

ALPSP, FEP and STM urge caution with the policy options outlined in the report for DG RTD – they result from a biased process followed a predetermined agenda, are not based on evidence and are short-sighted.

October 2024

ALPSP, FEP and STM acknowledge the release of the report “[Improving access to and reuse of research results, publications and data for scientific purposes](#)”, published in May 2024 by the European Commission, which outlines policy options for the next legislative cycle in the field of copyright.

We are committed to providing data and insights to facilitate the analysis of the current landscape across EU Member States. We make available [STM’s Open Access \(OA\) Dashboard](#)¹.

It is part of our mission to strive for improved access to and re-use of R&I results, publications, and data for scientific purposes. We believe that there are better approaches to achieve these goals than those outlined in the report. We respectfully offer some observations and suggestions for next steps:

At a glance

The report positions copyright as an obstacle to R&I, rather than as an asset and driver of competitiveness. It proposes interpretations of international private and copyright law driven by a predetermined agenda rather than solid evidence and runs an analysis on the national experiences of the Secondary Publishing Right on data unsuited for the task. Thus, the report proves unreliable and unsolid ground for any objective EU Commission work in this space. We recommend carrying out further analysis of market trends and driving factors and considering non-legislative routes that deliver access to the most authoritative version of an article.

General observations

1. Copyright is a driver of competitiveness, not a barrier

The European research and scholarly publishing industry is a powerhouse² – it is fully digital, competitive, diverse and independent. The important position of the publishing industry in the European economy should be further encouraged and strengthened so that Europe can continue to play a leading global role. Intellectual Property Rights (IPRs) are legally protected assets that incentivise free and creative expression and drive the economy. They are not obstacles. Unfortunately, the report fails to recognize the full nature of copyright as it proposes to “*reduce exclusive rights of publishers to mere remuneration rights*” (page 182).

¹ The details of sourcing, methodology and relevant definitions are available at <https://www.stm-assoc.org/oa-dashboard-2024/methodology-and-notes/>

² STM publishers serve the needs of Europe’s +2 million researchers and academics, and articles, reviews and conference papers authored in the European Union represent 18% of global output - coming second only to China. More than 5800 journals are originated in the EU, accounting for almost 25% of journals globally.

2. Private international law and international copyright treaties (including the three-step test) must be the guiding principles in considering copyright exceptions in the EU (including a possible Secondary Publication Right, SPR)

Should interventions in EU copyright law be explored, implications for private international law need to be considered and the Berne Convention's three-step test be respected. Exceptions should be devised in such a way as to allow reproduction in certain special cases that do not conflict with the normal exploitation of the works (for academic works, the normal exploitation is research) or other subject matter and do not unreasonably prejudice the legitimate interests of the rightsholders. On one hand, the report seems to acknowledge this for the SPR, stating "*the three-step test in international copyright law may become relevant and affect the design of a harmonised EU regime*" (page 175) and recommends that "*policymakers in the area of SPRs must walk a fine line*" (page 171). On the other hand, it is alarming to read that false alternatives are being considered to evade requirements: "*an assessment of compliance with the three-step test in international copyright law may be necessary when the SPR is seen as an exception to copyright that falls within the field of application of the three-step test. No such additional assessment is necessary when, instead, the SPR is regarded as an exponent of an author's moral and economic rights, or as a rule of copyright contract law*" (page 177).

The French CSPLA Mission report on open science and copyright³ is very clear with this regard: "*the need to open up science can be achieved without weakening copyright*" (page 79).

3. Many of the obstacles identified are not copyright-related

Indeed, the study purports to investigate "obstacles" to research and innovation in the EU but fails to do so meaningfully. Many of the obstacles found (e.g., lack of subscriptions) are not inherently dependent on copyright law and do not acknowledge the fact that rightsholders do offer a suite of access options, re-use permissions, licenses and technologies to advance trusted research (cf. the alleged inability to get permissions from the copyright owner). The report offers a flawed academic assessment of the current framework and doesn't engage with how the research publishing industry operates. Some of the circumstances described can be best addressed through partnership and dialogue between publishers, researchers and institutions and with the appropriate application of technology.

Regarding policy options concerning the Secondary Publication Right

The evidence supporting SPR provisions remain very weak given that a) faulty data sources were used in the analysis, b) the success of the SPR at national level is unproven and c) clearly successful alternative routes exist that lead to open access to the most authoritative version.

