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AISA

Associazione italiana per la promozione della scienza aperta

# Copyright for public and democratic science

“OPEN SCIENCE AND  
RESPONSIBLE RESEARCH EPISTEMOLOGICAL,  
ETHICAL, SOCIAL, POLITICAL ISSUES”, [Università  
Bicocca](#), Milano- June 23, 2023

Roberto Caso



# Some fundamental questions

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

# Outline

1. Academic freedom, democracy, IP and human right to (open) science
2. European contradictions on the public/private boundaries: IP, innovation, progress of knowledge, democracy
3. Making public and democratic science: e.g. SPR




# 1. 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

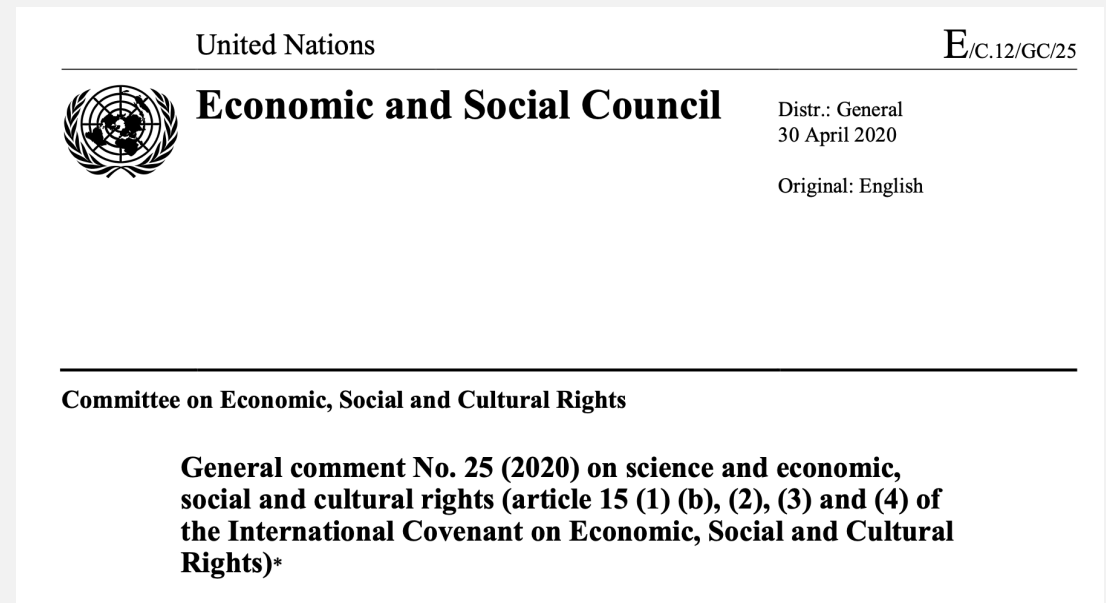
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**Committee on Economic, Social and Cultural Rights**

**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)\***

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

- 60. [...] **intellectual property can negatively affect the advancement of science and access to its benefits** [...]. It is necessary to tackle these three problems in order to ensure that intellectual property promotes the research and innovation crucial to the full enjoyment of economic, social and cultural rights without undermining these rights.



