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Towards a European Research Freedom Act: A Proposal for an EU-Wide Secondary Publication Right

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Abstract As of 2025, six EU Member States – Germany, France, Austria, Belgium, the Netherlands and Bulgaria – have introduced forms of Secondary Publication Rights (SPRs) as an effective tool for rebalancing the bargaining powers of authors and publishers, enhancing Open Access (OA) to scientific publications, and fostering national Open Science (OS) policies. Building on the results of a study conducted for the European Commission and published in 2024, this article supports the introduction of an EU-wide SPR as one of the key priority actions needed to fully align EU copyright law with the policy goals of the European Research Area (ERA). Given the fragmented nature of national approaches and the inherently transnational nature of much of scientific communication and publishing, a harmonised SPR with carefully tailored and balanced features is a precondition for

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creating a level-playing field for all scientific authors operating within the ERA. This article explores the potential of SPRs and where they intersect with OS, analysing their origins and underlying rationales. It then makes a comparative analysis of national SPR implementations and their main features. On this basis, it makes specific proposals for an EU-wide SPR, emphasising design, scope, and potential impact on stakeholders. It concludes by reflecting on the broader significance of integrating an SPR into the EU's OS agenda.

Keywords Secondary Publication Rights · Copyright contracts · European Research Area · Three-step test · Copyright exceptions · Open Science

1 Introduction

The transformation of academic publishing and the governance of intellectual property (IP) rights have become central to efforts to build a more equitable and efficient global research ecosystem. The European Union (EU) has emerged as a key player in this, actively fostering Open Science (OS) to promote the broad and open dissemination of publicly funded research. In this context, Secondary Publication Rights (SPRs) have emerged as a powerful legal mechanism because they could enable authors to share their published work freely under defined conditions. This article undertakes a comprehensive analysis of SPRs, situating them within the broader landscape of what has aptly been called "an internal market for research",[1] namely the European Research Area (ERA).[2]

Scientific knowledge is a cornerstone of technological innovation, policy-making, and socio-economic development. Similarly, access to that knowledge is a cornerstone of academic freedom and institutional accountability, particularly when research is publicly funded. However, despite substantial progress in Open Access (OA) and Open Data initiatives, significant barriers persist. These are often rooted in fragmented copyright regimes,[3] restrictive publishing contracts, and legacy business models of commercial publishers. The SPR offers a compelling legal instrument to address these challenges, ensuring that publicly funded research results remain accessible and reusable by both the scientific community and the larger public, who have usually already financed them via general taxation. This article aims to contribute to the ongoing dialogue about the future of OS and intellectual property governance in the EU, including the reform proposals for a European Research Freedom Act. It argues that a harmonised SPR, carefully calibrated to balance public and private interests, is a pivotal step toward realising a knowledge society that is not only fairer and more inclusive, but also more responsive to the pressing challenges of the twenty-first century.

[1] European Commission (2020b), p. 7.

[2] Art. 179(1) TFEU. Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

[3] European Commission and Senfleben (2022).

This article is structured to provide a thorough exploration of SPR's potential and its intersection with OS. Following this introduction, Sect. 2 delves into the origins and underlying rationales of the SPR. Section 3 then provides a comparative analysis of national SPR implementations, focusing on legislative frameworks, embargo periods, and operational challenges. Thereafter, Sect. 4 makes specific proposals for an EU-wide SPR, emphasising design, scope, and potential impact on stakeholders. Finally, Sect. 5 concludes by reflecting on the broader significance of integrating an SPR into the EU's OS agenda.

2 From Open Access to Secondary Publication Rights

Over the years, the EU has launched several ambitious initiatives dedicated to OS within the context of the creation of the ERA. The main goal has been to enhance scientific and technological research and development in the EU by overcoming the national barriers that often obstruct scientific collaboration among Member States. This collaborative endeavour aims to build a robust space for implementing reforms and investment strategies that ensure the quality of scientific research, guarantee universal access to its outputs, and promote dissemination of its results to enhance their social, economic, and global impact.[4]

International and European OS initiatives can arguably be traced back to the OA movement, first articulated in the Budapest (2002),[5] Berlin (2003),[6] and Bethesda (2003)[7] declarations. The OECD's Recommendations on enhancing data access and exchange,[8] along with its Guidelines on managing publicly funded research data,[9] can be seen as another crystallising moment in the shaping of OA priorities. The Plan S initiative was an additional stepping stone in this process, underscoring the importance of OA to research products.[10] Recently, the UNESCO Recommendations on Open Science have acknowledged the significance of OA in fully realising the human right to participate in scientific progress and its benefits (Art. 27(1) of the Universal Declaration of Human Rights – UDHR).[11] These recommendations define OS as a term that incorporates diverse movements and practices aimed at making scientific knowledge freely accessible, available, and reusable by all.

As part of its specific EU initiatives, in 2016 the European Commission (EC) published the document "Open Innovation, Open Science, Open to the World",[12]

[4] European Committee of the Regions (2020).

[5] Budapest Open Access Initiative (2002).

[6] Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (2003).

[7] Bethesda Statement on Open Access Publishing (2003).

[8] OECD (2007).

[9] OECD (2021).

[10] Plan S is an initiative for Open Access publishing launched in September 2018 and supported by cOAlition S, an international consortium of research funding and performing organisations. *See* cOAlition S (2018).

[11] UNESCO (2021).

[12] European Commission (2015).

one of the EU's first comprehensive texts on OS. The document lists and details significant reform objectives for technological and scientific infrastructures, research evaluation, and incentive systems, as well as training plans for research managers, and the development of interoperability to enhance the social impact of research. Two EC Recommendations emerged from this document. The first, on the "Open Science Policy Platform",[13] invites stakeholders to appoint national coordinators and task forces to align and implement their OS agendas. It also seeks to ensure a high level of interoperability of European research infrastructures, and to facilitate the open sharing of metadata across systems, disciplines, and Member States. The second Recommendation, "Access to and Preservation of Scientific Information",[14] introduces specific short- and medium-term objectives for advancing OS objectives. These include establishing a clear system of incentives, awards, and evaluation criteria for OS-oriented research projects, promoting more active dialogue among stakeholders, and developing clear policies on the preservation and reuse of scientific information.

The report "Open Science and Intellectual Property Rights"[15] presents substantial evidence on the interrelationship between European OS policies and the *acquis communautaire* in IP. It highlights how the period of greatest development of the OS agenda (from 2015 to the present) has been accompanied by a significant harmonisation of IP laws, despite no effective coordination between the two policy areas. Against this background, the EC emphasises the need for further research to identify the improvements needed in IP management practices to foster innovation and technology transfer, and to address the lack of public awareness on the existence and value of open and reusable research outputs, which could significantly contribute to innovation and development.[16]

2.1 European Horizons

The first steps taken in the areas of OA and Open Data by the Horizon 2020 framework programme have been built upon by Horizon Europe 2021–2027, which set OS as a key objective, recognising it as fundamental to achieving the programme's goals of scientific excellence. In addition to making OA publication compulsory for all outputs of funded research, the programme requires research data to be openly available and managed according to a Data Management Plan aligned with the FAIR principles (findable, accessible, interoperable, and reusable). This initiative has been accompanied by consolidation of the European Open Science Cloud, which aims to unify European research data infrastructures and create a network of data and services oriented towards openness, interoperability, reusability, and accessibility.[17] Finally, the actions resulting from the 2022 EU Council conclusions on "Research assessment and the implementation of Open Science",

[13] European Commission (2018a).

[14] European Commission (2018b).

[15] European Commission (2022).

[16] *Cf.* European Commission et al. (2024).

[17] *See* European Commission (2020c).

adopted in 2022,[18] call for a transformation of research assessment methodologies and principles with the objective of reinforcing non-commercial models and avenues for disseminating and publishing research outcomes.

Inspired by these EU initiatives, Member States have begun developing their own national OS policies, generally aligning with key points of the ERA agenda. While the timelines for development and implementation vary considerably, with some governments taking action as early as 2012 (Belgium and Ireland) and others still lagging behind in drafting dedicated plans (e.g. Malta and Romania),[19] the vast majority of the 27 EU Member States have adopted soft law instruments, in some cases incorporated into specific legislative acts, as in France[20] and Spain[21]. A primary objective of national OS plans is to guarantee free access to publicly funded research outputs,[22] in some instances with an explicit reference to open licensing schemes and/or incentives for adopting specific OA pathways (Germany,[23] Ireland,[24,25] Malta), or through national centralised agreements with major publishers (Hungary).[26] Some Member States also encourage their institutions to adopt open formats for the public dissemination of scientific materials used for teaching and research (Austria).[27] A second priority is to ensure the accessibility and reusability of data[28] by adopting data management plans at all stages of the process, in line with the FAIR principles. However, there is a remarkable lack of convergence on issues such as the legislative and administrative processes and the incentive/reward systems necessary for operationalising OS policies and ensuring their adoption by stakeholders. In addition, many of the mechanisms necessary for the proper implementation of OA priorities are still only partially developed or

[18] Council of the European Union, Brussels, 10 June 2022, 10126/22, https://data.consilium.europa.eu/doc/document/ST-10126-2022-INIT/en/pdf (accessed 31 January 2025).

[19] For an overview, *see* European Commission et al. (2024), pp. 399–452. For the analysis of the countries mentioned, see Belgium (pp. 414–415), Ireland (pp. 430–432), Malta (pp. 440–442), and Romania (pp. 444–449).

[20] *LOI n° 2016-1321 du 7 octobre 2016 pour une République numérique, Journal officiel de la République française* (JORF).
https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000031589829/ (accessed 31 January 2025). More generally, see European Commission et al. (2024), pp. 416–417.

[21] Law 14/2011 of 1 June 2011 on Science, Technology, and Innovation, *Boletín Oficial del Estado* https://www.boe.es/eli/es/l/2011/06/01/14/con (accessed 31 January 2025). More generally, *see* European Commission et al. (2024), pp. 449–451.

[22] This stems from the Member States' obligation to adopt national policies to support the availability of research data in Art. 10 Open Data Directive (ODD). Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast) [2019] OJ L172/56.

