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## Intellectual Property Rights and Open Scholarship in Europe

by Caroline Winter | 28 July 2023 | Observations, Observations and Responses | 0 comments



*Lisez-le en français*

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At a glance:

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The intersection of intellectual property rights (IPR) and open scholarship has long been an issue of

interest for the research community and for industry. Intellectual property policies and legislation aim to balance the moral and economic rights of creators in their works with the rights and interests of the broader public. The need to understand how IPR and open scholarship interact has become more pressing as the open scholarship movement has advanced. This is particularly true in the context of the COVID-19 pandemic, which highlighted the power of open, collaborative research to address complex, global challenges (see “[Open Scholarship and COVID-19](#)”).

In 2019, UNESCO’s members called for an instrument to build international consensus around open scholarship, and the [UNESCO Recommendation on Open Science](#) was released in November 2021 (see “[UNESCO’s Recommendation on Open Science](#)”). The possible tension between open scholarship and IPR was one of the key issues identified in UNESCO’s consultations.

In April 2021, UNESCO addressed this issue by hosting an online [Expert Meeting on Open Science and Intellectual Property Rights](#), bringing together more than 500 participants including six invited experts. As outlined in the [report on the Expert Meeting](#), the following key messages emerged from the discussion:

- Because there are possible tensions between IPR and open scholarship, balanced policy and strategic approaches are necessary.
- Rather than being a barrier to open scholarship, a well-defined IP framework can promote openness and collaboration: for example, open licenses can help ensure that all research contributions are recognized and acknowledged.
- Understanding the complexities and various forms of IPR and their different implications for open scholarship is also necessary, including how they intersect with other regulatory systems (UNESCO 2021).

In Europe, the possible tensions between IPR and open scholarship have been addressed in several studies and reports released over the past few years alongside policies calling for greater openness, such as [Plan S](#) (launched in 2018) (see “[Plan S and coAlition S](#),” “[Plan S Update: The Expanding Membership of coAlition S](#),” and “[The Fonds de Recherche du Québec Join coAlition S](#)”).

In 2017, the [European Commission’s Joint Research Centre \(JRC\)](#) and the [Directorate-General of Research and Innovation](#) held a workshop on [IPR, Technology Transfer & Open Science](#). The findings of the workshop included that balance was necessary, that IPR is an important tool for ensuring attribution in open science, that strategies for balancing the two should be informed by existing best practices, and that addressing this issue was especially pressing as the [European Open Science Cloud](#) was under development (Crouzier 2017).

In 2020, the European Association of Research and Technology Associations (EARTO) published the white paper [Towards a Balanced Approach Between IPRs and Open Science Policy](#). Although EARTO also calls for balance, the paper suggests policy frameworks and approaches that support commercialization and “open innovation,” a model for research, development, and innovation involving collaboration between universities, businesses, and other stakeholders.

In April 2022, the European Federation of Academies of Sciences and Humanities (ALLEA), published the statement [Aligning Intellectual Property Rights with Open Science](#). This statement focuses on the commercialization of innovations through patents and emphasizes that open scholarship can be implemented through the framework of IPR. For example, patents grant creators exclusive rights to innovations for a period of time, but when the patents expire, those innovations become common knowledge.

Christina Angelopoulos’ 2022 [Study on EU Copyright and Related Rights and Access to and Reuse of Scientific Publications, Including Open Access](#) analyzes the role of the EU copyright regime in the access to and reuse of scholarly publications. It offers legislative and non-legislative recommendations for facilitating access and calls for careful consideration of the effects—intended and unintended—of each.

Also published in April 2022 was *Open Science and Intellectual Property Rights: How Can They Better Interact? State of the Art and Reflections*, a report by the European Commission. This report presents the findings of a meta-analysis of literature on open scholarship and intellectual property from the past decade, including published scholarship and grey literature (policy documents, reports, and white papers). It argues that, although there is tension between open science and intellectual property, they are not fundamentally incompatible. Rather, they must be balanced, as expressed in the phrase “as open as possible, as closed as necessary” (p. 2).