# 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».**

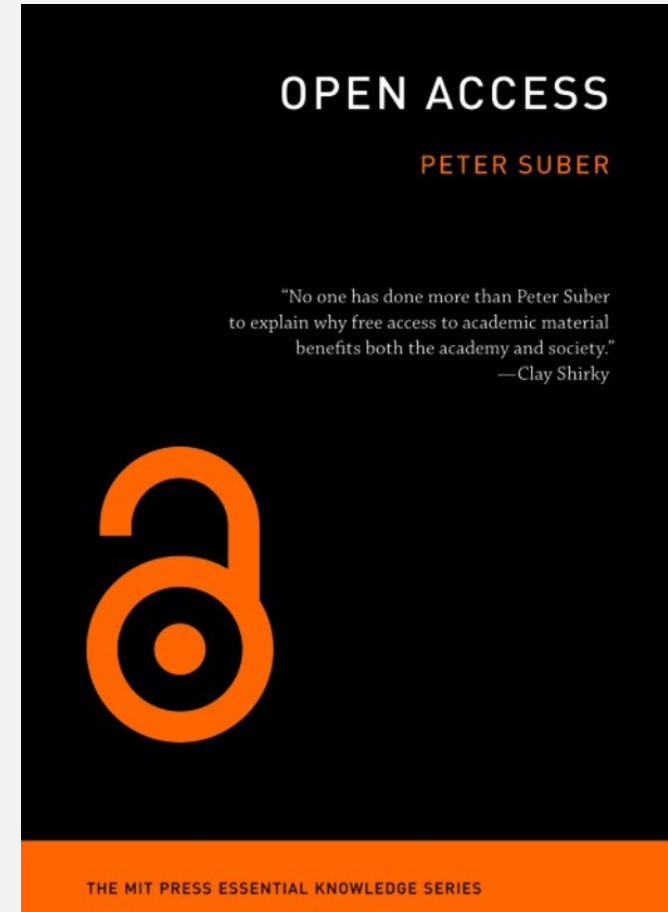


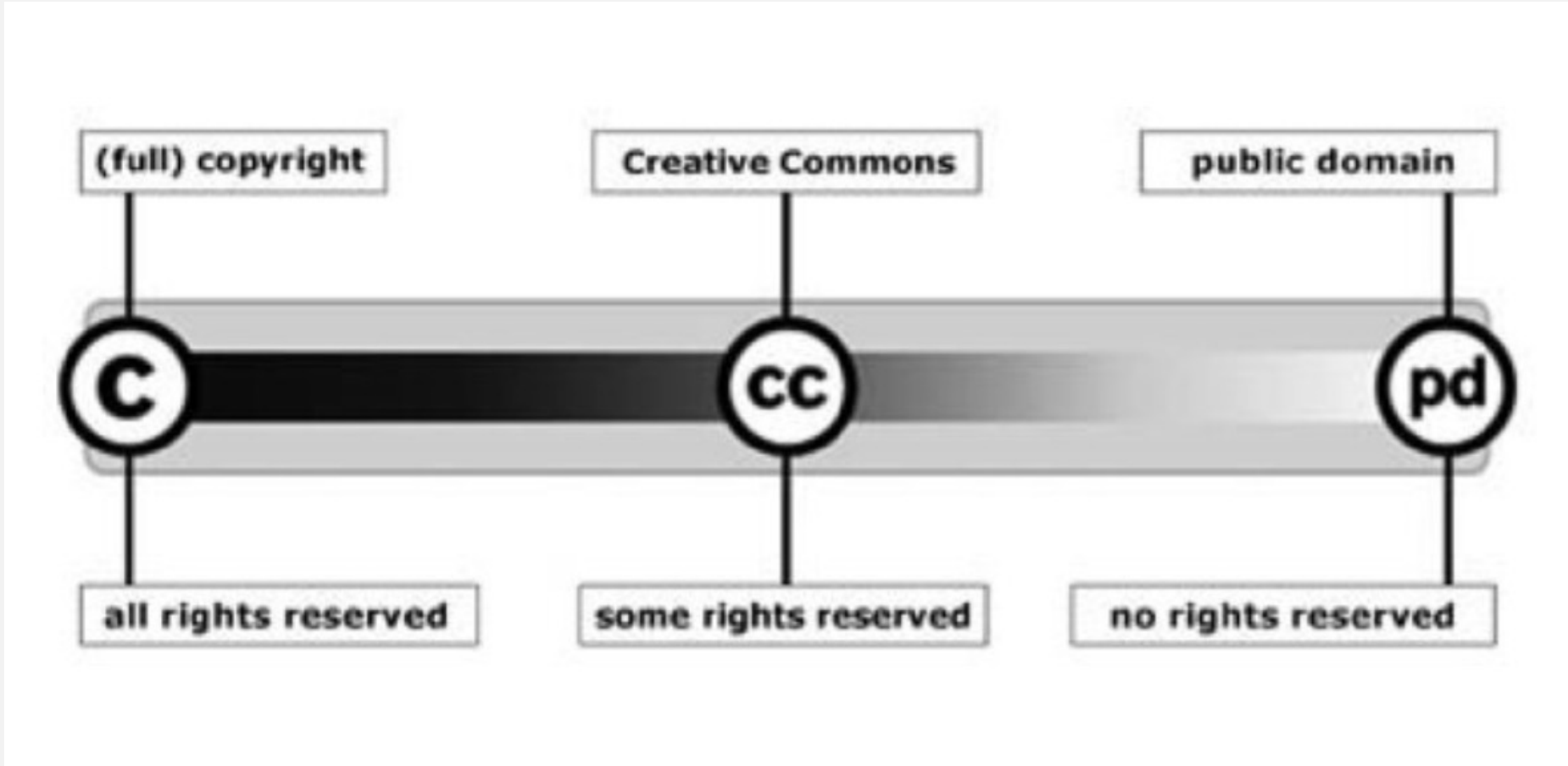


# 1. Open Access: Peter Suber (2012)

“Open access (OA) literature is

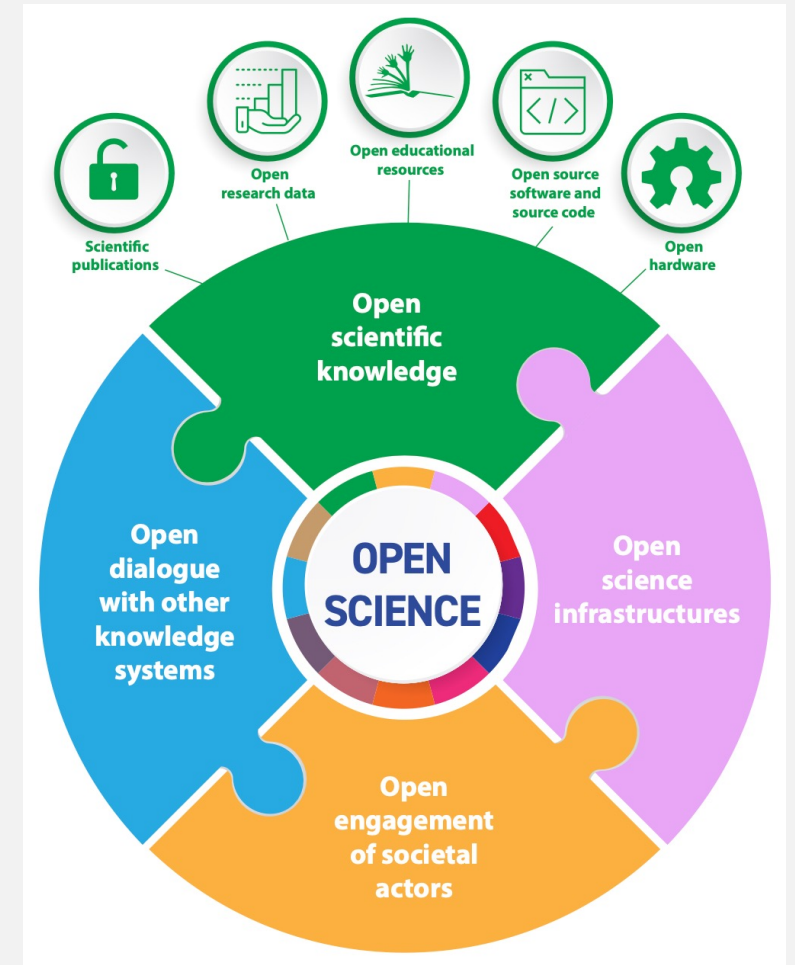
- **digital,**
- **online,**
- **free of charge, and**
- **free of most copyright and licensing restrictions”**





# 1. Open Science: UNESCO (2021)

- «[...] an inclusive construct that combines various movements and practices aiming to make multilingual scientific **knowledge openly available, accessible and reusable for everyone, to increase scientific collaborations and sharing of information for the benefits of science and society**, and to open the processes of scientific knowledge creation, evaluation and communication to societal actors beyond the traditional scientific community».



# 1. Ambiguities: RTS vs.[and] OS [Yu 2022]



The screenshot shows the SSRN website interface for a paper. At the top, there is a navigation bar with links for 'Product & Services', 'Subscribe', 'Submit a paper', 'Browse', 'Rankings', 'Blog', and 'Con'. Below the navigation bar, there are two buttons: 'Download This Paper' and 'Open PDF in Browser', and a link 'Add Paper to My Lib'. The main content area displays the title 'Can the Right to Science Reduce the Tensions Between Intellectual Property and Human Rights?' followed by the subtitle 'A HUMAN-CENTERED APPROACH TO HEALTH INNOVATIONS: RECONCILING INTELLECTUAL PROPERTY WITH HUMAN RIGHTS, Lisa Biersay, Thomas Pogge and Peter K. Yu, eds., Cambridge University Press, 2024, Forthcoming'. Below the subtitle, it says 'Texas A&M University School of Law Legal Studies Research Paper No. 22-56'. Further down, it indicates '14 Pages · Posted: 16 Nov 2022 · Last revised: 25 Apr 2023'. The author's name 'Peter K. Yu' is listed, along with 'Texas A&M University School of Law' and 'Date Written: November 10, 2022'.

