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**lawtech**  
The Law and Technology Research Group

# The human right to science: from the secondary publication right to the right to open scientific publications

LawTech Consortium – Second meeting – McGill -  
Montréal, May 2023

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# One (European) view of the (universal) cathedral

- What is the (Open) Science for?
- What is the University for?
- European ambiguities: lessons from pandemic (e.g., vaccines & IP)



# Outline

1. Academic freedom, democracy and human right to (open) science: some theoretical roots
2. Making public and democratic science: IP, infrastructures, research assessment, education (→ ethics)
3. From the SPR to the right to open scientific publications

# 1. Kantian roots of the human right to (open) science (1784-1785-1797)

## Kant

- **Copyright is not property**
- Work (of authorship) as **public dialogue** between author and public
- Public use of reason



# 1. Mertonian roots of the human right to (open) science (1938-1942)

## Merton

- **Communism**
- Universalism
- Disinterestedness
- Skepticism





# 1. Merton (1988)

- The Matthew Effect in Science, II: Cumulative Advantage and the Symbolism of Intellectual Property
- «[...] even in a capitalistic society, of publishing one's work without being directly recompensed for each publication have made for the growth of public knowledge and the eclipse of private tendencies toward hoarding private knowledge (secrecy), still much in evidence as late as the seventeenth century. **Current renewed tendencies toward secrecy,** and not alone in what Henry Etzkowitz has described as "entrepreneurial science," will, if extended and prolonged, **introduce major change in the institutional and cognitive workings of science».**

# 2. Surveillance Publishing and data analytics of the Intellectual Monopolies (2019-)

Surveillance Publishing

SPARC\*

LANDSCAPE  
ANALYSIS

The Changing Academic  
Publishing Industry –  
Implications for Academic  
Institutions

## Stop Tracking Science

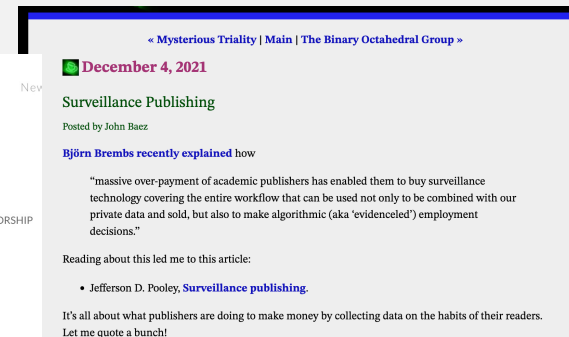
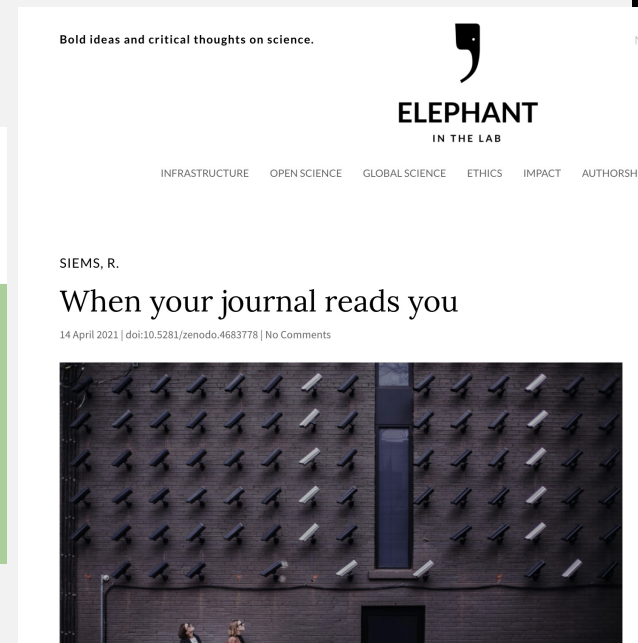
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*A working paper, under review*

The major academic publishers have made collection and trading of data about the research interests of individuals, groups and research institutions their new business model. Data about your scientific activities are collected in real time across the research workflow. The publishers take notes and sell the knowledge about you to third parties. This business model is in direct opposition to academic freedom. We have to stand up against these corporations!

Stop Tracking Science!



# 2. The Death of the (scientific) Author (and reviewer) (2023)

**nature**

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NEWS | 18 January 2023

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[Chris Stokel-Walker](#)



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bioRxiv posts many COVID19-related papers. A reminder: they have not been formally peer-reviewed and should not guide health-related behavior or be reported in the press as conclusive.