[23] Federal Ministry of Education and Research (BMBF) (2018), pp. 418–419. *See also* European Commission et al. (2024), p. 439.

[24] Government of Ireland (2019), pp. 6–7.

[25] Government of Malta (2021), pp. 30–34. *See* more generally European Commission et al. (2024), pp. 440–442.

[26] European Commission et al. (2024), p. 425.

[27] Open Science Network Austria (2020). *See* European Commission et al. (2024), pp. 411–414.

[28] As required by Art. 10(2) ODD.

simply do not exist. While OA is widely recognised as a concrete manifestation of fundamental rights, such as the right to take part in the cultural, artistic, and scientific life of the community (Art. 27 UDHR and Art. 15 of the International Covenant on Economic, Social and Cultural Rights), it remains only partially realised. The ambitious objectives articulated in national policy initiatives have, in practice, been reduced to aspirational statements, lacking the concrete measures needed to effectively regulate and facilitate equitable access to, and participation in, publicly funded knowledge by both the scientific community and the general public.

This effect can be clearly seen in the adoption of OA. In 2018, only 36% of publications were in OA,[29] with national rates varying from 52% in the United Kingdom to 49% in the Netherlands, 43% in Spain, 41% in France, and 40% in Italy. The most widespread format is the Green OA model (70–80%), while the Gold model usually accounts for around 15–20%.[30] The preference for the former option is plausibly explained by the respective costs of the two paths. Green OA, that is to say, self-archiving the pre-print version of the work in an open repository, is typically free of charge. On the other hand, Gold OA, that is to say publication in an OA journal, is usually an "author pays" model, with an average article processing charge (APC) of USD 1626 per article.[31] Fees in Europe may even be as high as EUR 2500–3000. However, it is important to note that Gold OA does not always involve APCs. Staying with the field of law, journals such as JIPITEC[32] or the German Law Journal[33] represent virtuous models of Gold OA that combine cost-free publication with extremely high academic standards. Over time, the term "Diamond OA" has been coined to differentiate this model from the APC-based Gold model.

It is certainly important to distinguish between the question of access and the connected, yet categorically distinct, issue of cost allocation. Historically, alongside the traditional "closed" model, where the public, rather than the author, bears the cost of publication, either directly or through university libraries, an "open" model developed (or perhaps always existed),[34] which requires publicly funded scientific publications to remain freely accessible to the public.[35] The business model of "closed" publications often revolves around restricting access – if the public wants access to knowledge, they must pay the price.

In the case of OA publications, the financial burden may fall on the authors themselves or on a third party. However, it should be noted that, when research is publicly funded, the actual cost of scientific publication may be minimal. This is because researchers are already paid by the funding body (usually a publicly funded university), and scientific publishers typically do not pay academic authors for the transfer or licensing of copyright. Nor do they pay for much of the quality

[29] *See* European Commission (2020d).

[30] *Ibid.*

[31] Morrisons et al. (2022), p. 1793.

[32] JIPITEC https://www.jipitec.eu/jipitec (accessed 31 January 2025).

[33] German Law Journal https://germanlawjournal.com/ (accessed 31 January 2025).

[34] *See* Fyfe et al. (2022), *passim.*

[35] *See* European Commission (2025).

assurance, since this is largely performed by peer reviewers – who are themselves academics and are motivated more by ethical or professional incentives than remuneration.[36] This raises a central issue within the wider debate.[37] While it is clear – and even logical – that commercial operators will seek to maximise profit by charging as much as the market will bear, it is also evident, particularly in the case of publicly funded research, that both the general public and funding bodies have an interest in ensuring that publicly funded research outputs remain publicly accessible. After all, the public has already paid, through general taxation, for the production of, and access to, this knowledge.[38] In the modern digital and internet-based ecosystem, the additional costs of publication are relatively modest, although they vary across scientific fields. Certainly, what cannot be justified is the annual amount that universities pay to scientific commercial publishers for access to a body of knowledge that they themselves have produced in the first place using public funds, and that was transferred to publishers for free (i.e. at zero cost). And this because of a historically stratified, but hardly still justifiable, system of scientific incentives for assessment and evaluation.[39]

2.2 An Incomplete Process

The limited success of OA in Europe can be attributed to a variety of legal, economic, organisational, and technological reasons. Among the legal obstacles, EU copyright law plays a central role. Two factors, one exogenous and one endogenous to the discipline, stand out. The exogenous factor concerns the harmonisation of EU copyright law. Since 1991 (the year the Software Directive was adopted),[40] almost twenty directives and regulations related to copyright have been enacted. Over the same period, more than 150 preliminary rulings by the Court of Justice of the European Union (CJEU) have significantly contributed to the convergence of national legal systems. Despite the intensity of these interventions, copyright remains almost exclusively a matter of national law and is still visibly fragmented.[41] This has had a significant impact on EU-wide OA policies that clash with national divergences, making the coherent and straightforward implementation of such policies much more difficult.

[36] Gennaro (2023), p. 901 *et seq*.

[37] This issue is also referred to as the "affordability problem". *See* Ress (2010), pp. 475 *et seq*; Morrisons et al. (2022), p. 1795.

[38] Scheufen (2015), *passim*.

[39] While no aggregated data at EU level is publicly available, some countries provide information in this respect. See, for instance, Sweden, at https://www.kb.se/samverkan-och-utveckling/oppen-tillgang-och-bibsamkonsortiet/utgifter-for-vetenskaplig-publicering.html (accessed 31 January 2025).

[40] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version) [2009] OJ L111/16, originally Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs ('Software Directive') [1991] OJ L122/42.

[41] This is an aspect that distinguishes copyright law, at least in part, from other intellectual property rights; *see, inter alia,* Margoni (2016), p. 85 *et seq*.

As highlighted by several scholars, the endogenous copyright factors lie in the imbalance between authors' exclusive rights on the one hand, and copyright exceptions and limitations on the other.[42] In recent decades, authors' prerogatives have significantly expanded in terms of duration, from the 50 years *post mortem auctoris* (pma) of the Berne Convention to the 70 years pma of the 1993 Term Directive.[43] The scope of their rights has also been extended, with the right of communication to the public now covering hyperlinks,[44] and the right of reproduction covering text and data mining activities.[45] The subject matter of protection has also been broadened to encompass, *inter alia*, software,[46] databases,[47] and press publications in online use.[48] On the other hand, since the 2001 InfoSoc Directive, general exceptions have been chiefly confined to a closed and exhaustive list (Art. 5).[49] As these exceptions are optional, they have been transposed in a highly fragmented and inconsistent manner by Member States. This, combined with the territorial nature of copyright, has resulted in a legally uncertain regulatory landscape, with consequent chilling effects on the free cross-border uses so common in collaborative research projects.[50] In addition, the effectiveness of exceptions has been severely limited by their frequent susceptibility to contractual override and by the use of technological protection measures that might nullify them.[51] Adding to this landscape, courts have historically interpreted exceptions restrictively, with only recent corrective interventions by the CJEU.[52]

Economic, technological and organisational factors have also contributed to hinder the full realisation of OA. While they cannot be adequately explored in this article, several issues stand out. Chief among these are the high concentration of supply in the publishing market;[53] the sometimes perverse incentives inherent in research evaluation systems, which are still largely based on place of publication

[42] Hugenholtz and Senftleben (2012); Shaver and Sganga (2010); Margoni (2011); Moscon (2016); Caso 2023).

[43] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) [2006] OJ L372/12.

[44] C-466/12 *Svensson and Others* (2014) ECLI:EU:C:2014:76.

[45] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Arts. 3-4.

[46] Software Directive, supra n 40.

[47] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20.

[48] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Art. 15.

[49] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ('Info Soc') [2001] OJ L167/10, Art. 9.

[50] Senftleben et al. (2025).

[51] Info Soc, Art. 6.

[52] *See, inter alia,* Case C-5/08, *Infopaq International A/S*, ECLI:EU:C:2009:465; Geiger and Jütte (2025).

[53] Puehringer et al. (2021); Lariviére et al. (2015).

rather than on content or objective parameters;[54] and the change of habits in the use of scientific journals, from purchasing individual issues or volumes to temporary, conditional access through online subscriptions.[55]

3 Secondary Publication Right: Origins and Rationales

Against this background, the introduction of a harmonised EU-wide SPR, based on experience accrued in the six Member States that have already implemented such a mechanism (Austria, Germany, France, Belgium, the Netherlands and Bulgaria) may represent the swiftest, most time-efficient, and most realistic policy response to the current obstacles that prevent the full realisation of an internal market for research.[56] The SPR grants authors of scientific works the right to make their works available openly and free of charge after publication, subject to certain conditions. In this sense, it could be understood as a safety net designed to enable OA to research where the aforementioned legal and extra-legal constraints would otherwise preclude it.

In the context of OA within the EU, the term "secondary publication right" refers to the possibility of republishing ("secondary") a scientific work that has already been published (the "primary" publication) by a scientific publisher, usually on the basis of a contractual agreement. Germany was the first Member State (2014) to employ terminology closely aligned with that of the SPR.[57] Departing from the Spanish approach, introduced three years earlier (2011), which imposed an obligation to deposit scientific articles in OA repositories (effectively a sort of "primary" publication right or, rather, duty), the German instrument grants authors of scientific publications the right to republish their work after a certain period has elapsed since the first publication (*Erstveröffentlichung*). This different approach was justified by the shortcomings of the Spanish model, which, being framed outside the national copyright framework, suffered from a crucial limitation that largely nullified its effectiveness. The Spanish provision is "*sin perjuicio de los acuerdos en virtud de los cuales se hayan podido atribuir o transferir a terceros los derechos sobre las publicaciones*",[58] that is to say it applies without prejudice to agreements between authors and publishers, thus being ineffective against contractual provisions that transfer the copyright in a scientific work to third parties (usually scientific publishers).

As highlighted above, factors such as the need to publish in certain scientific journals – owing to their prestige, citation metrics, or inclusion in specific lists for

[54] Caso (2023), p. 39.