- «Despite the high hopes of public health advocates and scholars that the right to science will provide a new human rights tool to resolve the tensions and conflicts between intellectual property and human rights, General Comment No. 25 **does not definitively provide such resolution**».



## 2. Intellectual Property (WIPO, WTO): a Western Neocolonialism

[https://it.wikipedia.org/wiki/Apocalypse\\_Now](https://it.wikipedia.org/wiki/Apocalypse_Now)



## 2. Pseudo-IP → control of data, machines and infrastructures

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- Paracopyright
- Sui generis right
- Trade secret as IP
- Data exclusivity
- Contract + de facto control of data
- Etc.

## 2. EU. Danger of death! Don't touch IP & pseudo-IP

- + IP = + innovation
- E.g. Making the most of the EU's innovative potential An intellectual property action plan to support the EU's recovery and resilience  
COM/2020/760 final



# 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

Jefferson D. Pooley

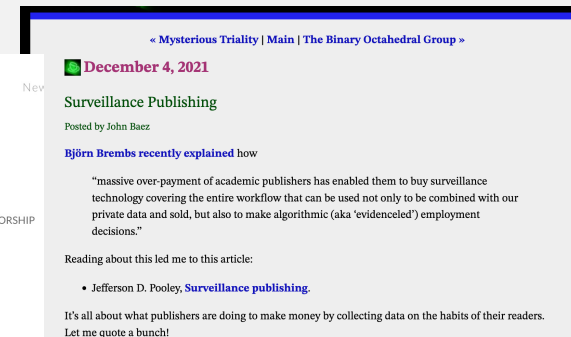
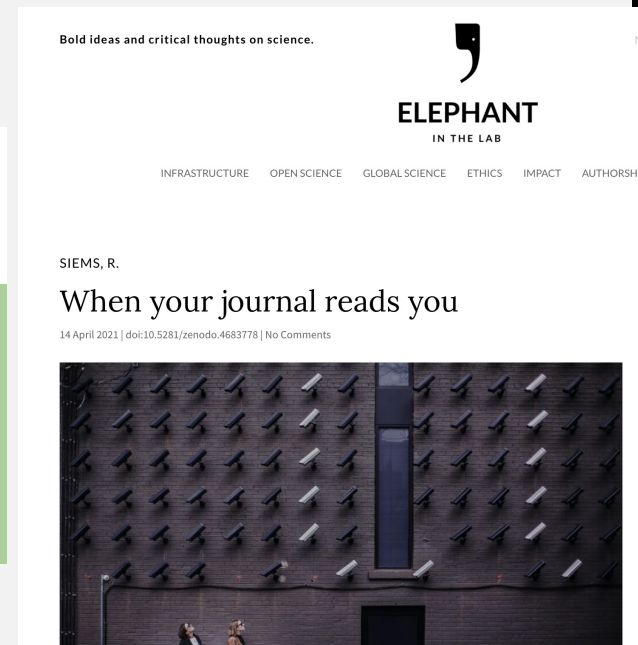
Muhlenberg College  
pooley@muhlenberg.edu  
jeffpooley.com

*A working paper, under review*

## Stop Tracking Science

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

## ChatGPT listed as author on research papers: many scientists disapprove

At least four articles credit the AI tool as a co-author, as publishers scramble to regulate its use.

[Chris Stokel-Walker](#)



CSH Cold Spring Harbor Laboratory **bioRxiv** THE PREPRINT SERVER FOR BIOLOGY



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**COVID-19 SARS-CoV-2 preprints from medRxiv and bioRxiv**

Subject Area **Scientific Communication and Education**








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.

