of any work available online without paywalls or technological restrictions. However, this interpretation conflicts with the "lawful source" CJEU's case law. If a database of copyright-protected e-books is made freely accessible on the dark web, it is hardly a lawful source, even if no technical restrictions exist.

This tension creates uncertainty for research institutions.[10] Must they verify the provenance of all content, even if freely accessible? If so, how far must due diligence go? Without clarification, researchers risk exposure to liability if they unknowingly mine from unlawful sources.

Contractual gatekeeping

Another challenge lies in the role of contractual arrangements. Many publishers condition access through restrictive licences,

potentially excluding TDM uses. While Article 7 of the CDSM Directive renders contractual clauses contrary to Article 3 unenforceable, this safeguard applies only to this exception. Article 4 of the CDSM Directive extends the TDM exception beyond non-commercial research, covering all users including commercial actors, but introduces a significant limitation – rightsholders may expressly reserve their works from being mined by "opting out". The CDSM Directive under Recital 18 envisages such opt-outs being made in an appropriate manner, such as "machine-readable means including metadata and terms and conditions of a website or a service", and once invoked removes the possibility of relying on the TDM exception.[11] This added criterion significantly narrows the scope of lawful access in commercial contexts.

This dynamic places academic institutions in a vulnerable position.[12] They may hold expensive subscriptions but still face contractual ambiguity over their TDM rights. Smaller research organisations or those in less wealthy jurisdictions are disproportionately affected, as their bargaining power with publishers is minimal.

The user's knowledge question

CJEU jurisprudence in *ACI Adam* emphasised that lawfulness depends on the source, not the user's knowledge. While this ensures a uniform standard, it also creates practical difficulties. Researchers cannot always ascertain whether content was uploaded with rights-holder consent. Open repositories, for example, may contain infringing uploads. If mining such content is later deemed unlawful, the institution could be at risk despite acting in good faith.

TDM in the context of AI

The tension has become even more acute in the context of AI training datasets. The Second General-Purpose AI Code of Practice requires that providers of generative AI models respect copyright, making "reasonable and proportionate efforts to ensure" that their training data has been obtained through "lawful access".[13] At first glance, this stipulation seems straightforward – datasets compiled from open-access works, appropriately licensed databases, or works which are freely available online and not subject to contractual restrictions would seem to comply. However, most large-scale AI models are trained on data gathered through web scraping, which inevitably ingests unauthorised works.[14] Consequently, relying on such datasets may fall outside the scope of the EU's TDM exceptions.

CJEU rulings reinforce this restrictive interpretation. In *Svensson* (C-466/12), the court held that hyperlinking is only lawful if the original content was posted with the rightsholder's consent.[15] Hence, AI training datasets built through indiscriminate web scraping may include works which are publicly accessible, but not "lawfully accessed", pushing their use outside the protective scope of EU TDM exceptions.

The recent German case of *Kneschke v LAION* (Hamburg Regional Court, 27 September 2024) exemplifies these tensions.[16] The Court held that building a dataset of images was permitted under the German equivalent of Article 3 of the CDSM Directive, accepting dataset creation as a preparatory research step, regardless of downstream commercial use. However, concerns were raised over commercial exploitation under Article 4, suggesting that rightsholder opt-outs may further narrow the scope of "lawful access".

Arguably, rightsholders' ability to opt-out, made possible by Article 4 of the CDSM Directive, transforms lawful access into a two-step requirement – accessing the work legitimately but also ensuring that no opt-out has been applied. This creates new layers of uncertainty for researchers and AI developers working with large-scale datasets. As per the European Copyright Society, "publishers might price TDM into their subscription fees", translating to an increased disparity between well-funded institutions that are able to absorb these costs and less-resourced institutions that may be priced out of data access, consequently deepening existing inequalities in research and innovation.[17]

Taking a synoptic view, this recent ruling has the potential to provide a narrow safe harbour for non-commercial TDM, whilst leaving commercial datasets and AI training in a state of uncertainty. Instead of providing clarity, the lawful access requirement continues to operate as a significant barrier within the context of AI, where datasets are built at large scales from uncontrolled online sources.