[55] Ponte et al. (2017), p. 99 *et seq*.

[56] *Cf*. European Commission et al. (2024), pp. 83–114 and Annex 1; European Commission, and Angelopoulos (2022), pp. 33–52; Lazarova (2024); Caso (2023, p. 53; Caso and Dore (2022), p. 332; Visser (2015b), p. 2.

[57] *See Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes, Gesetz vom* 01.10.2013 (BGBl. I 2013, Nr. 59, p. 3714).

[58] *Ley de la Ciencia, la Tecnología y la Innovación* 2011 (Spain), Art. 37.6.

research evaluation purposes – place researchers, particularly those early on in their academic careers, in a situation of limited or no choice. In this sense, the existence of a mechanism that allows authors to (re)publish their writings, *regardless* of (rather than *without prejudice to*) previous contractual agreements is essential to achieving OA goals and, ultimately, realising the ERA.

Conscious of these constraints, the Commission Recommendation of 17 July 2012 on access to and preservation of scientific information,[59] which was issued between the Spanish and the German actions, called on Member States to define "clear policies for the dissemination of and open access to scientific publications resulting from publicly funded research".[60] These policies included, *inter alia*, providing OA to such publications as soon as possible, preferably immediately, and in any case no later than six months after the date of first publication (or twelve months in the case of social sciences and humanities).[61] The Recommendation also noted that the 2010 "Innovation Union" initiative had called for the establishment of an ERA to eliminate obstacles to cross-border mobility and cooperation, as well as for the promotion of OA to both publications and data derived from publicly funded research.[62] Finally, the Recommendation specified that academic career systems should support and reward researchers who adhere to a culture of sharing the results of their research activities, in particular by ensuring OA to their publications and by developing, encouraging, and using new alternative career evaluation models, metrics, and indicators.[63]

In this context, a properly framed SPR may serve as an effective mechanism to ensure that scientific authors who do not opt for immediate Gold OA, but pursue the cheaper Green OA option, can do so without finding themselves caught between the "hammer" of the OA obligations imposed by an increasing number of research institutions and funding organisations, and the "anvil" of non-negotiable standard publication agreements (i.e. "take-it-or-leave-it" contracts). The latter, in fact, often require the free transfer of copyright in the scientific work – something that authors may not be able to avoid, as outdated evaluation procedures have often left them in a weak bargaining position.

To fulfil this function, the SPR must possess certain minimum characteristics, including a mandatory and non-waivable nature that cannot be overridden by any contractual provisions, and a meaningful embargo period, that is to say time frame after which the right may be exercised. According to the 2012 Commission Recommendation, this period should be reduced to zero (i.e. immediate availability of the work), or at most limited to six months in the field of applied sciences and twelve months in the field of humanities and social sciences.[64] Other important features concern the categories of works covered, the percentage of public funding that triggers application of the SPR, and the version of the work that may be

[59] European Commission (2012).

[60] *Ibid.* Recommendation 1.

[61] *Ibid.*

[62] European Commission (2010).

[63] *Ibid.*

[64] *Ibid.*

republished. As reiterated by the Recommendation, the precise definition of these key parameters must be guided by the need to ensure that the SPR is suitable for achieving the goal of maximum dissemination of the results of publicly funded scientific research.

3.1 SPR in Action: National Initiatives and Comparative Remarks

As already mentioned, Germany was the first EU Member State to introduce an SPR, which it did in Sec. 38(4) of the German Copyright Act (*Urheberrechtgesetz* – UrhG) in 2014.[65] The German SPR grants authors the right to make available to the public short scientific works resulting from research that was at least 50% publicly funded and originally published in a journal issued at least twice a year. The right applies only to the author accepted manuscript (AAM), which must indicate the original source, and may be used only for non-commercial purposes, such as self-archiving in repositories or other institutional platforms. To ensure the rule's effectiveness, the German legislator expressly provides that SPRs may not be overridden by any contract: any clause to the contrary is null and void, and the SPR applies even where the author has previously assigned their rights to the publisher.

The Dutch regulation dates back to 2015, with the introduction of Art. 25fa into the national copyright act (*Auteurswet* – AW).[66] The Dutch SPR grants authors of short scientific contributions resulting from research funded "at least partially" by public funds, with no fixed threshold and no restrictions regarding where the work was first published, the right to make their work available to the public free of charge, after a "reasonable period" following the first publication.[67] The duration of the embargo is thus defined on a case-by-case basis: the higher the percentage of public funding, the shorter this period will be. The Dutch SPR does not restrict the type of version that may be shared but does require the original source to be mentioned. Article 25 AW, which applies to Art. 25fa AW as well, declares the SPR to be mandatory and any contractual provision to the contrary to be null and void.

The Austrian legislator introduced its SPR in 2015 by adding Art. 37a to the national copyright act (*Urheberrechtgesetz* – UrhG).[68] This provision grants authors the right to make their scientific contributions available to the public after an embargo period of twelve months from the first publication, if the work was published in periodical collections issued at least twice a year, such as journals and magazines, and stems from research that was at least 50% publicly funded. Collective works, contributions in non-periodical journals, annual reports, and monographs thus fall outside the scope of the provision. The Austrian SPR also restricts the range of beneficiaries to employees of research institutions that are at least 50% publicly funded, thus excluding privately funded positions and non-

[65] *Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes 2014* (Germany); European Commission et al. (2024).

[66] *Wet van 23 September 1912, houdende nieuwe regeling van het auteursrecht* (Auteurswet 1912. *Cf.* Visser (2015a), p. 68.

[67] *Ibid.* pp. 69–72.

[68] *Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte* (UhG-A).

academic staff. The SPR applies to the AAM only, can be exercised only for non-commercial purposes, and is subject to the requirement that the author mention the place of first publication. As with other national models, the Austrian SPR is retroactive and cannot be overridden by any contract.

One year later, France introduced its SPR through Art. L533-4 of the *Code de la propriété intellectuelle* (CPI).[69] The right to make the digital version of a work publicly available free of charge applies to scientific publications issued at least once a year and resulting from research funded at least 50% by the State, by public or local institutions, or by national or EU funding agencies. Unlike other national models, the French SPR is conditional upon two requirements: (i) the original publisher must not have already made the digital version available for free, and (ii) all co-authors must consent to the exercise of the right. The embargo period is six months from the date of first publication – which must also be mentioned – for works in the scientific, technical, and medical fields, and twelve months for those in the humanities and social sciences. The right applies to the AAM, which cannot be used for commercial purposes. In addition, research data made publicly available by the researcher or their institution may be freely reused, provided that no third-party rights or specific regulations hinder it. As in other national SPRs, Art. L533-4 CPI is mandatory and cannot be overridden by contract.

In Belgium, the SPR was introduced in 2018 through Art. XI.196 Sec. 2/1 of the *Code de droit économique – Wetboek van economisch recht* (CDE – WER).[70] In line with the earlier national models, the provision covers scientific contributions resulting from research that was at least 50% publicly funded and published in periodical journals, although it does not specify a minimum publication frequency. Authors are allowed to make only the AAM freely available to the public after an embargo period of one year from the date of first publication for humanities and social sciences, and six months for all other disciplines, provided that the original source is mentioned. The embargo period may be shortened by agreement between author and publisher, or extended by royal intervention. There are no restrictions regarding commercial or non-commercial use. The provision also applies retroactively to works already published and existing contracts, and cannot be overridden by any contract between the parties.

Most recently, Bulgaria introduced the SPR in the context of transposing the Directive on Copyright in the Digital Single Market (CDSM Directive).[71] The new Art. 60(2) of the Bulgarian copyright law provides that authors of scientific works resulting from research publicly funded in whole or in part retain the right to make the entire work or parts thereof available to the public on scientific or educational repositories, for non-commercial purposes (Table 1). This right may be exercised immediately upon acceptance of the contribution by a journal, and thus without a predetermined embargo period. The author is only required to notify the publisher of their intention to exercise the SPR. Any contractual clause aimed at restricting or preventing the exercise of this right is considered null and void.

[69] *Code de la propriété intellectuelle, dernière modification le 22 Jan 2025* (CPI).

[70] *Code de droit économique (CDE); Loi relative au droit d'auteur et aux droits voisins.*

[71] *Закон за изменение и допълнение на Закона за авторското право и сродните му права, УКАЗ № 211*, (Law on Amendment and Supplementation of the Copyright and Related Rights Act Decree No. 211) *брой*: 100, *от дата* 1.12.2023 г. *Cf.* Lazarova (2024).

Table 1 Secondary publication right in EU member states

FEATURES	DE (2014)	NED (2015)	AT (2015)	FR (2016)	BE (2018)	BG (2024)
Source	UrhG, §38	AW, Art.25fa	UrhG, §37a	CPI, Art. L.533-4	CDE, Art.XI.196	Bulgarian Copyright Act, Art.60
Subject matter	Scientific contributions Published in collections issued periodically at least twice a year	Short scientific works No limitation as to where work first published	Scientific contributions by staff member of research institution Published in collections issued periodically at least twice a year	Scientific writing (écrit) Published in a periodical issued at least once a year	Scientific article Published in a periodical (number of issues not specified)	Scientific work
Requirements	Research >50% publicly funded	Research entirely/partly publicly funded	Research at least 50% publicly funded	Research at least 50% publicly funded Agreement of all co-author(s) required	Research at least 50% publicly funded	Research wholly or partially publicly funded Publisher to be informed
Overrides contrary contractual clauses?	Y	Y	Y	Y	Y	Y
Version limitation	Only for AAM version	No limitation	Only for AAM version	Only for AAM version	Only for AAM version	No limitation
Content of SPR	Right to make contribution available to public	Right to make work available to public free of charge	Right to make contribution publicly accessible	Right to make contribution available free of charge in an open format, by digital means	Right to make manuscript available to public free of charge	Right to make work or parts thereof available to public