4. Faulty data in SPR analysis

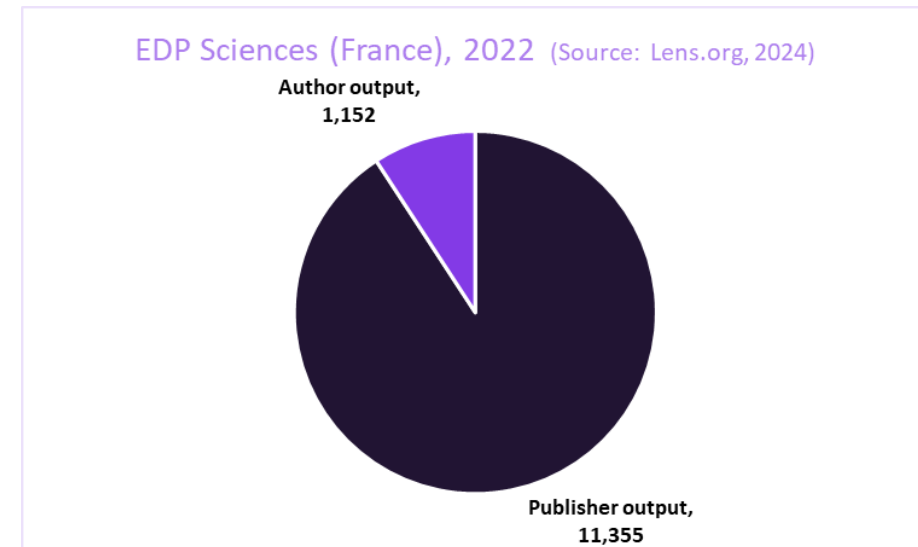
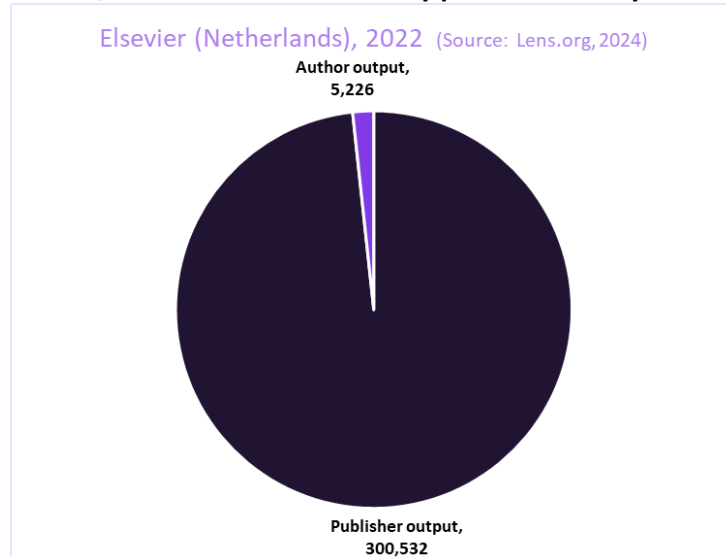
The study team made use of OpenAlex data that allocates country of origin by location of the publisher. This completely undermines the use of this data for the purpose of assessing the impact of policies in each country, as the SPR depends on the location of the author, not the publisher's and all publishers publish content from outside their geographical location. Thus, the analysis presented is not reliable.

³ CSPLA (2023), Mission report on Open Science and copyright. Available at <https://www.culture.gouv.fr/Media/Nous-connaitre/Organisation/Services-rattaches-a-la-ministre/Les-Conseils-du-Ministere/cspla-science-ouverte/rapport-sur-la-science-ouverte-et-le-droit-d-auteur-en-anglais>.

We replicated the analysis undertaken using STM's OA Dashboard data (analysed and produced by Research Consulting and STM) which allocates the country of origin by the correspondence address of the lead author.

Allocating a country of origin by the location of the publisher has skewed the study team's analysis, for example, the OpenAlex figures are very high for the Netherlands, where some large publishers are known to be located, while the number of publications for other EU-27 countries are conspicuously low in comparison to the STM OA Dashboard's figures.

Chart 1, Pie charts with location by publisher and by author⁴



These charts illustrate the difference between the output of a publisher based in a Member State, and the number of articles authored in that Member State that were published by the same organisation. A measurement of the number of articles authored rather than published within a particular Member State is more accurate when measuring the impact of SPR.

⁴ Author location identified using the institution country/region filter of the Lens.org tool, based on matching RoR record. Available at <https://support.lens.org/knowledge-base/scholar-field-definition/#:~:text=Scholar%20Field%20Definitions.%20Every%20document%20in%20the%20Lens%20has%20a>, accessed on 30/09/2024.