New Results [Follow this preprint](#)

### Comparing scientific abstracts generated by ChatGPT to original abstracts using an artificial intelligence output detector, plagiarism detector, and blinded human reviewers

 Catherine A. Gao,  Frederick M. Howard,  Nikolay S. Markov,  Emma C. Dyer,  Siddhi Ramesh,  Yuan Luo,  Alexander T. Pearson

doi: <https://doi.org/10.1101/2022.12.23.521610>

**Abstract** Full Text Info/History Metrics [Preview PDF](#)





## 2. Karen Maex (January 8th 2021)



- [...] And so **private companies continue to enlarge their role** while the public character of our independent knowledge system is further eroded.
- [...] **What applies to the future of democracy applies equally to the future of universities** and of independent education and research as vital building blocks for the organisation of knowledge. We cannot simply leave the future of knowledge to the corporate boardrooms.

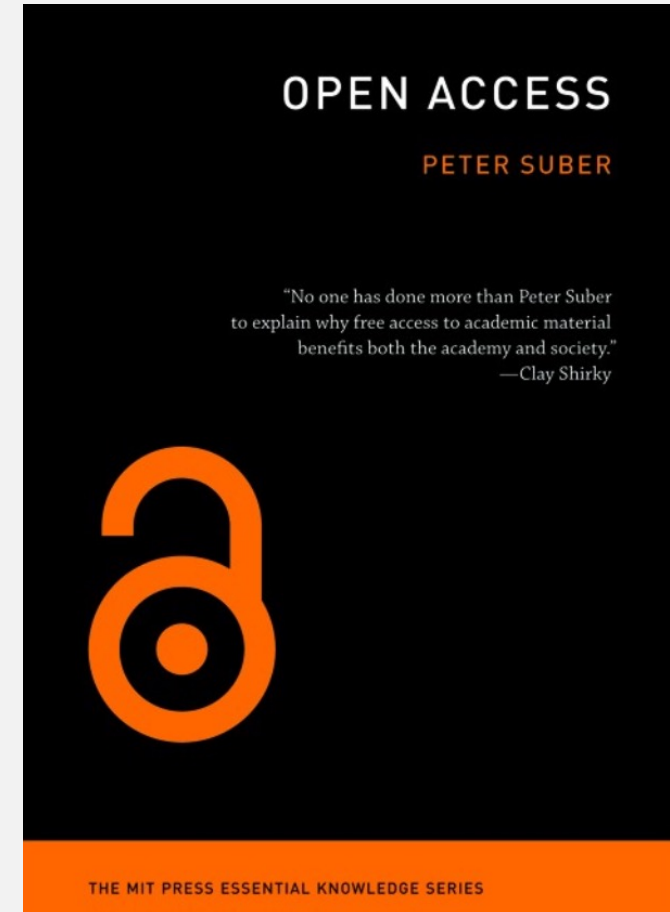
## 2. Making public and democratic science

- Building public **infrastructures** based on **open standards** (for text, data and code)
- Reforming **research assessment**
- Investing in **education** (→ ethics) of the new generation of scientists and citizens
- Reforming **Intellectual Property** → patent law → **copyright** law (exceptions and limitations, SPR etc.)

# 3. Open Access: Peter Suber (2012)

“Open access (OA) literature is

- **digital,**
- **online,**
- **free of charge, and**
- **free of most copyright and licensing restrictions”**



### 3. Second Publication Right: a tentative definition

- The **right to (re-)publish in Open Access a scientific text** (e.g.: a scientific article) previously or at the same time published in a closed access venue (e.g.: a closed access scientific journal with strong copyright restrictions)

# 3. For example...

## Academic Copyright, Open Access and the “Moral” Second Publication Right

Roberto Caso  
Giulia Dore

© Academic purposes; Authors’ rights; Copyright; EU law; Moral rights; Publication; Publishers

### Abstract

*The Green route to Open Access (OA), meaning the re-publication in OA venues of previously published works, can essentially be executed by contract and by copyright law. In theory, rights retention and contracts may allow authors to re-publish and communicate their works to the public, by means of licence to publish agreements or specific addenda to copyright transfer agreements. But as a matter of fact, because authors lack bargaining power, they usually transfer all economic copyrights to publishers. Legislation, which overcomes*

*provocatively suggests that it has a “moral” nature that even makes it a shield for academic freedom as well as a major step forward in the overall development of OA.*

### Introduction

The implementation of Open Access (OA) to scientific publications follows two roads: Gold or Green.<sup>1</sup> The Gold Road to OA consists in publishing *ab initio* with open licences (such as Creative Commons licences) on OA publishing venues (e.g. OA journals). The Green Road consists in re-publishing (and communicating to the public via the internet) in OA venues (e.g. self-archiving OA repositories) works previously published in non-OA or closed venues. The Green OA route is made possible through two legal strategies: the first is contractual, whereas the second is legislative.