Towards a coherent concept of lawfulness in European copyright law

The proliferation of terms – lawful user, lawful use, lawful source, lawful access – suggests the need for a more coherent and autonomous EU concept.[18] Currently, the inconsistent terminology risks producing fragmentation, uncertainty, and over-restriction of exceptions that were designed to promote research and innovation.

Certainly, given the importance of TDM research activities, the concept of lawful access as a condition for the application of

the TDM research exception should be interpreted flexibly. That means that the CJEU's heavy findings on lawfulness cannot be applied verbatim. On the other hand, there will also certainly be cases of obvious unlawfulness that even the noble and meaningful objectives of enabling research and promoting innovation cannot justify.

In that context, a balanced approach could be that, in principle, freely available mining content should by default be considered as lawful, while mining of freely accesible, but obviously illegal content should not be lawful.

Conclusion

The lawful access requirement in the CDSM Directive represents both continuity and innovation in EU copyright law. It continues the tradition of conditioning exceptions on lawfulness but extends the concept by recognising freely available online content as a potential lawful basis. While this development could facilitate TDM for research, it also creates uncertainty, particularly when contrasted with the CJEU's stricter "lawful source" jurisprudence.

For academic and research institutions, the stakes are high. The ambiguity surrounding lawful access risks chilling legitimate TDM activities, especially in an era where AI and data-driven research depend on large-scale mining. The solution lies in clarifying and consolidating the lawfulness criterion into a coherent and flexible concept, ensuring that copyright law supports rather than hinders scientific progress.

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Teresa Nobre

The Case for a EU Digital Knowledge Act

The European educational, research and cultural heritage institutions – or knowledge institutions for short – face significant barriers to transition their practices into the digital environment. Despite playing a fundamental role in supporting the exercise of rights such as education, scientific freedom, access to information, and participation in cultural life, these institutions are peripheral to the European Union's digital legislative agenda. None of the ambitious legislative acts addressing the digital and data-driven economy that the European Union passed in recent years have these institutions as their primary regulatory intent. The civil society proposal for a Digital Knowledge Act (DKA) emerges as a response to this regulatory blind spot.[1]

The DKA seeks to introduce a single legal framework for the digital activities and services offered by knowledge institutions. Such an EU-wide intervention could remove fragmentation in key areas of copyright and contractual fairness, areas where these institutions face serious hurdles. However, due to its cross-sectoral nature, such an act potentially raises conflicts of legal basis for Union action and can result in inter-institutional disputes. This chapter argues that these challenges to the act's viability can be navigated, showing that a broad policy intervention focusing on the public interest mission of knowledge institutions and on the realisation of the "fifth" Freedom is possible.[2]

What's the gravitational centre of the Digital Knowledge Act?

The DKA aims at addressing persisting obstacles that affect knowledge institutions' ability to access and use digital formats, to develop an adequate digital offering and to collaborate across

borders. These difficulties place knowledge institutions increasingly at risk of not fulfilling their mission in the digital environment, and result largely from the fragmented state of most EU copyright exceptions and an almost total reliance on licensing for access to digital formats. This edited volume contributes to advancing policy solutions to address some of these obstacles, ranging from harmonisation of the copyright framework for research activities and e-lending services to the introduction of protective mechanisms against contractual overrides of those measures.[3]

The DKA – as envisioned by the civil society – brings those policy solutions under a single horizontal intervention, whose primary policy contribution is to target areas where legal fragmentation hinders the internal market and where harmonisation would better achieve the objective of ensuring that digital access to knowledge across borders and institutions is not undermined by legal uncertainty or regulatory divergence. From this perspective, the DKA can be seen as a measure aimed at furthering the Union's goals in the creation of a Digital Single Market and the advancement of a single European Research Area (ERA). This gives rise to the question as to which objective – if any – is the act's predominant purpose.