# 3. Intellectual monopoly capitalism (Pagano 2014)

*Cambridge Journal of Economics* 2014, **38**, 1409–1429  
doi:10.1093/cje/beu025  
Advance Access publication 4 August 2014

## **The crisis of intellectual monopoly capitalism**

Ugo Pagano\*

The last three decades have witnessed the emergence of a new species of capitalism. In spite of marked differences between its national varieties, a common characteristic of this species can be found in the global monopolisation of knowledge. This monopolisation involves hierarchical relations among firms and between capital and labour, because the capital of some firms includes the exclusive ownership of much of the knowledge used in production. Since the 1994 Trade-Related Aspects of Intellectual Property Rights agreements, the growing commoditisation of knowledge has extended the role of closed science and closed markets at the expense of open science and open markets. The intrinsic long-term dynamics of this species of capitalism is increasingly characterised by financialisation, inequality and stagnation. In order to exit from the current crisis, we must change many features of intellectual monopoly capitalism and rely on an eclectic approach that draws insights from liberal, Keynesian and Marxian traditions.

*Key words:* Intellectual monopoly, Great Recession, Financialisation, Eclecticism  
*JEL classifications:* B52, E11, E12, F55, G01

- Inequality
- Stagnations

# 3. The Fall of the Innovation Empire (Gold)

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The **Fall** of the Innovation **Empire** and its Possible Rise Through Open Science  
*Research Policy* 50:5 104226  
13 Pages • Posted: 29 Mar 2021 • Last revised: 31 Mar 2021  
[E. Richard Gold](#)  
McGill University - Faculty of Law  
Date Written: March 17, 2021

**Abstract**  
There is growing concern that the innovation system's ability to create wealth and attain social benefit is declining in effectiveness. This article explores the reasons for this decline and suggests a structure, the open science partnership, as one mechanism through which to slow down or reverse this decline. The article examines the empirical literature of the last century to document the decline. This literature suggests that the cost of research and innovation is increasing exponentially, that researcher productivity is declining, and, third, that these two phenomena have led to an overall flat or declining level of innovation productivity. The article then turns to three explanations for the decline – the growing complexity of science, a mismatch of incentives, and a balkanization of knowledge. Finally, the article explores the role that open science partnerships – public-private partnerships based on open access publications, open data and materials, and the avoidance of restrictive forms of intellectual property – can play in increasing the efficiency of the innovation system.

**Keywords:** Innovation, Research productivity, Open science, Intellectual property, Patents, Research incentives, Public-private partnerships, Networks

**Suggested Citation:**

- «The article examines the empirical literature of the last century to document the decline. This literature suggests that the cost of research and innovation is increasing exponentially, that researcher productivity is declining, and, third, that these two phenomena have led to an overall flat or declining level of innovation productivity. The article then turns to three explanations for the decline – the growing complexity of science, a mismatch of incentives, and a balkanization of knowledge».

# 3. Upstream policies: public/private

- Designing roles of public and private sectors
- Designing roles of university and public research institutions
- Designing IP and pseudo-IP



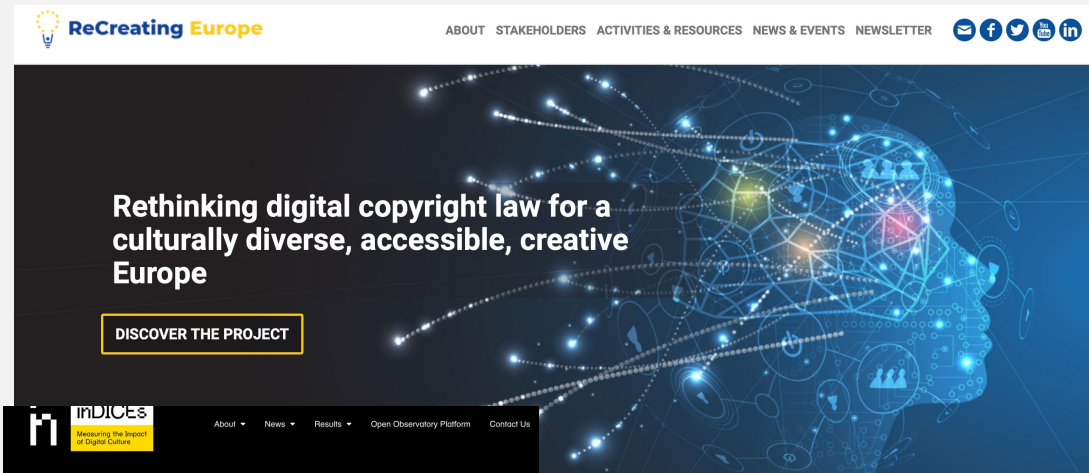
# 3. Making public and democratic science