The contractual retention of the rights of re-publication and communication to the public allows authors to negotiate with the publisher to retain the right to re-publish and communicate to the public an OA version of the work, through transfer agreements (e.g. licence to publish), or additional contractual amendments to standard publishing contracts (addenda).<sup>2</sup> With reference to research texts, this could be the first draft (pre-print), the modified version following peer review (post-print or Author Accepted Manuscript) or, in some limited cases, the final edited version published by the publisher (publisher’s version or Version of Record).<sup>3</sup> This

The screenshot shows the Zenodo interface for a publication. At the top, the Zenodo logo and navigation links are visible. The publication title is "Academic Copyright, Open Access and the 'Moral' Second Publication Right". The authors listed are Roberto Caso and Giulia Dore. The publication date is December 7, 2021. The document is categorized as a "Working paper" and "Open Access". On the right side, there are buttons for "Edit" and "New version". Below that, there are community tags for "reCreating Europe" and "Trento LawTech paper series". The page also displays statistics: 1,473 views and 642 downloads. A yellow banner mentions the "EU project ReCreating Europe—Rethinking digital copyright law for a culturally diverse, accessible, creative Europe (Grant Agreement No. 870626). European Intellectual Property Review. Forthcoming". A preview window shows the document cover, which includes the University of Trento logo and the text "Trento Law and Technology Research Group Research Paper n. 47". At the bottom right, there is a section for "Indexed in" with the OpenAIRE logo, and a "Publication date" section showing "December 7, 2021" and a DOI of "10.5281/zenodo.5764841". There are also keyword tags for "Scientific publications", "Open Access", "Copyright", "Moral rights", and "Second publication right".



# 3. The rationale of SPR

- Usually the author does not receive a monetary compensation (e.g. royalties) from the publisher
- Usually the basic research is funded by public sector (tax payers)
- The scientific author speaks on behalf of a **universal science** not on behalf of an institution (e.g. University of Trento)



### 3. Freedom, autonomy and right to science


- Freedom of expression and information
- Academic freedom and autonomy → democracy
- **Right to (open) science** (art. 15 International Covenant on Economic, Social and Cultural Rights)

# 3. Right to (open) science (2020)

- 11. The right enshrined in article 15 (1) (b) encompasses **not only a right to receive the benefits of the applications of scientific progress, but also a right to participate** in scientific progress. Thus, it is the right to participate in and to enjoy the benefits of scientific progress and its applications.

United Nations E/C.12/GC/25

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 **Economic and Social Council** Distr.: General  
30 April 2020  
Original: English

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**Committee on Economic, Social and Cultural Rights**

**General comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights)\***

### 3. Contract, bargaining power and research evaluation

- Copyright Transfer Agreement (CTA): author → publisher
- **Unequal bargaining power:** publisher has more bargaining power
- Research assessment system based on bibliometrics (Impact Factor, H Index etc.)

# 3. Toward an European harmonization? (2022)

- Some Member States have a SPR finalized to practice Open Access (Germany, Austria, Netherland, Belgium, France)
- It is not an exception or limitation; it is a **right** composed by **economic** and **moral rights** finalized to practice Open Access (e.g. through Creative Commons Licences)
- It is an **unavailable** and **inalienable** right (moral right); it is **not overridable by contract**