Navigating multiple policy objectives

The choice of a legal basis for the Union's action "is a politically charged issue",[4] since it determines the legislative procedure and, thus, the rights of participation in the lawmaking process. However, choosing the correct legal basis is not always easy. There are multiple legal bases and the delimitation between

them is not always clear. Furthermore, a proposed measure can fall under two or more legal bases.

The DKA's policy proposals lie at the intersection of different competence domains. While the main substantive area touched by the DKA proposal is copyright – which falls under the internal market competence (Article 114 TFEU) – certain copyright measures are aimed at supporting the ERA (e.g., the introduction of a right to republish publicly funded outputs in open access).[5] This suggests the need to consider whether this legislative intervention would also call for recourse to Article 182(5) TFEU. Furthermore, the proposed act may incidentally pursue objectives falling under Article 81(2) TFEU, when/if introducing mechanisms to protect its copyright measures against choice-of-law agreements.[6]

The internal market competence constitutes one of the horizontal competences in the Treaties, which grants the EU an extensive mandate to approximate laws. Article 114 TFEU has been widely used throughout the decades for a variety of measures, and it is the legal foundation of EU copyright law. The role of this provision in regulating the Digital Single Market is not, however, without criticism. Engel and Zemskova point out that "the scope of this provision is delimited by the existence of more special legal bases available in the treaties for a proposed measure", warning that there are other provisions that may be more suitable as a legal basis in the Digital Single Market.[7]

In the case of DKA, the internal market seems suitable as a legal foundation. However, there is a research and innovation angle that also seems essential to the intervention. After all, the proposals advanced in the DKA respond to a large extent to the Commission's ambition to create a "single, borderless market for research, innovation and technology across the EU".[8] So the

question remains: Is the internal market competence the gravitational centre of the DKA and the research objectives merely incidental to it? If we respond affirmatively, the DKA would need to be based on a single predominant legal basis,[9] Article 114 TFEU. If, however, we consider that the advancement of a single ERA is a directly compared objective to the internal market harmonisation, we would need to assess whether a dual legal basis is permitted.

The use of dual or multiple legal bases for an EU legislative measure is permissible only where the different components of the act are inseparably linked and provided that the procedures are not incompatible.[10] Fragmentation in the implementation of optional copyright exceptions, legal uncertainty in digital and cross-border activities, and contractual practices that prevent the enjoyment of copyright exceptions, all create friction in the internal market and that affects these institutions disproportionately, impedes collaborative research and innovation, and raises compliance costs for institutions. It can thus be said that these policy objectives – directed at improving the conditions for digital knowledge flows across Member States – are tightly integrated and are capable of forming a single coherent legislative architecture. Ensuring procedural alignment also does not seem problematic, as the DKA would be anchored in legal provisions (Article 114 TFEU and Article 182(5) TFEU) that allow for the ordinary legislative procedure throughout.

Addressing institutional complexity

The ambition to establish a harmonised legal framework for the digital practices of knowledge institutions must, however, contend with another layer of complexity: the Commission's

own administrative structure and the politics of portfolio management, which is ultimately a matter of political discretion. The different policy domains in the DKA fall under distinct Directorate-Generals (DGs), each with its own policy priorities and internal expertise.

Institutional responsibility for drafting a DKA would likely rest with DG CNECT, especially its Copyright Unit, given the copyright nature of most measures. However, DG RTD would need to be closely involved for research-related provisions. While this integration might appear complex, the Commission has extensive experience with cross-departmental collaboration. Indeed, major digital legislative files like the AI Act and the Digital Services Act were developed through such cooperation, and DG CNECT and DG RTD are already working closely together in the context of the ERA. These files illustrate that coordination under a common strategic vision is not an impediment but a condition for legislative coherence in fields where competences overlap, and that such integration is possible when there is the necessary political ambition.