Table 1 continued

FEATURES	DE (2014)	NED (2015)	AT (2015)	FR (2016)	BE (2018)	BG (2024)
Embargo	1 year after first publication	After a reasonable period	1 year after first publication	6 months (science, technology, and medicine) or 1 year (humanities and social science) after first publication	6 months/1 year after first publication, but may be shorter (if so provided by contractual licenser) or longer (by law)	None
Use limitation	Non-commercial purposes	No limitation (type of use not specified)	Non-commercial purposes	Non-commercial purposes	No limitation (type of use not specified)	Non-commercial purposes
Mention of source	Mandatory indication of first publication	Mandatory indication of first publication	Mandatory indication of first publication	Not required	Mandatory indication of first publication	Not required

3.2 The EU Commission's Initiatives

As seen above, the EC first outlined its priorities for achieving fairer and more reasonable access to publicly funded research outputs in its 2012 Recommendation. Subsequently, in a 2016 document supporting OA to scientific publications and open research data, it reviewed recent developments in the field of scientific publications as well as action taken by European institutions to support and accelerate the adoption of OA practices.[72] Such action included promoting OA publications and open data in research funding programs (FP7, H2020, and now Horizon Europe).[73] Among various documents produced by European institutions, the most important for open science (OS) was the "European Research Area Policy Agenda – Overview of actions for the period 2022–2024",[74] which offered a very interesting overview of the actions planned for that period within the framework of the "Pact for Research and Innovation in Europe". The ERA actions for 2022–2024 were based on a series of Council and Commission documents directed at supporting the effective operation of the ERA.[75] ERA Action 2, entitled "Propose an EU copyright and data legislative and regulatory framework", aimed to intervene on data and copyright legislation to ensure free access and reuse of publicly funded research results, including for research purposes. It emphasised the free flow of scientific knowledge and data across the EU, based on Art. 179 TFEU, and the protection of academic freedom.[76]

To achieve the objectives of ERA Action 2, the EU Commission funded a study to analyse the impact of current EU and national copyright and data legislation on access to and reuse of data and publications for research purposes. The study, published in 2024,[77] provides a detailed comparative analysis of relevant legislative texts, and both EU and national OS Plans, focusing on the most important EU copyright directives and their national transpositions, as well as legislative developments concerning data and the digital environment (e.g. the Open Data Directive, the Data Governance Act, Data Act, the Digital Services Act, the Digital Markets Act, and the AI Act), complemented by an evaluation of the European Open Science Cloud system.

The mapping and assessment of EU and national copyright sources identified provisions in EU legislation that currently allow access to and reuse of protected material for research purposes (research-specific exceptions and limitations) or that facilitate this practice indirectly (general exceptions and limitations with an indirect impact on research).[78] It also analysed general rules that can directly or indirectly

[72] European Commission (2016).

[73] Council of the European Union (2021b).

[74] European Commission (2021).

[75] European Commission (2020a); Council of the European Union (2020); Council of the European Union (2021a).

[76] European Commission (2020a), p. 5.

[77] European Commission et al. (2024). The authors of this contribution are four of the co-authors of the study mentioned.

[78] *Ibid.* p. 67.

support OA, access, and reuse of copyrighted publications and other material, such as public domain provisions and collective or extended collective licensing schemes.[79] These results are discussed in a separate article.[80]

On this basis, the study formulated a set of policy recommendations, including specific legislative and non-legislative proposals aimed at aligning EU copyright and data legislation more closely with the OS goals of the ERA Agenda.[81] Among the actions suggested, the study advocated for the introduction of an SPR. The recommendations were subject to an impact assessment based on social, economic, and fundamental rights.[82] They were also first based on, and subsequently tested through, a comprehensive programme of surveys and interviews with researchers, research performing organisations, and both institutional and commercial publishers.[83]

4 Towards an EU Secondary Publication Right

4.1 Conceiving an EU-Wide SPR

The study, along with surveys conducted among researchers and research institutions in countries that have an SPR, revealed a general lack of awareness among sector operators about the existence and potential of this tool.[84] Arguably, this lack of awareness, coupled with the territoriality of copyright, has limited the applicability and effectiveness of national SPRs. The latter have rarely been exercised and remain confined to publication contracts that are governed by the law of a Member State with an SPR. As a result, national reforms have had no impact on a significant portion of research outputs hosted by international journals with publishers based in different territories where standard agreements are regulated by other national laws. Additionally, differences between the SPR regimes across Member States have resulted in different practices and expectations within the academic and publishing sectors.

[79] *Ibid.* pp. 203–204.

[80] *See* Senftleben et al. (2025).

[81] Many of these proposals had already been anticipated in academic commentaries and collective studies, including policy recommendations emerging from analyses conducted in the H2020 reCreating Europe project. Quintais et al. (2023); Dore et al. (2023); Sganga et al. (2023); van Eechoud (2023); Iljadica et al. (2023).

[82] Social criteria used to evaluate sustainability and value included the impact on intellectual property rights, the need for adequate quality control in research, and objectives like broader public availability of scientific research, greater research output diversity, and enhanced cross-border cooperation among groups. Economic variables considered the potential effects of each proposal on sector competitiveness and stakeholders' business models.

[83] European Commission et al. (2024).

[84] *Ibid.* p. 84.

Against this background, it is clear that introducing an EU-wide SPR is essential for achieving a unified ERA based on shared OS principles. Such a measure would help prevent nationality-based or geographic discrimination, enhance legal certainty, and reduce the risk of forum shopping.[85]

When devising a harmonised SPR regime, it is important to consider several key legislative elements that can have a major impact on researchers and academic publishers. These include the spectrum of scientific output covered by the right (4.1.1); the public funding requirement (4.1.2); the manuscript version covered by the right (4.1.3); the embargo period before the right can be invoked (4.1.4); and any limitation of the right to non-commercial use (4.1.5).

From a legal perspective, the complexity of implementing these design elements across the EU depends on how the competing interests of researchers and publishers are assessed in the light of the nature of the SPR. Approaches that regard the SPR as an expression of an author's inalienable moral and economic rights afford greater regulatory flexibility.[86] Conversely, if the SPR is seen as a copyright exception that limits the exploitation rights of publishers, any legislative intervention must comply with the three-step test under international copyright law (4.1.6).

4.2 Subject Matter of the Right

Most Member States that have introduced the SPR so far have limited its applicability to scientific contributions published in periodicals, such as journal articles, thereby excluding monographs or chapters in collective works. However, the definitions adopted by Member States diverge. Germany and Austria require a "scientific contribution" to a collection, France a "scientific writing," Belgium a "scientific article," and the Netherlands a "short scientific work".[87] In addition, all except the Netherlands and Bulgaria impose a periodicity requirement: in Belgium, the collection must be published periodically; in France, at least once a year; and in Austria and Germany, at least twice a year.[88]

The confusion and problems arising from these divergent national approaches call for a clarifying and unifying intervention – one that also takes into account the wider variety of research outputs that fall outside the strict category of journal articles. This would reflect the modernisation and diversification of academic

[85] *Ibid.* Annex 6, RPO Survey, question 31. Survey results indicate that the vast majority (92.4%) of research institutions believe that a broader SPR would significantly increase public access to research results, aligning with researchers' intentions. For 91.2% of researchers, a potential EU-wide SPR should cover a wider range of products than just articles (*ibid.* Annex 6, RPO Survey, Question 32).

[86] *See* Caso (2023), p. 35 *et seq*; Caso and Dore (2022), pp. 336–337.

[87] Caso and Dore (2022), p. 337; European Commission and Angelopoulos (2022), p. 34.

[88] *Ibid.*

practices in various fields.[89] A harmonised SPR regime covering a broad spectrum of scientific outputs would also align with the fundamental right to research.[90]

In the light of Arts. 11 and 13 of[91] the Charter of Fundamental Rights of the European Union (CFREU), it is important to ensure that copyright protection regimes – rooted in Art. 17(2) CFREU – strike a proper balance and leave sufficient room for open-ended, exploratory research processes, thereby supporting research autonomy.[92] Against this background, the confinement of research-related provisions to specific resources, such as the confinement of SPR regimes to specific types of outputs, appears problematic. The limitation of the SPR to journal articles is not fit for purpose and calls for a rethinking of the balance between Art. 17(2) and Arts. 11 and 13 CFREU.

Where the configuration of SPRs in the Member States appears overly restrictive from this perspective, it is important to find alternative, proportionate[93] solutions at EU level to reconcile copyright protection with the right to research. Exploring the overarching fundamental rights framework, it must also be considered that the differential treatment of journal articles vis-à-vis other research outputs may be understood as contrary to Art. 20 CFREU, which prohibits discrimination between similar situations without objective justification. The rigorous limitation of the SPR's subject-matter to journal articles means that both researchers and publishers are treated differently, depending on the types of outputs they usually produce and work with, and no due account is taken of research practices and research outputs in the various scientific disciplines. There may not be an easy way to generalise, since the types of publication outlets that are perceived as advancing progress within a discipline may vary.[94]

To address these concerns about fundamental rights and provide an appropriate solution, a harmonised SPR regime at EU level should cover a broad range of publication outlets and forms of scientific output, including not only journal articles but also books and other writings that enjoy copyright protection. Where other conceivable forms of scientific output, such as blogposts or data collections, enjoy copyright and/or sui generis database protection, and this protection creates access barriers comparable to the obstacles that led to the introduction of SPR regimes at Member State level,[95] these other forms of scientific output should also be included in an EU-wide SPR regime.

[89] European Commission et al. (2024), p. 133.

[90] *Cf.* European Commission and Senftleben (2022), pp. 12–15; Geiger and Jütte (2023a), p. 24 *et seq*; Geiger and Jütte (2023b), p. 148.

[91] *Cf.* Jongsma (2019), pp. 163–168; Griffiths and McDonagh (2013), p. 75; Geiger (2009), p. 113 *et seq*.

[92] *Cf.* C-516/17 *Spiegel Online* (2019) ECLI:EU:C:2019:625, para. 54; C-469/17 *Funke Medien* (2019) ECLI:EU:C:2019:623, para. 70.

[93] *See* the general requirements and reference to the principle of proportionality in Art. 52(1) CFREU. *Cf.* Senftleben (2024), p. 1474.