Using Scopus data, we have recreated the analysis carried out by the study team (Figure 41). **Our analysis shows that since the year of SPR adoption, there has been no significant nor sustained increase in green OA share of total publication – contrary to what is shown in the report.**

Share of Green OA in SPR countries (Scopus, 2024)

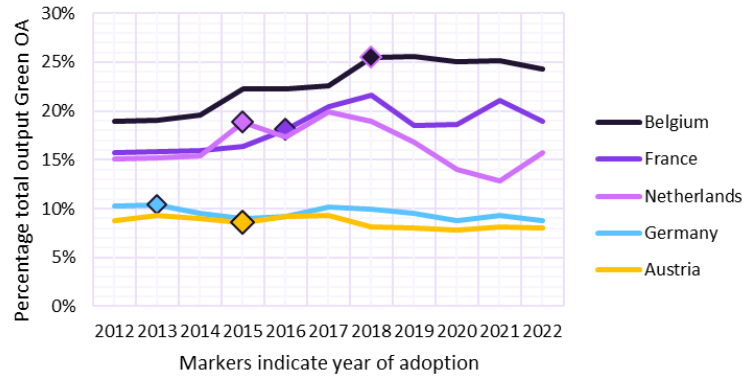
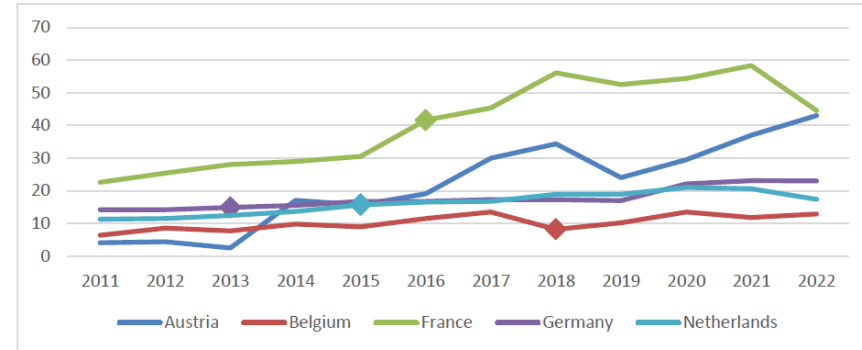


Figure 1, Share of Green OA in SPR countries, STM analysis

Figure 41. Share of Green OA by SPR country by year.



Source: Compiled by the study team using OpenAlex data.

The STM analysis shows that the figures captured in the study do not correctly capture the effective stagnation of green OA in countries with SPR provisions. Below, you see a comparison between the data included in Table 34 of the study team (sourced from OpenAlex) and the STM data side by side.

Country	2012		2013		2014		2015		2016		2017		2018		2019		2020		2021		2022	
	Table 34	STM	Table 34	STM	Table 34	STM	Table 34	STM	Table 34	STM	Table 34	STM	Table 34	STM	Table 34	STM	Table 34	STM	Table 34	STM	Table 34	STM
AT	4.4	9	2.5	9	17.1	9	15.7	9	19.1	9	30	9	34.4	8	24	8	29.5	8	37	8	43	8
BE	8.6	19	7.7	19	9.8	20	9	22	11.5	22	13.5	23	8.2	25	10.2	26	13.5	25	11.8	25	12.9	24
FR	25.4	16	28	16	29	16	30.5	16	41.6	18	45.3	20	56.1	22	52.5	18	54.4	19	58.3	21	44.6	19
DE	14.2	10	24.9	10	15.5	10	16.8	9	16.8	9	17.3	10	17.3	10	17	10	22.1	9	23.1	9	23	9
NL	11.5	15	12.4	15	13.7	15	15.7	19	16.5	17	16.8	20	18.9	19	18.9	17	21	14	20.6	13	17.4	16

Year of SPR adoption

STM OA Dashboard data

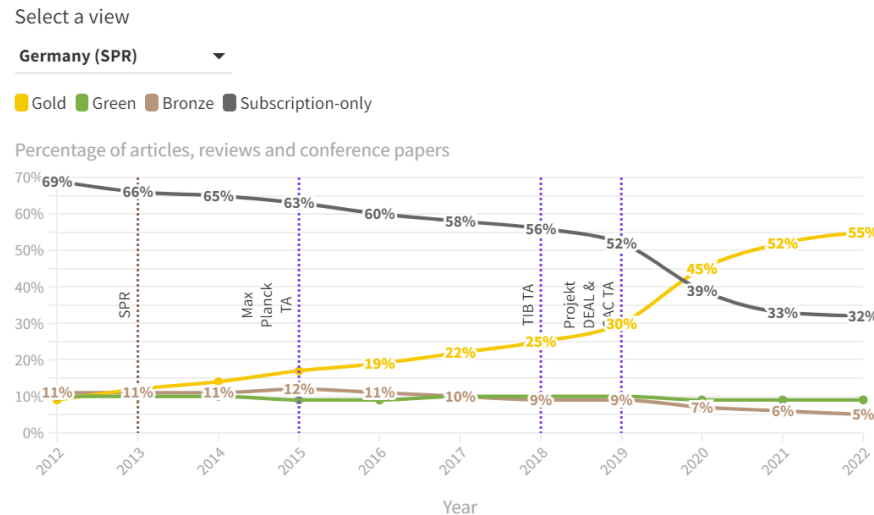
5. Inconclusive findings about the Secondary Publication Right (SPR) at national level