Conclusion

The civil society proposal shows that it is possible to target the interests and needs of knowledge institutions across different sectors and still form a coherent legislative architecture. Such an architecture would lie within the limits of competences assigned to the EU by the Treaties (Article 5(2) TEU) and would likely satisfy both the subsidiarity and proportionality requirements under Article 5(3) and (4) TEU. The necessity and added value of an EU-wide intervention are clear in areas such as cross-border research or e-lending, where diverging national

implementations of EU copyright exceptions,[11] on one hand, and outdated or restrictive interpretations of such provisions,[12] on the other, undermine the functioning of the internal market. Provided that the measures are well-justified and designed to fill gaps in existing legislation, such as clarifying lawful access requirements or ensuring that publicly funded research is accessible across Member States, the likelihood of the proposal passing the three-part-proportionality test, as developed by the CJEU, also seems high.[13]

At a time when the EU is preparing to consolidate the European Research Area through a legislative act,[14] refine its copyright framework "to address new challenges raised by market and technology developments",[15] and promote the free movement of knowledge as a new foundational freedom of the Single Market, the case for a cross-sectoral intervention is feasible and it is more urgent than ever. The DKA is a test of the EU's capacity to act in areas where institutional interests compete and legislative competence overlaps, and to affirm the Commission's role as an agenda-setter capable of legislative innovation for the benefit of public interest institutions.

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Stephen Wyber

From Backwater to Battleground

Law, Libraries, and Research

The EU acquis, as it affects research libraries, is characterised by both overlaps and gaps, which exist alongside forces and habits endemic to these institutions. Together, these create a situation that is far from favouring research in Europe. It's time for a change.

Where the rubber hits the road

Libraries have long played a crucial role in facilitating research. By centralising the purchasing of materials, they allow access for researchers and students at a scale that would otherwise be inaccessible to all except the wealthiest. As arguably an early example of the sharing economy, they have long provided a way of sanding off one of the rougher edges of the monopoly rights created by copyright.

Furthermore, with a long history of collaboration – for example, through inter-library loan or resource sharing – they collectively form a vital research infrastructure, providing a means for someone registered with one institution to access copies of works held by another.

In pursuing their missions, libraries are subject to the rules established by copyright. These are not typically designed with libraries and research operations in mind, setting up a situation of potential tension between these rules and their legal mandate (typically indirectly through university or research laws) to support research and learning.[1]

Nonetheless, in a pre-digital world, this conflict tended to remain a possibility rather than a reality. Exhaustion offered enough space for libraries to perform their functions, for example, by allowing consultation on site, lending, preservation copyright and more (save the case of licensing for photocopy-

ing), and where it did not, they were excluded from the scope of provisions in other ways. This is the case, for example, with the Rental and Lending Directive, which allows for the exclusion of education and research libraries from obligations to make public lending payments.

However, this is no longer the case today. Shifts in technology and business models mean that it is far harder to avoid contradictions, leaving libraries with hard choices. Added to this, the multiplication of digital legislation in Europe and elsewhere has also left libraries with a much longer checklist of rules that they need to follow.

In short, while libraries have always been the place where the rubber hits the road – where the commands and constraints of different laws and policies need to be translated into a single body of practice – this contact is far bumpier today than it was before.

This contribution explores these tensions, as well as the additional complexity introduced by the circumstances in which libraries operate.

A Faustian pact…

The past decades have brought a huge expansion in the technological possibilities open to researchers and the libraries that support them. Accessing, analysing, and sharing data – all typical research activities – have become far easier, opening possibilities for greater collaboration and enhancing research productivity. The logic of research freedom and responsibility both push in the direction of making the most of these opportunities in order to advance science on behalf of wider societal goals.