[94] For instance, in computer science, conference proceedings are regarded as an important source for sharing and accessing research results but are normally published in the form of a book rather than in a periodical. European Commission et al. (2024), p. 86.

[95] Regarding problems that may arise from sui generis database protection, *see* European Commission and Senftleben (2022), pp. 29–36.

The survey results reported in the study confirm the research community's support for an inclusive SPR regime. A significant majority of research performing organisations (RPOs) (92.4%, n = 397) considered that an SPR regime covering a broad range of scientific outputs would "rather increase" (46.6%, 185 responses) or "strongly increase" (45.8%, 182 responses) immediate OA to publicly funded research.[96] Furthermore, 91.2% (n = 136) of RPO respondents in the Member States that currently provide for SPRs acknowledged the need to extend the SPR regime beyond journal articles to cover diverse scientific outputs – either "to a large extent" (57.4%, 78 responses) or "to some extent" (33.8%, 46 responses).[97] This position of the research community reflects the diversity of academic practices, calling for a policy that accommodates a wide range of scientific contributions and research outputs, irrespective of publication outlet.

At the same time, broadening the subject matter covered by the SPR may have an impact on the business models of several publishers.[98] The majority of scientific publishers (61.9%, n=52) indicated that a harmonised SPR covering a broad range of scientific outputs, including not only journal articles but also other research results that enjoy copyright protection, would require a fundamental reshaping of their business model. A further 11.9% of publishers expressed that it would require some non-fundamental changes to their business model, while 26.2% of publishers stated that no substantial changes would be necessary. The views differed significantly between commercial, non-commercial and institutional publishers:[99] some 76.9% of commercial publishers expected that the inclusion of a broad range of scientific outputs would require a fundamental reshaping of their business model. This compared with 63.2% of non-commercial publishers and only 14.3% of institutional publishers.

To clarify the impact of an inclusive SPR regime that covers various forms of scientific output, it would be advisable to conduct a thorough impact assessment that weighs the detriment to different types of publishers against the benefits of OA to research results for researchers and the public at large.[100]

4.3 Public Funding Requirement

The six Member States that have introduced an SPR into their national legislation require that works covered by the SPR stem from research that has been covered wholly or partially by public funding.[101] However, the modes and sources of

[96] European Commission et al. (2024), Question 31, p. 951.

[97] *Ibid.*

[98] Some 61.9% of publishers believe that such an approach would require a drastic rethink of their business models. *Ibid.* Annex 6, Publisher Survey, Question 24.

[99] In the study survey, publishers are defined based on their interaction and role within the publishing industry, as identified through the use of OpenAlex and Apollo.io tools. The survey categorised publishers into three main types based on their operational and funding models: commercial, non-commercial, and institutional publishers. In the survey, publishers self-selected their category, ensuring an accurate reflection of their business model and industry standpoint.

[100] European Commission et al. 2024, Annex 6, Publisher Survey, Questions 43–44.

[101] European Commission and Angelopoulos (2022), p. 34.

research funding, as well as the percentage of public-private partnerships, vary significantly by discipline.[102] Limiting the SPR to research outputs that are at least 50% or entirely publicly funded discriminates against researchers in fields where private/industrial funding is predominant, such as applied sciences.[103] In addition, this approach creates practical uncertainties (with related chilling effects), such as how to treat privately funded publications or publications by non-tenured staff members, whose contributions may not be understood as stemming from public funding. The same applies for publications resulting from multiple projects within extended partnerships,[104] where calculating the exact percentage of public funding contributing to the research may be difficult.

In the case of EU-wide harmonisation, it is thus important to note that the public funding requirement can substantially limit the effectiveness of an SPR regime. A restrictive approach may cause imbalances and other problems. Indeed, quantitative data indicate that as much as 90.5% (n = 496) of RPOs are involved in research projects in which researchers collaborate with partners in the private sector.[105] For 26.5% (n = 305) of researchers participating in the survey, public-private partnerships constituted 50% or more of their research activities, with 7.5% stating that this share exceeded 90%.[106] Too high a percentage of public funding is thus likely to exclude the results of research based on mixed public-private funding from SPR regimes, thereby reducing the effectiveness of the SPR as a tool for fostering OS goals. In developing a harmonised SPR regime at EU level, it would therefore be prudent to consider relaxing the requirement of public funding. In fact, 84.0% (n = 387) of RPOs considered that a relaxed SPR regime, covering research with 50% or less public funding, would "rather increase" (45.5%) or "strongly increase" (38.5%) immediate OA to (partly) publicly funded research.[107] Individual responses

[102] "Indeed, quantitative data indicates that as much as 90.5% of RPOs [n = 496] are involved in research projects in which researchers collaborate with partners in the private sector. Too high a percentage of public funding will thus exclude the results of privately funded research from SPR regimes and reduce the effectiveness of SPR rules as tools to foster open access and open science goals". European Commission et al. 2024, p. 100 and Annex 6 RPO Survey, Question 11.

[103] *Ibid.* p. 100 and Annex 6, RPO Survey, Question 12. "The collected data highlight that in the case of 26.5% of RPOs [n=305], public-private partnerships constitute 50% or more of the research activities carried out at their respective organisations. In the case of 7.5%, that share amounts to more than 90%".

[104] *Ibid.* Question 31. Survey results among researchers and research institutions in countries that already have an SPR show a widespread belief that removing the requirement would substantially increase the number of OA products, supporting a broadly favourable stance on this issue (84%). Commercial publishers are predictably among the stakeholders most opposed to removal of the requirement, owing to the potential impact on their business models (65.9%), while 60% of non-commercial publishers and only 15.4% of institutional publishers hold this position, with 69.2% of the latter believing the change would not significantly affect their practices (*ibid.* Annex 6, Publisher Survey, Question 24) Notably, in countries that already have an SPR, 55.6% of all publishers (with 72.7& for institutional publishers and 53.8% for non-commercial publishers) believe modifying this requirement would not have significant consequences (*ibid.* Annex 6, Publisher Survey, Question 35).

[105] European Commission et al. (2024), Annex 6, RPO Survey, Question 11, p. 915.

[106] *Ibid.* Annex 6, RPO Survey, Question 12, p. 912.

[107] *Ibid.* Annex 6, RPO Survey, Question 31, p. 951.

from researchers in Member States with an SPR confirm the preference for a lower public funding requirement.[108]

However, publishers have highlighted the potentially disruptive effects of such a policy choice on their business models: 57% of scientific publishers (n=86) considered that an SPR that required 50% or less public funding would require a fundamental reshaping of their business model. By contrast, 16.3% did not expect fundamental changes, and 26.7% considered that a low public funding threshold would not require any substantial changes.[109] Among commercial publishers, 65.9% (n = 41) responded that a lower public funding threshold would require a fundamental reshaping of their business model, while 19.5% believed that it would require some changes. Responses from non-commercial publishers were rather similar, with 60% and 15% (n = 20) considering that it would require a fundamental reshaping of their business model or at least some changes, respectively. For institutional publishers, the distribution was reversed, with 69.2% (n = 13) considering that it would not require any substantial changes and 15.4% that some changes or a fundamental reshaping of their business model would be required.[110]

These reactions raise the question of how the public funding requirement affects the legitimacy of private exploitation interests. In this regard, it may be tempting to posit that a high percentage of public funding reduces the legitimacy of private interests in exploiting the work, as the publishable output is made available to the publisher free of charge, with the publisher only incurring necessary costs related to preparation and marketing. However, public-private partnerships do not change this equation – at least not with regard to the publisher's position. Unless the research contribution comes from the publisher itself, an amalgam of public and private funding does not prevent publishers from obtaining research output for free and limiting their own investment to the preparation and marketing of the final product. In other words, publishers do not finance the research that underpins the results in the form of a scientific article or other data. From this perspective, it does not seem necessary to tie the SPR to a public funding requirement. It remains a discretionary policy choice to frame the SPR as a vehicle for ensuring OA to publicly funded research. Weighing the public and private interests involved, the EU legislator may conclude that the SPR can also serve as a tool to ensure OA to research outputs from public-private partnerships.

4.4 Manuscript Version

The third point, which is much debated, concerns the version of the product to which the SPR should apply. The German, Austrian, and French SPR regimes currently allow only the final AAM – before the publisher adds journal/book layout and typesetting – to be made publicly available. This approach also seems to underly the Belgian regulation, which uses the term "manuscript".[111] By contrast,

[108] *Ibid.* Annex 6, Researcher Survey, Question 45 (Belgium), p. 1228.

[109] *Ibid.* Annex 6, Publisher Survey, Question 24, p. 1556.

[110] *Ibid.* p. 105.

[111] European Commission and Angelopoulos (2022), p. 37.

the Dutch definition does not refer to a specific manuscript version, leading some to believe that, in the Netherlands, the SPR may cover the final published version (version of record – "VoR").[112]

From the perspective of research practices, there is a clear preference for an SPR regime that covers the VoR. For academic discourse, it is important to have access to the final version of published research. Previous versions cannot guarantee that the manuscript has undergone final scrutiny prior to publication, regardless of whether it was accepted with or without corrections. In addition, other versions do not include typesetting, which is essential for proper referencing and verification as part of scientific debate. If several versions of the same article are in circulation, it may be difficult to determine which version is final, especially if post-publication changes have to be made. The VoR is essential for citation purposes and accurate references to research results.

Not surprisingly, 86.7% of the RPOs that participated in the study (111 respondents out of 128) expressed the need to extend the SPR regime in their country to the VoR,[113] with 56.2% seeing a particularly strong need, while 30.5% simply agreed that it would be a desirable development. More broadly, 78.1% of RPOs (285 respondents out of 365) considered that a harmonised SPR that covered the VoR would "rather increase" (34.8%) or "strongly increase" (43.3%) immediate OA to publicly funded research.[114] Responses from researchers in SPR Member States confirmed the research community's preference for an SPR regime covering the VoR.[115]

Like the researchers, the publishers also pointed to the negative effects of an SPR regime that results in the free circulation of multiple versions of the same work.[116] However, regarding inclusion of the VoR in a harmonised SPR regime, publishers warned of substitution effects: if the SPR were to allow unbridled distribution of the final VoR, this could easily kill demand for the journal publication in which the article appears. Publishers therefore emphasised that including the VoR within the scope of the SPR would affect the return on investment in managing the entire review, typesetting, and pagination process, potentially leading to disincentives, and

[112] Visser (2015b), p. 2.