The European Commission report presents some general findings as well as recommendations for policy makers and for researchers and practitioners that echo those in the other reports described here. These findings and recommendations can be summarized into several themes:

- There must be balance between the protection of IP and the open sharing of knowledge, with openness as the default. Ideally, a global IPR framework should be developed for open scholarship that is responsive to changing technologies and that protects the openness of basic science.
- More research is needed about the relationship between IPR and open scholarship, particularly the effect of intellectual property regulations on innovation, at the national and European level. A better understanding of the value of public domain works and infrastructure—including the internet—is also needed.
- Although government funding and intellectual property regulations tend to incentivize innovations that can help solve complex global challenges (e.g., COVID-19 research), we must consider holistically the true value of open, collaborative scholarship—and the true costs of protecting potentially life-saving innovations as intellectual property.
- Researchers’ choices about their work must be respected. Researchers should not be penalized for doing open scholarship, such as through extra administrative or financial burdens. At the same time, researchers’ IPR must be respected, and the terms and conditions for reusing data must be followed.
- Practitioners should be aware of best practices from the open software community, including the use of up-to-date licences, licence diversity, the standardization of licenses and making them human- and machine-readable, building communities of practice, and the “release early, release often” mentality.

At the policy level, the report calls for the creation of an Office for Free Intellectual Property Rights and Open Science, which would be aligned with the European Union’s *Intellectual Property Action Plan*, and which could be funded through Horizon Europe. It also calls for a review of European intellectual property legislation related to hyperlinks, copyright exceptions for text and data mining, and copyright levies.

The report concludes with a call to revise and adapt intellectual property regulations to align with new technologies developed over the past few decades: “Opening up research processes and science leads us towards a promising transformation of the way we do science” (p. 9). A new intellectual property paradigm is needed for this new digital age.

#### IPR and Open Scholarship in the Press

Although the European Commission’s report has not been covered widely in the press, intellectual property and open scholarship are issues of interest in the academic and broader communities in Europe and North America. A 2020 piece in *University Affairs/Affaires universitaires*, for instance, emphasizes the need for less restrictive IPR in biomedicine through the example of researchers fast-tracking a potential SARS vaccine in 2003, which was only possible by sidestepping IPR (Voinigescu). A recent backgrounder by Itzel Saldivar for *Times Higher Education* outlines various forms of intellectual property—patents, copyright, and trademarks—and argues that researchers should understand how IPR affects them and their work. A piece by Claire Woodcock in *Vice* explains how the *New York Public Library uncovered* thousands of creative works published before 1964 that are now in the public domain because their copyright was not renewed, a discovery made using open source XML. As part of lively discussions about

the promises and pitfalls of generative AI, a *Wall Street Journal* article discusses class-action lawsuits launched by media creators who claim that the data used to train Dall-E 2, Stable Diffusion, and similar generative AI systems is stolen intellectual property.

#### IPR and Open Scholarship in the INKE Community

Several INKE partners engage with issues related to intellectual property rights and open scholarship.

On behalf of its members, the *Canadian Association of Research Libraries (CARL)* undertakes initiatives related to copyright policy. For instance, it contributed to the *2018 statutory review of the Copyright Act* and submitted a *joint response to the Canada–United States–Mexico agreement with the Canadian Federation of Library Associations (CFLA)* in 2021. In 2020, *CARL and CFLA* submitted a joint letter to *federal and provincial ministers about crown copyright*, calling for open licences for government information to improve public access to information about COVID-19. It also released a *Statement on Fair Dealing and Copyright* in 2016 and intervened in the *York University v. Access Copyright* case.

In fall 2022, John Willinsky of the *Public Knowledge Project (PKP)* went on an *Amend Copyright tour* through Europe and North America to advocate for including copyright as part of the open access agenda. His position on statutory licensing for research publications, in which IPR are placed in the service of open access, is outlined in his open access book *Copyright's Broken Promise: How to Restore the Law's Ability to Promote the Progress of Science* (Willinsky).

The *Canadian Research Knowledge Network (CRKN)*'s *Rights Statement Project* seeks a solution to the challenge of missing and incomplete rights information in CRKN's *Canadiana Collections*. The project is developing a framework for determining how digital heritage materials across the collection in order to protect creators' rights while making the collections as open and reusable as possible.

#### Responses from the Broader Academic Community

In a blog post for *The Guild*, Alessandra Baccigotti—one of the invited experts at the UNESCO Expert Meeting—discusses the meeting alongside the first *EU Knowledge Valorisation Week*, which was organized by the European Commission and took place from April 27–30, 2021. She notes that there is often skepticism among the open scholarship community about IPR and knowledge valorisation or research and innovation, and just as UNESCO and other organizations are working on building knowledge and consensus about open scholarship, the same needs to be done for IPR.

#### IPR and Open Scholarship

It was widely recognized early on in the COVID-19 pandemic that openness and collaboration was essential to fighting the disease, as summarized by the *OECD*. E. Richard Gold notes in an article in *Nature* that the research community's response to the pandemic challenged some assumptions about IPR, including that strong IPR regulations boost innovation. As the pandemic brought larger issues such as the human right to health and the right to knowledge into focus, the need to consider IPR and open scholarship in a holistic way became more clear.