In addition, libraries have led the way both in advocating for and implementing open access and open science, themselves enabled by the shift to digital. They have become managers of institutional repositories, focused on giving greater profile to their own institutions' outputs, as well as supporting the uptake of open science practices which promote collaboration throughout the scientific process.

At the same time, the shift from the outright purchasing of physical copies to the (temporary) licensing of digital ones has effectively side-stepped the provisions that used to protect libraries' space to support research.

This effectively represents a Faustian bargain (although not a conscious one); in exchange for the convenience and ease of digital, libraries have lost the safety net they used to enjoy. Even core library functions, such as preservation, are no longer guaranteed, with content only available under time-bound licences not typically covered by relevant exceptions, which only apply to items in permanent collections.[2] Preservation provisions applying to materials in a library's permanent collection are useless when a library is not even able to build up a permanent collection anymore.

While practice may vary from country to country, typically the terms of a licence prevail over exceptions. Furthermore, in the absence of clear mechanisms for their removal – or, for example, provisions limiting institutions' ability to take unilateral action – technological protection measures provide an extra layer of cladding around whatever terms feature in the licence, regardless of whether they undermine copyright exceptions provided for in law. Unlike what happens when universities license patents, there has not been a drive to promote FRAND

principles when it comes to content licences *for* research institutions and their libraries.

The most recent copyright reform – the Directive on Copyright in the Digital Single Market of 2019 (Directive (EU) 2019/790) – did offer some potentially helpful guarantees with the creation of a text and data mining exception for research (Article 3), protected against contract terms and technological protection measures. However, the Directive was fundamentally lacking in ambition, merely making tweaks around the edges of InfoSoc (Directive 2001/29/EC), rather than aiming to provide a comprehensive and coherent model that could help to ensure coherence between copyright and research law and policy.

As highlighted above, a further dimension here is the growing thicket of digital legislation, in part due to the European Union's ambition to make the most of the "Brussels effect". Such laws have generally paid little attention to research,[3] if any at all, let alone to libraries. As such, we have a Data Act (Regulation (EU) 2023/2854) that gives clearer access possibilities to SMEs than to universities, and a Digital Services Act (Regulation (EU) 2022/2065) that does not offer a clear exemption for research repositories. These rules, furthermore, are not always clearly and consistently formulated.[4]

An additional factor is the political drive to encourage a stronger focus on "knowledge valorisation". While this term is designed to replace the previously more widespread "research transfer" or "knowledge transfer", it continues to imply an emphasis on identifying scope for commercialisation.

For institutions following this path, this means that researchers using library resources are, more and more, involved in research-industry collaborations or are working on a spin-off alongside academic work. While supporting such colleagues

may make sense in light of funding and policy mandates, current EU copyright law stands in the way with its blanket exclusion of all commercial uses.

… with an added dose of complexity

While steering a path through the potential contradictions of legal obligations is already difficult enough, this is likely to be particularly true for the nature of libraries and research institutions themselves. These characteristics tend to tip the balance of the contradictions created in law towards a more negative impact.

First of all, libraries tend to be risk-averse by nature. In a profession with a strong focus on wanting to be seen as having done things correctly, there is a reputational risk to making mistakes. Furthermore, university general counsels are likely to be focused on avoiding legal action rather than aiming to challenge the law, while institutions as a whole will not want to face the risk of fines or damages.

In this context, it is important to note that the penalty for getting things wrong with copyright looms far larger than the penalty for failing to deliver on libraries' mission. Libraries are unlikely to be sued by a researcher to whom they need to say no (they will likely then use informal channels to get what they want, or just give up). In contrast, the threat of legal action from a publisher or collective management organisation is far more present. As a result, even when faced with a contract term that can be overridden by law, a library may well follow it nonetheless.