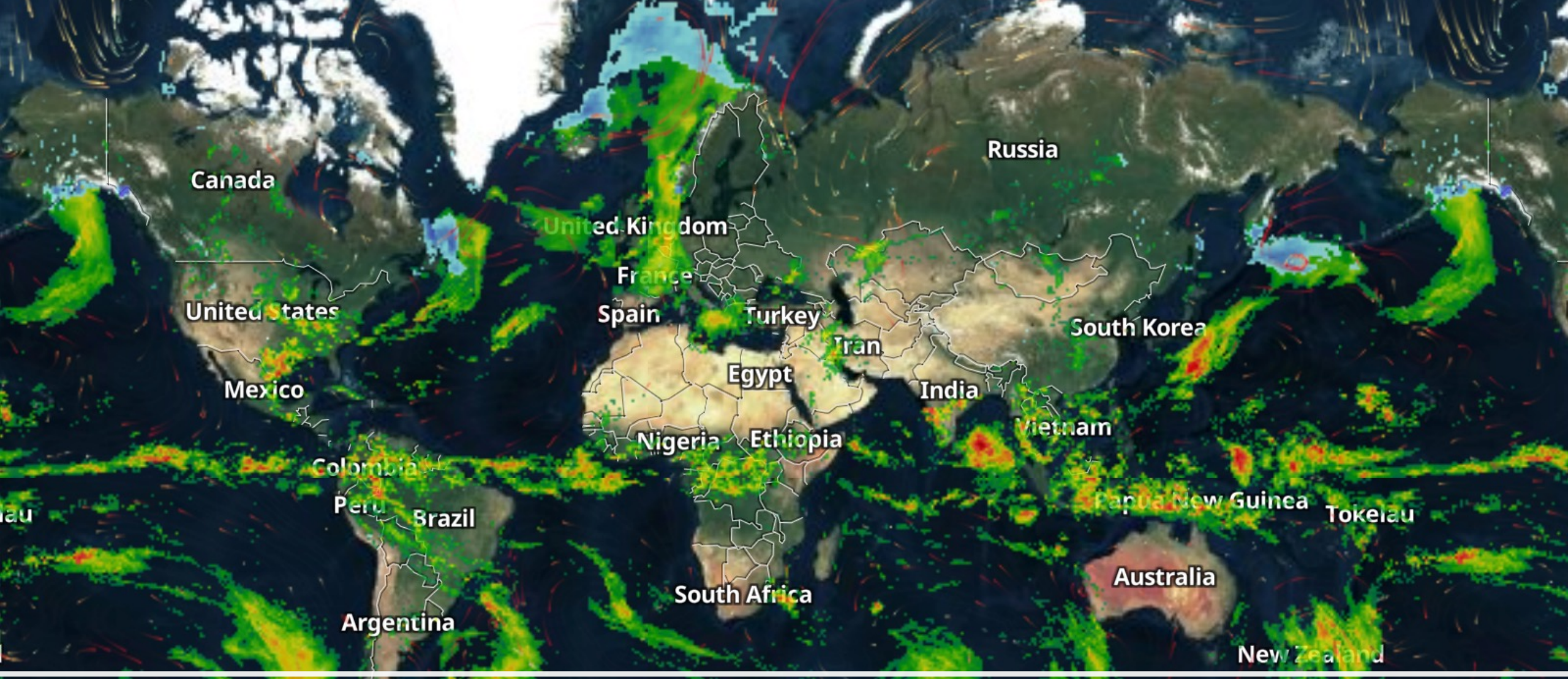


A different  
view of...

- The Cathedral  
of Trani  
(Puglia, Italy)







Thanks!



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- R. Caso [2020], [The academic copyright in the age of commodification of scientific research](#), in SCIRES-IT – SCientific RESearch and Information Technology, [Volume 10, Special Issue \(2020\) Open Science: New models of scientific communication and research evaluation](#)

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- R. Caso, M.C. Pievatolo [2023], [A liberal infrastructure in a neoliberal world: the Italian case of GARR, forthcoming in Journal of Intellectual Property, Information Technology and Electronic Commerce, 2023, Zenodo, <<https://doi.org/10.5281/zenodo.7561821>>](#)
- <https://www.robertocaso.it/2022/08/06/il-diritto-di-ripubblicazione-in-ambito-scientifico-secondary-publication-right-bibliografia-e-sitografia/>

# Abstract

«While much of the debate on the relationship between a human right to science and copyright focuses on the exceptions and limitations to exclusive rights and on users' rights, this paper, on the wake of foregoing studies, argues that it is also necessary to look at other legal mechanisms. In this perspective, it is necessary to reflect on the so called "secondary publication right". This right is an essential tool to defend academic autonomy and freedom, which are increasingly at risk. It is not an exception or a user's right but rather a moral and economic author's right to open scientific texts, which is philosophically rooted on the Kantian vision of copyright (protecting the integrity of the discourse between author and public), the public use of reason and the Mertonian norms of science. The right to open scientific texts is a fundamental aspect of the human right to (open) science».

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