- Building public data management **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
- Top down/Bottom up: Reforming **Intellectual Property** → e.g. reforming Exceptions & Limitations to copyright, introducing a **SPR** – Using IP in a different way → Istituto Mario Negri, Montréal Neurological Institute





# 3. Towards a copyright for science?



ReCreating Europe

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**Rethinking digital copyright law for a culturally diverse, accessible, creative Europe**

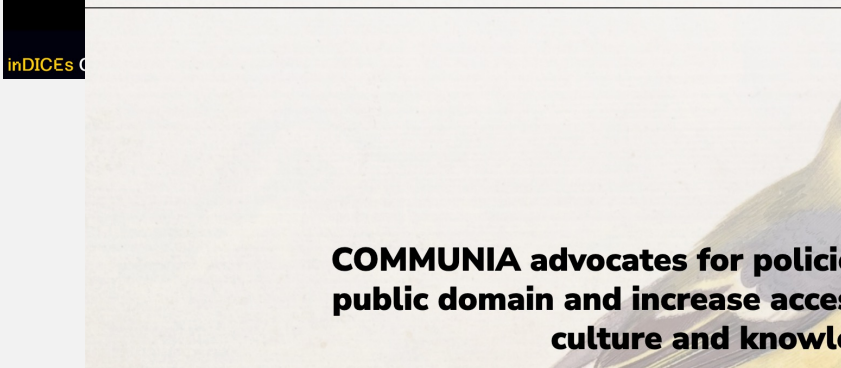
DISCOVER THE PROJECT

**Empowering the Cultural and Creative Industries and policy-makers to fully understand the social and economic impact of digitisation and innovate the reuse of cultural assets**



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**COMMUNIA advocates for policies public domain and increase access to culture and knowledge**



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COLLEGE OF LAW

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**PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY**



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Diritto di ripubblicazione in ambito scientifico

Cerca ...

**Articoli recenti**

- Richard Stallman, Working for the public. Universities, software and freedom (Pisa, 7 giugno)

0 - 2023

# 3. Towards a copyright for science?

E.g.

- Reforming Exceptions & Limitations
- Secondary Publication Right (SPR)





### 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

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December 7, 2021 Working paper Open Access Edit

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

Caso, Roberto; Dore, Giulia

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 license 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 the constraints of a contractual scheme where authors usually have less bargaining power, may deliver a (digital) second publication or communication right, which this paper discusses in the context of research publications. Outlining the historical and philosophical roots of the secondary publication right, the paper 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.

EU project ReCreating Europe—Rethinking digital copyright law for a culturally diverse, accessible, creative Europe (Grant Agreement No. 870626). European Intellectual Property Review. Forthcoming

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Publication date: December 7, 2021  
DOI: 10.5281/zenodo.5764841  
Keyword(s): Scientific publications Open Access Copyright Moral rights Second publication right  
Published in: European Intellectual Property Review.  
Communities: reCreating Europe Trento LawTech paper series

Preview

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Research Paper n. 47



# 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. Italy. AISA's proposal

- **AISA**
- **Art. 42-bis (L. 22 aprile 1941, n. 633, Protezione del diritto d'autore e di altri diritti connessi al suo esercizio)**
- 1. L'autore di un'opera scientifica che sia il risultato di una ricerca interamente o parzialmente finanziata con fondi pubblici, come un articolo, una monografia o un capitolo di un libro, ha il diritto di riprodurre, distribuire e mettere a disposizione gratuita del pubblico la propria opera nel momento in cui l'editore l'abbia messa a disposizione gratuita del pubblico o dopo un ragionevole periodo di tempo, comunque non superiore a un anno, dalla prima pubblicazione. L'autore rimane titolare di tale diritto anche qualora abbia ceduto in via esclusiva i diritti di utilizzazione economica sulla propria opera all'editore o al curatore. L'autore nell'esercizio del diritto indica gli estremi della prima edizione, specificando il nome dell'editore.
- 2. Le disposizioni del primo comma sono di ordine pubblico e ogni clausola contrattuale che limiti il diritto dell'autore è nulla.