[113] European Commission et al. (2024), Annex 6, RPO Survey, Question 38, p. 1030.

[114] *Ibid.* Annex 6, RPO Survey, Question 31, p. 951.

[115] "Aligning with a preference for the VoR, 75.4% of researchers [n = 134] indicate that they made available open access to the final published peer-reviewed version, as opposed to the final peer-reviewed manuscript accepted for publication, a preprint (that has not gone through peer-review), or a different version, in which cases the share of responses was 15.7%, 6% and 3%, respectively. A comparable distribution can be observed between SPR and non-SPR countries, in respect of which 82.9% [n = 35] and 72.7% [n = 99], respectively, made available the final published version, while 8.6% and 19.2%, respectively, the final peer-reviewed manuscript accepted for publication" (European Commission et al. 2024, p. 138 and Annex 6, Researcher Survey, Question 9). A large majority of researchers (86.7%) support extending the SPR to the VoR (*ibid.* Annex 6, RPO Survey, Responses to Question 38), believing that such a reform would rapidly increase the number of freely accessible research products (*ibid.* Annex 6, RPO Survey, Responses to Question 31; *ibid.* Annex 6, Researcher Survey, Responses to Question 29 (Germany) (open-ended); Researcher Survey, Responses to Question 45 (Belgium) (open-ended)).

[116] *Ibid.* Annex 6, Publisher Survey, Question 23.

negatively affecting product quality assurance.[117] The effects of extending the SPR to the final VoR would vary depending on an individual publisher's copyright management strategies: the impact would be greater in cases of exclusive assignment or licensing, and lesser where rights are licensed non-exclusively. However, it is a common misconception that researchers always assign their rights fully or grant exclusive licences when their work is accepted for publication.[118]

In the survey, 66.3% of publishers (57 respondents out of 86) indicated that including the VoR in an SPR regime would have a substantial impact on their business model, while 27.9% (24 respondents) indicated that it would have no disruptive effect.[119] The responses from commercial publishers make a clear case against extending SPR regimes to the VoR: 82.9% of commercial publishers (34 respondents out of 41) reported that doing so would require a fundamental reshaping of their current business model.[120] This is despite the fact that 24.3% of publishers (n = 103) indicated that, in their standard practice, copyright is neither assigned nor exclusively licensed by the author.[121]

Balancing publishers' commercial interests in controlling access to the final published version against researchers' interest in OA to the VoR as a basis for academic discourse may therefore require further nuancing. To take an informed policy stance, it is also necessary to assess additional elements related to the VoR, such as the existence of publishers' exclusive rights in the layout and typographical arrangement of published editions. Indeed, some national laws explicitly protect the

[117] *Ibid.* pp. 136–138.

[118] "Copyright management strategies vary. In addition, the adoption of different strategies to manage and clear copyright is relatively equal among publishers, according to the collected data. In the case of 28.4% of publishers [n = 183], copyright is neither assigned by the author nor does the author grant an exclusive licence. In case of 31.7% copyright is equally not assigned but the author grants an exclusive licence. In the case of 33%, copyright is assigned by the author in its entirety, while in the case of 6.6%, the copyright is assigned partially. In the case of commercial publishers specifically, the distribution is relatively similar, with 24.3% [n = 103] indicating that copyright is not assigned nor does the author grant an exclusive licence, 32% indicating that the author grants an exclusive licence while not assigning copyright, and 36.9% and 6.8% indicating complete or partial assignment of copyright respectively. Other categories follow roughly the same pattern. 30.6% of non-commercial publishers [n = 36] indicate that copyright is neither assigned nor does the author grant an exclusive licence. 36.1% indicate that the author grants an exclusive licence, while 25% and 8.3% indicate complete or partial assignment of copyright, respectively. In the case of institutional publishers, 33.3% indicate (n = 21) no assignment and non-exclusive licence, 19% no assignment but exclusive licence, but 42.9% and 4.8% complete or partial assignment, respectively. In the case of respondents who consider that they do not belong to any of these categories, 39.1% [n = 23] indicate no assignment and no exclusive licence, 34.8% no assignment but exclusive licence, and 21.7% and 4.3% complete or partial assignment, respectively. When multiple copyright management strategies are adopted, the predominant practice among publishers [n = 38], in case of 47.4%, is non-assignment of copyright and grant of a non-exclusive licence by the author, followed by complete assignment of copyright by the author, in the case of 42.1%. The third most widely used approach involves partial assignment of copyright by the author (10.5%). Grant of an exclusive licence by the author in such situations seems to not be practiced at all (0%)". *Ibid.* Annex 6, Publisher Survey, Question 19.

[119] *Ibid.* p. 104.

[120] *Ibid.* p. 1160.

[121] *Ibid.* p. 1118.

typographical arrangement of published editions.[122] However, any such assessment would need to take into account the differences between different types of scientific outputs, at least to determine the actual scope of protection for such "visual" works.

4.5 Embargo Period

The fourth issue that requires careful evaluation is the duration of a potential embargo period that must elapse between the first publication and the secondary OA publication. The six Member States that have adopted SPRs offer varying solutions. Germany and Austria impose an embargo of one year, irrespective of the discipline involved; France and Belgium differentiate by field, allowing secondary publication after six months for natural sciences and after one year for the humanities and social sciences, or immediately in France if the publisher has already made the document available in OA. The Netherlands provides for a "reasonable period", while Bulgaria does not impose an embargo at all.

As with publication of the VoR, as discussed in the preceding section, there can be little doubt from an OS perspective that an SPR regime with a short or no embargo period is preferable.[123] Survey results support this view: a significant majority of RPOs (87.4%) expressed support for SPR regimes with minimal or no embargo periods, aiming to enhance immediate access to publicly funded research.[124] From the research community's perspective, reducing or eliminating embargo periods is an important tool for aligning SPR regimes more closely with OA goals, in particular greater and more immediate access to scientific findings.

However, from the publishers' perspective, embargo periods are of particular importance. They limit the impact of SPR regimes on existing business models and on the primary exploitation of research output. Proposals to reduce or eliminate embargo periods after the first publication carry the risk of substituting the published product with the secondary publication. Overall, 62.1% of publishers surveyed indicated that no or minimal embargo periods would require a fundamental reshaping of their business model.[125] Broken down by type, 71.4% of commercial publishers, 23.1% of institutional publishers, and 65.0% of non-commercial publishers reported that abandoning embargo periods would necessitate such a change.[126]

Therefore, an EU approach that minimises embargo periods requires a careful balancing of the divergent interests of publishers and researchers. In this context, it should be noted that the real added value of scientific journal subscriptions may increasingly lie in their aggregative power, i.e. the fact that they provide access to

[122] European Commission and Angelopoulos (2022), p. 44, footnote 271, who refers to the protection regime in Ireland.

[123] Moreover, an SPR regime with no embargo period would align with relevant international initiatives, such as the Plan S Rights Retention Strategy. *See* cOAlition S "Plan S Rights Retention Strategy": https://www.coalition-s.org/rights-retention-strategy/ (accessed 31 January 2025).

[124] European Commission et al. (2024), p. 140.

[125] *Ibid.* p. 104.

[126] *Ibid.* p. 179.

all the articles of all of a publisher's journals.[127] Access to individual articles, even to multiple articles, may replace the individual value of a scientific contribution, but not the aggregated value. This is particularly important in an era of massive data analytics, where the added value offered by publishers' platforms lies more in the additional data-related services they provide than in access to single scientific publications.[128]

4.6 Non-Commercial Use

While the German, Austrian and French SPRs only cover use for non-commercial purposes, the Dutch and Belgian SPR approaches do not specify any purpose.[129] This divergence raises the question whether a harmonised SPR regime at EU level should limit the freedom of using secondary publications to non-commercial purposes.

A non-commercial use requirement is clearly a complicating factor. In current research practice, collaboration with private partners is increasingly common and often even a prerequisite under national funding schemes. This makes the non-commercial use restriction seem outdated and overly restrictive.[130] Limiting the freedom to use secondary publications to non-commercial research raises legal uncertainties in projects involving private partners. Faced with such a limitation, researchers may refrain from exercising their SPR when the underlying work is funded privately or through mixed sources that anticipate or require commercial exploitation of the results.[131]

Against this background, there can be little doubt that, from an OS perspective, limiting a harmonised SPR at EU level to specific types of (re-)use – such as non-commercial use – is undesirable. Survey results indicate that a significant majority of RPOs (73.6%) and researchers favour a more inclusive SPR regime that supports a broad spectrum of uses, including use arising from collaborations with commercial partners, in order to enhance the availability and utility of research outputs.[132]

Among scientific publishers, 70.1% noted that OA publications made available for all types of use, including commercial use, would require a fundamental reshaping of their business models.[133] When broken down by publisher type, 83.7% of commercial publishers, 33.3% of institutional publishers, and 65.0% of non-commercial publishers expected that an SPR regime that went beyond non-commercial use would require a significant reshaping of their business models.[134] It

[127] *Ibid.* p. 180. *Cf.* Senftleben et al. (2017), pp. 539–540.

[128] *Ibid*. *See*, *also*, Lamdan and Mann (2023).

[129] European Commission and Angelopoulos (2022), p. 34.

[130] *Ibid.*

[131] Due to this risk, the majority of researchers involved in the survey conducted for the EU Commission consider it important for SPR legislation to specify the freedom to use republished texts also for these purposes and without any restrictions. *See* European Commission et al. (2024), p. 180.

[132] European Commission et al. (2024), p. 180.

[133] *Ibid.* p. 1156.