Besides the incorrect numbers reported, in any case the report does not show any strong correlation between the introduction of SPR provisions at national level and increases in access to and re-use of research: *“it is important to acknowledge that the increase in OA publications might not necessarily be directly associated with the introduction of the SPR”* (page 76). **There is no way to ascertain that Green OA is SPR-motivated.**

6. Broader consideration of the publishing ecosystem and factors that influence the availability and re-usability of research is needed

The report notes that the *“increase in OA publications can be attributed to various factors”* (page 76). Indeed, the SPR cannot be isolated from other dynamics in the research market, which weren’t adequately analysed in the study. For instance, whilst transformative agreements (TAs) are recognised as *“instrumental”* (page 77), their effect on the market and interplay with SPRs are not considered. This is extremely relevant as the SPR is only a poor substitute and becomes redundant where gold OA routes are in place and provide open access to the Version of Record. STM analysis shows that, **regardless of the introduction of SPR provisions, green OA has been stagnating in EU countries, whereas gold has grown exponentially, particularly where Transformative Agreements are in place.** See the example of Germany below (and other countries under Annex I), which shows **how OA can successfully be achieved.**

Figure 3, Share of publications authored in Germany by access type, 2012-2022



Source: [Scopus, 2024](#)

Vertical annotations indicate the first year of adoption of Transformative Agreements for a significant number of publications or a major consortium.

The growth of gold OA across all EU Member States over the same period (2012-22) is far stronger than for green OA.

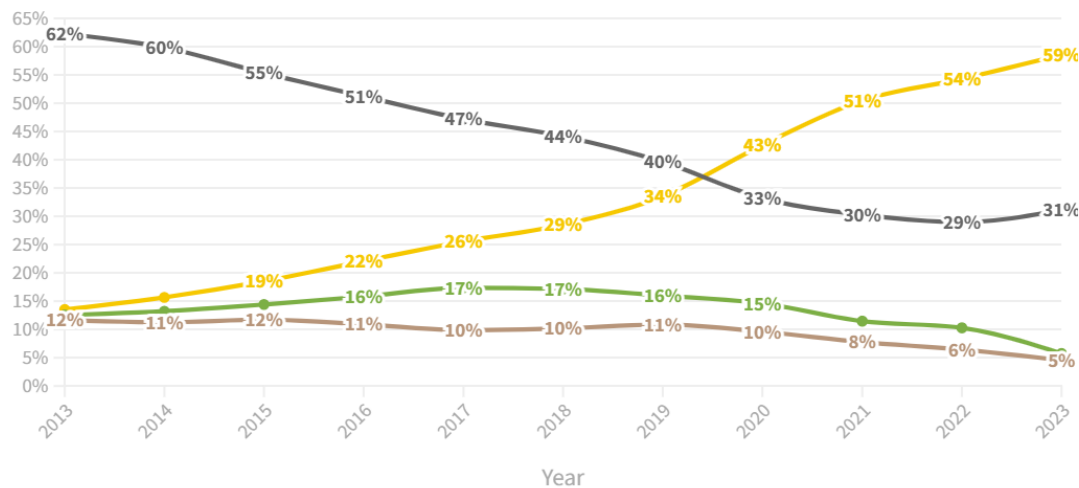
Also, in 2023, articles authored in the European Union demonstrated a higher uptake of gold OA (50% of total output) than the global rate (38%). Authors based in the EU-27 also had the opportunity to choose gold OA in 88% of cases, significantly higher than the global rate of 79%. Those authors have also increasingly chosen gold over the years and did so in 67% of cases in 2023, which again, far exceeds the global rate (48%).

This suggests that **policies supporting gold OA would be better positioned to increase OA uptake than those championing green**, for which there has been no sign of growth in both SPR and non-SPR countries. To view the uptake of access types for all EU member states from 2012 to 2022, please view <https://public.flourish.studio/visualisation/19061766/>.