# 3. Italy. Gallo's bill

- XVIII Legislatura -Proposta Gallo – DDL 1146 – Art. 42-bis LdA
- Dopo l'articolo 42 della legge 22 aprile 1941, n. 633, è inserito il seguente:
- **«Art. 42-bis. – 1.** L'autore di un'opera scientifica pubblicata in un periodico, che sia il risultato di una ricerca finanziata per una quota pari o superiore al 50 per cento con fondi pubblici, ha il diritto, purché senza fini commerciali, di renderla disponibile gratuitamente al pubblico nella rete internet, in archivi elettronici istituzionali o disciplinari, con accesso aperto, dopo che essa è stata messa a disposizione gratuita del pubblico dall'editore o comunque dopo non più di sei mesi dalla prima pubblicazione, quando si tratta di opere nelle aree disciplinari scientifiche, tecniche e mediche, e dopo non più di un anno, quando si tratta di opere nelle aree disciplinari umanistiche e delle scienze sociali. Nell'esercizio del predetto diritto l'autore indica gli estremi della prima edizione, specificando il nome dell'editore.  
2. L'autore rimane titolare del diritto di cui al comma 1 anche nel caso in cui abbia ceduto in via esclusiva i diritti di utilizzazione economica della propria opera all'editore o al curatore. Le clausole contrattuali pattuite in violazione di quanto disposto dal comma 1 sono nulle».



Senato della Repubblica  
XVIII Legislatura 2018-2022

Introduzione	Senatori	Lavori	Leggi e Documenti
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Sei in: [Home](#) » [Le legislature della repubblica](#) » [XVIII Legislatura](#) » [Leggi e Documenti](#) » [Disegni di legge](#)

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**Disegni di legge**

**Atto Senato n. 1146**  
XVIII Legislatura

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Modifiche all'articolo 4 del decreto-legge 8 agosto 2013, n. 91, convertito, con modificazioni, dalla legge 7 ottobre 2013, n. 112, nonché introduzione dell'articolo 42-bis della legge 22 aprile 1941, n. 633, in materia di accesso aperto all'informazione scientifica

**Titolo breve:** *accesso aperto all'informazione scientifica*



# 3. Italy. Italian publishers' lobbying



A.S. 1146

Modifiche all'articolo 4 del decreto-legge 8 agosto 2013, n. 91, convertito, con modificazioni, dalla legge 7 ottobre 2013, n. 112, in materia di accesso aperto all'informazione scientifica.

**Nota dell'Associazione Italiana Editori**

## **Conclusioni**

Per le ragioni esposte, chiediamo:

*Che i periodi di embargo previsti siano portati a 12 mesi per le discipline scientifico tecnico mediche e a 18 mesi per le scienze umane e sociali, per rendere sostenibile la norma per il sistema italiano della ricerca e per il sistema editoriale italiano, in un quadro di assenza di risorse aggiuntive.*

*Che sia cancellato il comma 2 dell'articolo unico del progetto di legge poiché il vincolo introdotto con il nuovo articolo 42-bis della legge sul diritto d'autore, applicandosi solo alle imprese italiane, le indebolirebbe nei confronti di agguerriti concorrenti stranieri e avrebbe quindi effetti negativi sul tessuto industriale del Paese.*

# 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**



# Paul David (2008)

- «Open science **norms and institutions** are a **social innovation** whose workings must be continually re-created as “social facts”. This **regenerative process** depends upon the scientific practitioners themselves recognizing that much of the “power” that their research communities possess for the successful pursuit of reliable knowledge derives from their **personal appreciation of and commitment** to behaviors that conform broadly to the **informal “cognitive norms,”** as well as to the **formal regulations** governing their activities».



# Paul David (2008)

- «In short, the sustained functionality of these **vulnerable institutional legacies** ultimately rests not in the hands of some distant, unknown and hopefully wise designers of public policy, but upon **scientists' acceptance of responsibility for day-to-day individual and collective actions** in support of “good scientific conduct conjoined with good technique,” and for transmitting that ethos to the future scientists who look to them as mentors».