[134] *Ibid.* p. 1158.

seems that publishers perceive the confinement to non-commercial use as a form of protection for their commercial interests, aimed at preventing the SPR from being exercised for purposes similar to, and in competition with, those of the first publication.

Once again, the positions of researchers and publishers seem difficult to reconcile. However, the publishers' stance appears to be largely based on the assumption that the commercial value of a published article depends on its exclusive public availability – an assumption that underestimates the growing importance of integrated databases with additional functionalities in academic publishers' business models.[135] It is no coincidence that academic publishing is increasingly experimenting with business models that are based on offering article processing charges (APCs) to authors willing to pay a fee to make their products openly accessible alongside the more expensive subscription models and structured databases that offer additional resources (particularly data and their aggregations) to users. These new models ultimately make researchers and academic institutions more dependent on publishers above and beyond access to publication outlets and published articles alone.[136] This evolution should be carefully considered in any objective assessment of the potential impact on publishers and their actual market of opening up SPR regimes to commercial uses.

Although Member States with an SPR have adopted different approaches on this point, the business models and profit channels of the academic publishing industry do not seem to differ substantially across borders. Indeed, 88% of commercial publishers (22 out of 25) indicate that their business models/revenue generation does not differ significantly from those of publishers in other countries.[137] It is worth noting that, among high-revenue publishers, 70.0% (7 out of 10) indicated that their approach did not differ, while 30.0% reported some variation. All medium-revenue publishers surveyed (100%, n=6) reported no differences.[138]

It is also important to consider the rights management strategies used in publishing relationships. In one-third of cases, these are based on implied licences, where no transfer or exclusive licence is granted to the publisher. Where the SPR is limited to specific uses by law, this effectively translates into an exclusive licence, as mentioned in relation to potential embargo periods. The same effect arises where publishing agreements are based on explicit non-exclusive licences.

Against this backdrop, it is evident that any decision on use limitations must be subject to an appropriate impact assessment that takes into account multiple viable solutions and evaluates their coherence and real effects on the consolidation of business models, as well as their potential for achieving greater openness of research outputs and enhanced legal certainty. From an OS perspective, an EU-wide SPR should not have any use limitations. However, it is important to adequately and carefully balance the diverging interests involved, particularly in the light of the evolving nature of academic publishing business models.

[135] Senftleben et al. (2017), p. 348.

[136] *See*, generally, Elsevier (2013), p. 4; Posada and Chen (2018); Hagner (2018).

[137] European Commission et al. (2024), Annex 5, Publishers' survey, Question 37.

[138] *Ibid.*

4.7 SPR: Nature and Legal Qualification

A review of the preceding discussion of various SPR elements reveals a consistent theme, that is the need for a proper balance between the interests of researchers on the one hand and publishers on the other. While such a balance is imperative, it should be borne in mind that an excessively restrictive approach to individual SPR features risks undermining the effectiveness of the right and thus frustrating the attainment of underlying OS goals. The introduction of multiple benchmarks and specific requirements calls for a high degree of definitional clarity; without it, there is a risk of legal uncertainty and perhaps even fragmentation in Member State implementation. This could reintroduce the very obstacles to cross-border circulation of research results that are currently created by the divergences between national SPR solutions.

Hence, harmonisation of the SPR at EU level should aim to create a comprehensive, flexible, and balanced framework that serves the public interest by reconciling the rights of researchers and publishers. The key task in this process is to configure the parameters of a European SPR regime in a way that reflects the variety of research outputs produced by researchers, research funding models, manuscript versioning practices, collaboration with industry partners, the expectations of funding organisations, and developments in the publishing sector. Only in this way can an EU-wide SPR evolve that is effectively capable of enhancing OA to research outputs, and supporting the development of a unified ERA built on OS principles.

From a legal perspective, it is also important to discuss the flexibilities and requirements that impact the design of an EU-wide SPR regime. Indeed, the nature of SPRs within the existing structures of copyright law remains a subject of ongoing debate. In a nutshell, an SPR can be seen as an expression of the author's economic and moral rights, a specific rule of copyright contract law, or a copyright exception.[139] Each of these different conceptions of the right have repercussions for the assessment of regulatory choices.

Arguably, an approach based on an author's economic and moral rights, or an understanding of SPR regimes as specific rules of copyright contract law, offers far-reaching flexibility. As moral rights protect the author's personal bond with the work, a moral rights approach can give the SPR an inalienable nature.[140] An approach framing the SPR as an author's inalienable right with economic and moral components, or as a specific rule of copyright contract law that protects the author's economic and moral interests against exploiters of the author's work, also allows the legislator to define those aspects of the right that must necessarily remain in the author's hands. Mechanisms with such qualities are known in international and European copyright law, such as the artist's resale right (*droit de suite*).[141]

[139] European Commission and Angelopoulos (2022), p. 37 [heading 4.2]. *Cf. also* Caso (2023), pp. 35–45.

[140] Caso and Dore (2022), p. 333.

[141] *See* Berne Convention, Art. 14ter and Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

From this perspective, it is possible to state *ab initio* that a broad range of research outputs fall within the scope of the SPR, irrespective of public funding, without the need for embargo periods or restrictions to non-commercial uses. Where the final VoR includes only the author's free creative choices (and no additional copyright or typesetting right on the part of the publisher),[142] an approach understanding the SPR as an expression of the author's inalienable economic and moral rights could also affirm the author's freedom to publish the VoR.

However, the need to strike an appropriate balance between researchers' and publishers' interests remains. If the legislator were to introduce an SPR of disproportionate scope, such that it renders research outputs unattractive to scientific commercial publishers, the publishing sector's contribution to the publication of research results could be forfeit, and the research community would have to develop their own publishing ecosystem.[143]

For the sake of completeness, the possibility that an SPR might be classified as an exception – and the consequences of this approach – should be explored. However, before doing so, it is important to point out that classifying SPRs as exceptions seems difficult to justify not only linguistically, but also systematically and in terms of general theory. The SPR is configured as a legal tool, labelled as a *right*, which is intended to empower the *original* rightholder (the *author*) by granting them certain legal faculties (*rights*). It enables the author to *decide whether to exercise such faculties* vis-à-vis another party (with *erga omnes* effect), allowing a work to be exploited even where contractual agreements would otherwise have deprived the author of such possibility. All the elements cited are common characteristics of (intellectual) property rights, not of exceptions. Accordingly, classifying SPRs as exceptions would be systematically and methodologically incorrect (as well as potentially unconstitutional).[144]

That said, if SPRs were to be classified as copyright exceptions that limit the exploitation rights transferred to publishers (an approach that would, moreover, be conceptually inappropriate), the three-step test known from international copyright law,[145] and its European counterpart in Art. 5(5) of the InfoSoc Directive[146] might affect the design of a harmonised EU regime. However, this presumes that the

[142] Regarding the protection of typographical arrangements in Member State law, *see* European Commission and Angelopoulos (2022), p. 44, footnote 271, who refers to the protection regime in Ireland.

[143] Regarding this alternative, *see* European Commission et al. (2024), p. 188; European Commission and Angelopoulos (2022), pp. 53–56. Admittedly, such alternatives are gradually crystallising. For example, the Association of Swedish Higher Education Institutions (SUHF) has recently adopted a policy on the future of transformative agreements in which one of the key actions for implementing this policy in negotiations with publishers is to establish an independent publication platform with peer review of published articles; Association of Swedish Higher Education Institutions (SUHF) (2023), p. 2.

[144] *See* the references cited above, n 56. *See*, also, regarding the qualification of the SPR as an element of copyright contract law, Visser (2015a), pp. 69–72.

[145] For a discussion of the international three-step test, *see* Senftleben (2004), pp. 245–282; Ricketson and Ginsburg (2006), pp. 856–862 and 868–873; Geiger et al. (2014), p. 581 *et seq*; Geiger et al. (2008); Hugenholtz and Okediji (2008), p. 21; Senftleben (2006), p. 407; Ficsor (2002), p. 111; Oliver (2002), p. 119; Brennan (2002); Ginsburg (2001), pp. 13–15.

[146] Senftleben (2021); Griffiths (2009); Geiger (2006); Koelman (2003).

author explicitly[147] transfers all exclusive rights to the publisher and does not retain a secondary right to make the publication available in academic repositories, etc.[148] Interestingly, survey results show that such complete transfers of copyright do not take place in about a third of cases.[149]

In practice, it is thus necessary to ascertain in each individual case whether the publisher is in a legal position (through having obtained a full transfer of copyright that excludes any use by the author) that allows it to treat any secondary publication as an exception to its exclusive control. If the author retained the right of secondary publication when entering into a publishing agreement, then the publisher never obtained full control over the research outputs, and a secondary publication by the author would not infringe upon the publisher's legal position. In such cases, the secondary publication option had never become part of the publisher's portfolio of publication rights from the outset.

If an author has fully transferred copyright, including all publication rights, to the publisher, the three-step test becomes relevant where it can be demonstrated that certain elements of the SPR conflict with the normal exploitation of the research output or unreasonably prejudice the publisher's legitimate interests. In such cases, each limitation placed on the scope of the SPR reduces the risk of non-compliance with the three-step test, whereas a broad SPR increases that risk. Nonetheless, the three-step test need not preclude the introduction of a flexible SPR regime at EU level.

For instance, the degree of public funding does not change the equation regarding the publisher's exploitation interests. As already explained above, publishable research output is often made available to publishers free of charge and, where a project is publicly funded, the publisher's investment typically covers only the preparation of the final publication and related marketing activities. The same can be said when the research project is supported by a mix of public and private funding. As long as the private funding does not come from a publisher that seeks to commercialise the research output, the publisher can still obtain the research output free of charge and limit its own investment to typesetting and marketing. Accordingly, for the purpose of assessing conflict with normal exploitation or unreasonable prejudice to the publisher's legitimate interests, the degree of public funding is not a decisive factor.