Although these issues were foregrounded by the pandemic, thinking about IPR and openness has been shifting alongside the shift toward open access. Willinsky notes that in the past, publishers tended to see open access as a threat to their IPR, but as open access becomes more entrenched, publishers are considering how their IPR can sustain open access into the future.

Indeed, this overview of recent policy reports about IPR and OS in Europe show that, in this policy context, intellectual property rights are increasingly understood as being in service to open scholarship rather than in opposition to it.

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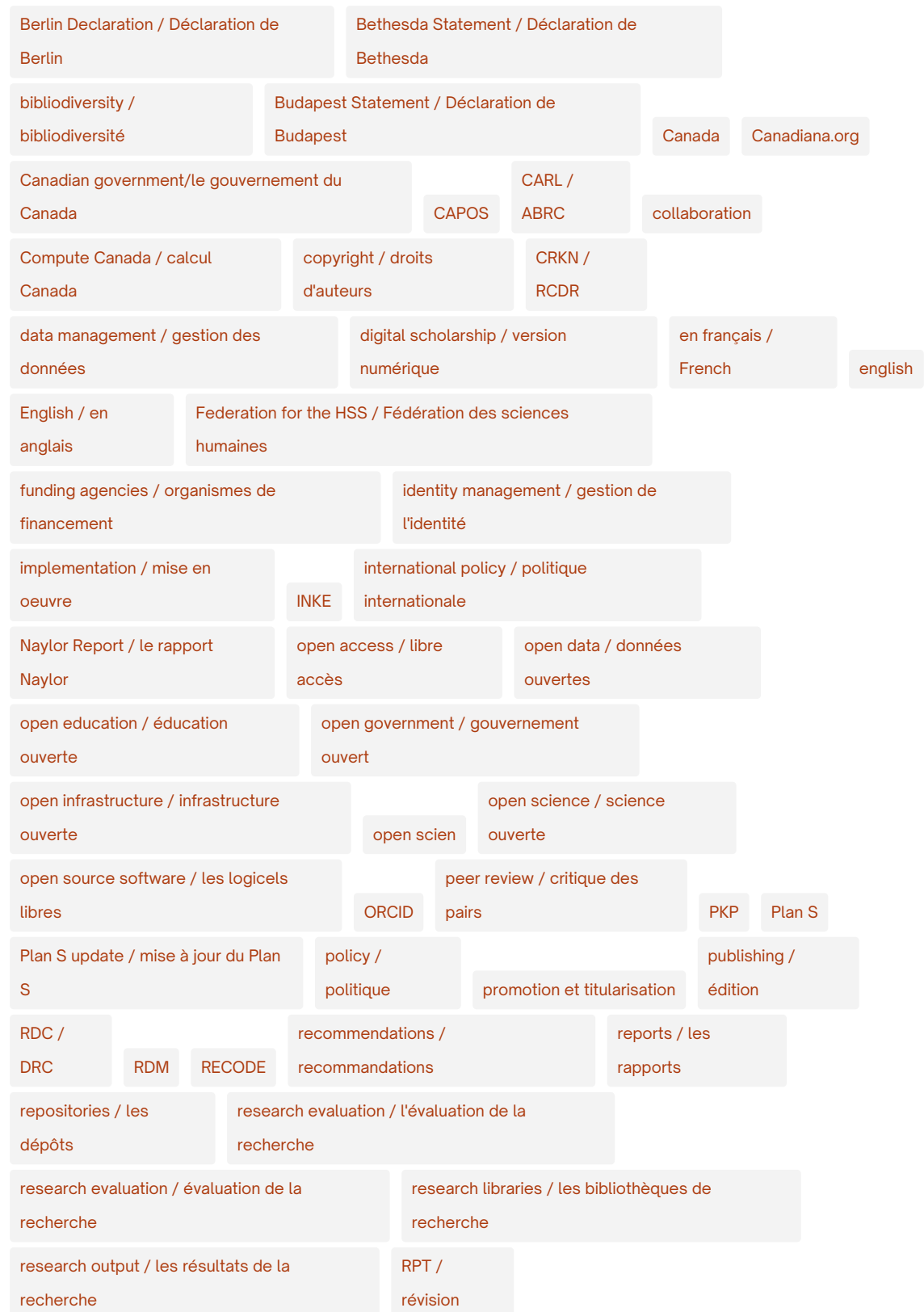
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