Beyond attitudes towards risk, the capacity of libraries to deal with complexity is also low; they rarely have access to

dedicated copyright expertise. At the same time, there is also a more fundamental question about whether being in a situation where a library needs to dedicate significant resources to managing copyright is really an optimal one. Similarly, while training is welcome, this should not be based on the assumption that dysfunction in the copyright system is solely due to the ignorance of librarians.

Finally, it is also worth remembering that librarians themselves do not necessarily have as much power as one might expect. For example, while they may run institutional repositories and have the best overview of the impact of licensing practices, it is researchers themselves who typically negotiate and sign agreements over their articles. Moreover, unless there is a specific provision granting institutions the right to do this, they may not even have particularly strong leverage for ensuring that articles are placed into repositories.

In summary, the situation we are in is one where the law is already giving conflicting signals, and the circumstances of libraries work against a pro-access/research approach. To come to a positive outcome, not only does the law need to change, but interventions are also necessary to help shape attitudes and behaviours.

A way out?

There are, of course, different versions of the Faustus story, which end better or worse for the doctor. The same goes for libraries and research institutions.

Already, there are initiatives in the pipeline which can help resolve the complexity currently faced by libraries. Perhaps the most promising is the European Research Area (ERA) Act,

proclaimed as the means by which the European Union can make a reality of the "fifth Freedom".

For knowledge truly to be borderless within the EU, it is hard to imagine any comprehensive approach that does not aim to harmonise the research exception, or to remove the non-commercial/commercial distinction, which makes so little sense given the strong encouragement for partnerships and spin-offs elsewhere. Similarly, introducing a harmonised Secondary Publication Right will complement the open access mandates attached to much public funding, and should help to further expand the share of research outputs that are available open access. Similarly, any efforts to eliminate barriers to retaining rights and subsequent open licensing will also be pursued.

Coming sooner than this, the Digital Package promises to update various pieces of data-related legislation and offers a chance to harmonise definitions. It could also helpfully expand protections against unfair terms for access to data, ensuring that they benefit research institutions and researchers as well as businesses.

As for changing incentives, the extension of protections against unfair contract terms may also be beneficial, building an understanding among libraries and research institutions that they are not alone. While the upcoming Digital Fairness Act will *a priori* focus on the rights of natural persons as consumers, there is an opportunity to underline how contracts for (bundled) digital content offered to institutions ultimately also hurt researchers and learners. Penalties for companies found to be systematically imposing unfair terms could significantly change the dynamic.

Nonetheless, even if the legislation mentioned here delivers on all that it might, this does not necessarily offer a long-term

solution. There will always be pressure to pass laws to address real or perceived issues, in particular in the digital space. These bring with them the risk of increasing complexity for libraries and research institutions.

This points to a different approach to lawmaking in general. Research needs to be recognised as a top-level policy priority. We need to stop regulating for it (and the infrastructures that underpin it) by accident or acting as if research institutions are the same as major digital platforms. This could be achieved through a stronger "research test" as part of regulatory impact assessments,[5] as well as by ensuring that the ERA Act itself is thoroughly reviewed on a regular basis.

Arguably, we still can choose our own adventure here, but to do so, we need to be ready to make the most of the opportunities imminent legislation brings by:

1. Making research a first-order policy priority, rather than a secondary concern.
2. Designing laws that respond to the nature and needs of the sector.
3. Not hesitating, but rather seizing the opportunities already in front of us.

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Access to knowledge and information is essential to foster innovation. In the EU, existing copyright rules pose significant barriers to research and education. Instead of promoting access to knowledge resources, copyright creates legal uncertainty for researchers and educators and enables information intermediaries to exercise strict control over the use of protected works. This edited volume proposes ways out of the copyright conundrum by rethinking copyright as an access right.

"This book marks a fundamental contribution to the topical debate on a Digital Knowledge Agenda. More than ever, a fifth Freedom for research, innovation, knowledge, and education is key for the sustainability and success of the European project. The individual contributions illustrate with rare clarity and intellectual depth how to make EU copyright law fit for purpose."

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