For publishing sector business models based on databases and platforms that offer additional search (and potentially also generative co-creation) functions, the

[147] In many EU Member States, copyright contract law follows the maxim *in dubio pro autore*: a researcher is deemed to have granted a publisher only those exclusive rights that are explicitly mentioned in the exploitation contract. In case of doubt, the law assumes that the contract only covers the rights necessary for the intended, contractually agreed, exploitation. All other rights remain in the hands of the researcher. *Cf.* Sec. 31(5) of the German Act on Copyright and Related Rights (*Urheberrechtsgesetz*), official English translation available at: https://www.gesetze-im-internet.de/englisch_urhg/; German Federal Supreme Court, 28 November 2010, case I ZR 18/09, *Der Frosch mit der Maske*, *Gewerblicher Rechtsschutz und Urheberrecht* 2011, 714 (716, para. 20); Dreier and Schulze (2022), Sec. 31, paras. 110–113; Art. 2(3) of the Dutch Copyright Act (*Auteurswet*); Spoor et al. (2019), pp. 524–528; Lenselink (2012), pp. 186–188.

[148] *See generally* Wolk and Szkalej (2018); Monotti (2021), p. 331 *et seq*.

[149] European Commission et al. (2024), pp. 114–115.

corrosive effect of secondary VoR publications also seems rather limited. Arguably, SPR-based publications of books, articles and other writings are unlikely to erode the market for more complex database products with additional functionalities, even if the secondary publication concerns the VoR. The transition from traditional business models (with a focus on the commercialisation of individual works) to new business models in the publishing sector (based on content platforms, community building, and data analytics)[150] leads to a shift in the assessment of substitution effects. Once an information platform and database infrastructure are in place, individual works – journal articles, books, etc. – merely constitute individual information items that are embedded in a much more complex information product.[151] The secondary publication of individual information items in VoR format seems unlikely to compete with the offer of a whole publication database and related platform infrastructure.

When addressing the issue of a potential embargo period from the perspective of the three-step test, it is also important to take a broader view of publishing sector business models and assess whether the transition to platform-based exploitation and the offer of databases with additional functionalities reduces the need for embargo periods for individual publications.

The shift in publishing sector business models – from a focus on individual works to the aggregation of comprehensive work repertoires and the provision of databases and related platform-based services – can thus play a crucial role when scrutinising a harmonised SPR regime in the light of the three-step test.

4.8 Are There Alternatives to the SPR?

In order to make a well-considered decision on the introduction of a harmonised EU-wide SPR, it is also necessary to evaluate alternative approaches to achieving the same objective. In theory, the evolution of licensing mechanisms and remuneration schemes could yield comparable results in terms of opening up research outputs. While such mechanisms would have the advantage of leveraging familiar market-based tools, and thus being less disruptive for current business models, they would still not be immune to the traditional problems of contractual power imbalances and information asymmetries between authors and publishers.

Publishing contracts – currently the main tool for regulating access to research outputs and related infrastructures – are, in the vast majority of cases, drafted by publishers. As a result, publishers maintain strong control over contractual terms This is backed up by their stronger bargaining power owing to their role as gatekeepers to the dissemination of research. Additionally, academic practices often require publication in outlets recognised as prestigious for a positive evaluation of a researcher's career, thus perpetuating a vicious cycle. Researchers and their institutions are usually in a weaker bargaining position when it comes to negotiating clauses related to OA fees, costs for database subscriptions, and terms and conditions related to OA to earlier versions of manuscripts, the attribution of

[150] *Cf.* Senftleben et al. (2017), p. 556.

[151] *Ibid.* pp. 557–558.

copyright ownership, and embargo periods for self-archiving.[152] In addition, the terms and conditions for publication and access are often unpredictable, as they may be subject to changes by the publisher, for example owing to mergers and acquisitions, the implementation of new technologies, or changes in market strategies. It is also common for publication and access terms to vary from one country to another and between different types of users, with price and condition discrimination, including regarding APCs.

Contractual terms that explicitly address the openness of research outputs remain relatively uncommon. To complicate matters further, any such schemes, as in the case of transformative agreements, often tend to be applied to organisations rather than individual research entities (for example, through national consortia like the *Conferenza dei Rettori delle Università Italiane* – Conference of Italian University Rectors). Such framework agreements typically allocate a limited number of free OA opportunities annually – significantly fewer than the number of contributions actually produced in the same period. This leads to unhealthy competition between entities and their researchers. Moreover, as these agreements are often entered into only for short periods of time and are subject to renewal, they can hardly be seen as a sustainable solution and risk placing research organisations and national OS policies in a continuous state of transition.[153]

The EU legislator addressed copyright contract law for the first time with Arts. 18–23 CDSMD, which aim to mitigate the distortive effects of the imbalance in bargaining power between authors, publishers, and commercial distributors. Similarly, legislative action to develop norms to regulate OA mechanisms for academic publications that support researchers and research entities as the "weaker parties" in their relationships with publishers could compensate for the lack of an SPR in achieving the EU's OS objectives. In defining these provisions, consideration could be given to transforming publishers' rights from exclusive rights into rights to remuneration, and to introducing extended collective licensing schemes or mandatory contractual clauses. Of course, the caveats mentioned above would remain valid.

In this area, the use of non-legislative measures could plausibly facilitate the development of remuneration schemes and umbrella licensing mechanisms at national level. A potential source of inspiration for such initiatives could be found in Art. 12 CDSMD on extended collective licences, as well as in the tools adopted by Directive 2014/26/EU on collective management of copyright and multi-territorial licensing of rights in musical works for online use in the internal market.

Researchers are the most vocal advocates for greater simplicity, transparency, and fairness in contractual relationships. Yet they often express scepticism towards

[152] *Ibid.* Annex 6, Publisher Survey, Question 22; Publisher Survey, Question 17. "In case of publishers terms and conditions relating to Open access are considered by a slight majority to be more challenging than subscription terms/costs to journals with restricted access" – *ibid.* p. 144, note 144.

[153] Association of Swedish Higher Education Institutions (SUHF) 2023, p. 1. *See*, *also*, news announcement by Stockholm University, https://www.su.se/english/news/open-access-need-to-move-away-from-transformative-agreements-1.683787 (accessed 31 January 2025).

the practices of collective management organisations.[154] At the same time, publishers show little interest in engaging in different negotiating practices, such as extended collective licensing or lump-sum remuneration systems.[155] These factors, which testify to a certain reluctance on the part of key stakeholders to trust in contractual leverages as a means of tackling OS needs, must be carefully considered when assessing whether licensing (collective or otherwise) or remuneration mechanisms may constitute a valid alternative to the introduction of an EU-wide SPR. In this regard, further research is necessary in order to fully understand whether alternative solutions to an EU-wide SPR effectively tackle the legal and extra-legal obstacles that hinder progress towards achievement of the ERA.

5 Conclusions

The SPR may be seen as the culmination of the ambitions of EU institutions and an increasing number of Member States to build a more advanced, efficient, and equitable knowledge society. Ensuring public access to publicly funded research can improve quality of life, accelerate the pace of scientific discovery and its translation into technological innovation, and ultimately foster fairer outcomes across all sectors of society.

In the European context, the implementation of an EU-wide SPR represents a crucial yet hitherto unfulfilled component of this vision. It exemplifies the most effective tool to support perhaps the weakest actor in the scientific process, namely the researcher, who is too often employed on a temporary contract and, in carrying out public-interest tasks, must frequently submit to the logic of a highly concentrated scientific publishing market that is driven by profit, and not by a desire to expand access to publicly funded knowledge. Economic actors are naturally (and correctly) driven by profit maximization and return on investment. Profit is not only the ultimate goal but often also a legal imperative, the neglect of which may expose management to liability. Within this profit-driven dynamic, the fundamental right to the dissemination of knowledge enshrined in the CFREU receives minimal, if any, consideration. Additionally, when research is publicly funded, OA is not only a matter of fairness, but also one of economic efficiency: taxpayers who have already paid for the creation of that knowledge should not be obliged to pay again for access to its results.

A question that may logically follow from this framing is whether there is room in the twenty-first century for a profit-driven scientific publishing industry in the realm of publicly funded scientific publications. Formulating an answer is not straightforward. It is clear that the current scientific publishing landscape is characterised by a highly concentrated market structure, with the well-known

[154] *Ibid.* Annex 6, RPO Survey, Responses to Question 39 (open-ended). On the contrary, publishers show little support for introducing alternative negotiating solutions to SPR, such as extended collective licences or lump-sum remuneration systems.

[155] Only 29.4% express interest in exploring such options, compared with 70.6% against them, a percentage that rises to 76.3% among commercial publishers (*ibid.* Annex 6, Publisher Survey, Responses to Question 28).

inherently inefficient dynamics in competitive price-setting, innovation and product differentiation. It is also evident that the ability to disseminate knowledge, which was once one of the added values of the scientific publishing industry, has been drastically reduced by the advent of the internet, online journals, and high-value scientific blogs. Conversely, many scientific publishers, especially the more established ones, have been transitioning for some years towards a technological and business model that aligns them more with scientific data analysis companies than with traditional publishers. Should this trend be consolidated in the next decade, it is reasonable to posit that the role of scientific publishers is destined to change considerably. Rather than acting as gatekeepers of what can or cannot be published and publicly accessed, scientific publishers are likely to shift towards providing added value in the form of data aggregation and analytical capabilities.

This transition, driven in part by a number of broader economic, business, technological, and social changes, is likely to be at least partly welcomed by the publishers themselves. Regardless of market pressures, many are not indifferent to the criticism levelled at a model that is difficult to justify in a market economy and from the perspective of rational public resource management. Against this background, it is undeniable that an ERA, conceived as the "fifth freedom" and as a set of legal and policy initiatives aimed at fostering a fairer and more efficient information society, is destined to play a central role, influencing not only the timing but also, at least in part, the direction of this shift. From this perspective, the SPR may be seen as a decisive step towards restoring the academic/scientific community's ability to determine the accessibility of knowledge produced with public funding. The enactment of an EU-wide SPR, with carefully tailored requirements and characteristics, would facilitate the realisation of a public research model that is more beneficial to the general public, accelerates technological and scientific development, and provides the knowledge and data needed to address the health, environmental, economic, informational, and participatory challenges that the future holds for our society.

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