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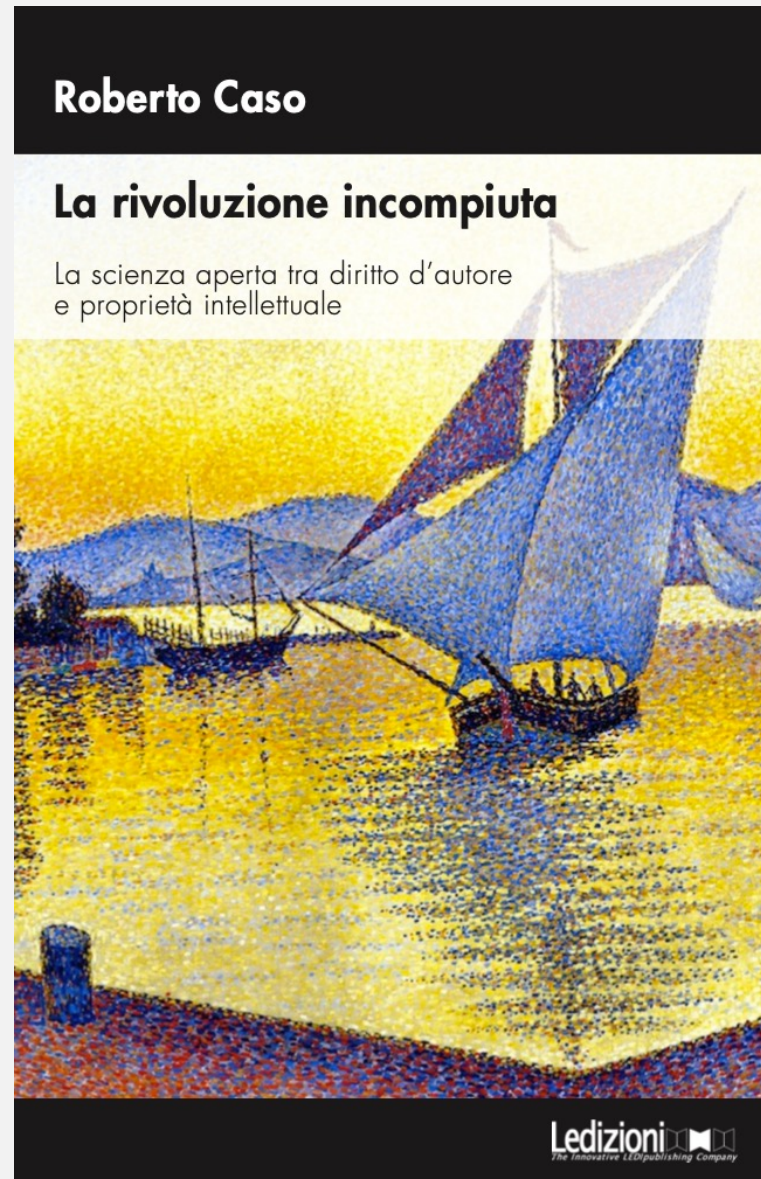
- R. Caso [2021], [Pandemia e vaccini. L'irrisolvibile antagonismo tra scienza aperta e proprietà intellettuale](#), versione 2.0, 23 maggio 2021, [Trento LawTech Research Paper series nr. 44](#), in [Rivista critica del diritto privato](#), nr. 2/2021
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- 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>](#)

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- <https://zenodo.org/record/3588071#.ZAx6HrTMK3J>



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<https://aisa.sp.unipi.it/attivita/diritto-di-ripubblicazione-in-ambito-scientifico/novella/>

- DDL 1146 (bill) XVIII L (Gallo's bill)

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- AIE

[https://www.senato.it/application/xmanager/projects/leg18/attachments/documento\\_evento\\_procedura\\_commissione/files/000/040/901/AIE\\_29.10.2019\\_.pdf](https://www.senato.it/application/xmanager/projects/leg18/attachments/documento_evento_procedura_commissione/files/000/040/901/AIE_29.10.2019_.pdf)

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- reCreating Europe Final Conference Booklet  
<https://zenodo.org/record/7774557#.ZCGNiHZBy3A>

# 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 presentation, 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».





# Roberto Caso

E-mail:

[roberto.caso@unitn.it](mailto:roberto.caso@unitn.it)

Web:

<http://www5.unitn.it/People/it/Web/Persona/PER0000633#NFO>

<http://lawtech.jus.unitn.it/>

<https://www.robortocaso.it/>

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