

Manoeuvring out of the Crisis: the Fundamental Right to Research and its Implications for Copyright Law in the EU

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Research is essential for scientific, cultural, and social advancement, and it will be essential in economic and societal recovery in a post-pandemic world. Restrictions to access and use of information contained in copyright-protected expression can constitute significant hindrances to conducting research efficiently, especially since modern research methods rely on accessing and processing large amounts of digitized data. Recent extensions of the scope of exclusivity, the creation of specific neighbouring or *sui generis* rights and the legal protection of technical protection measures have amplified the potential monopolization of information by intellectual property legislations. At the same time, existing exceptions for research which could serve as a possible counterbalance to the extension of the exclusivity paradigm that currently governs copyright policy are not sufficiently developed or too narrow conceived, and moreover they not harmonized in Europe. This is particular problematic for the development of Artificial Intelligence (AI)-based research because in order to allow machine learning, it is necessary to have robust exceptions for text and data mining so that AI-machines can reproduce, store and process existing data and propose new solutions. The question is also very topical in the field of public health, because it is obvious that very large stocks of data on COVID-19 and their subsequent variants will have to be processed and analyzed at global level in order to allow the development of new treatments.

In this context, the identification of a fundamental ‘right to research’ (R2R) grounded in the foundation of the European legal order is of key importance to advance the development of vibrant creative environment and to secure that research interest at its origin are reflected in secondary IP legislation. The paper maps the existing fundamental rights relevant for research, amongst them freedom of expression, the right to (receive and impart) information and the right to academic freedom, in order to lay a constitutional foundation for a R2R that can serve to frame a discussion not only in Europe, but for a global, networked and cooperative research community. It demonstrates that a combined reading of existing fundamental rights can serve as a solid foundation for the elaboration of a constitutionally grounded European ‘right to research’. The fragmented conceptualizations of a R2R at national and European level can be galvanized into a comprehensive set of characteristics that define the R2R, which can stand as an opposing weight against restrictive interpretations of copyright law. More importantly, it provides argument for changes to current copyright law with a view to making it an enable for research in Europe. It will also allow courts to interpret existing copyright provisions fostering the right to research in a fundamental rights compliant manner and possibly extending the free spaces left by copyright law to enable research. Finally, the paper argues that in order to secure an optimal taking into account of the right to research in the future, a revision of existing fundamental rights instruments in the EU would be a good option and advances concrete proposals to give the R2R a better visibility and legitimacy in the Charter. An explicit constitutional codification of the R2R will participate in framing innovation policies and legislations (including IP) in a forward-looking manner and ensure that cultural and scientific progress is not hindered unduly by the blocking effects of exclusive rights.

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Far from being anti-IP, such an approach, on the contrary, restores its social function by fostering societal progress, helping the EU to manoeuvre and rise again in a post pandemic environment.