Figure 4, Share of publications per access type in the EU (incl. UK prior to Brexit)

Gold Green Bronze Subscription-only

Percentage of articles, reviews and conference papers



Source: [Scopus, 2024](#)

Regarding policy options concerning the revision of the existing research exceptions

7. Exceptions and limitations misconstrued as access vehicles

The Berne Convention allows certain limitations and exceptions (E&L) on economic rights, that is cases in which protected works may be used without the authorization of the rightsholder, sometimes without payment or compensation⁵. E&L are not an instrument to gain access, rather lawful access to protected works is a pre-condition for the exercise of E&L. Instead, the researchers propose the following: "The three-step test should be interpreted in an alternative way to balance the freedom of science and academic freedom against the economic interests of copyright holders."

Shortcomings in the study process

8. The study followed a predetermined approach favouring introduction of new legislation

Whilst the study is positioned as an analysis of the current research landscape, the report actually indicates that ERA action 2 "*aims at proposing an EU legislative and regulatory framework for copyright and data*" (page 22). The focus is expressly on "proposing" legislation at the outset, rather than assessing the actual need for a new intervention as the starting point. In STM's view, this presupposition that any legislative or regulatory amendment should be considered or proposed flies in the face of the EU Commission's Better Regulation principle that law-making needs to be based on evidence.

9. Bias in the research team

The possibility of picking an appropriate consortium was limited at the outset since the EU Commission relied on an existing framework contract; still, it is particularly disappointing that this led to entrusting the study to institutions and individuals with a clear track record critical of strong exclusive rights and with corresponding prior opinions expressed on the topics that they were going to analyse. This strongly undermines their impartiality and the reliability of the research framework, and the findings presented. See Annex II for further information.

Next steps

10. Build on the superiority of the Version of Record (VoR)

The report repeatedly acknowledges the superiority of the Version of Record (VoR) to the previous versions of an academic article – the VoR is the final, corrected, enriched and maintained version, published in the journal of choice of the author. Publishers take responsibility for this article version, and it is the article version the author as a scientist will be measured against, that will display corrections and that permanently enters the "record of science" for posterity. Policies that aim to improve access to and reuse of publicly funded publications should prioritise options that provide access to and reuse of the VoR. We strongly recommend this be taken as a guiding principle.

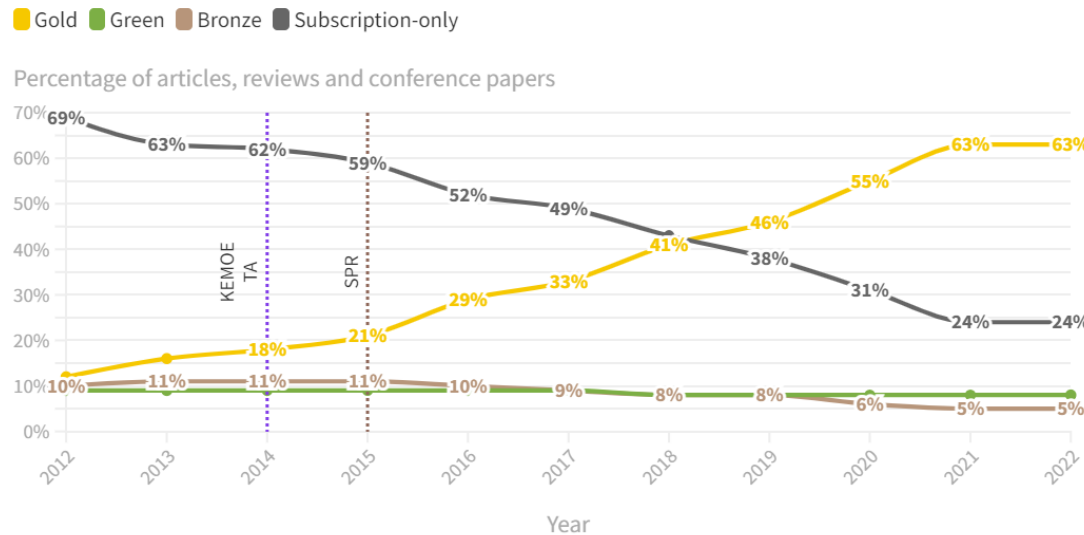
⁵ [Summary of the Berne Convention for the Protection of Literary and Artistic Works \(1886\) \(wipo.int\)](https://www.wipo.int/treaties/en/other/berne/summary/summary.html)

11. Further the analysis of the research publishing and, in general, the copyright-based market in consultation with stakeholders

As pointed out in several passages of the report, before any actions are considered, a proper understanding of the functioning of the research and publishing market is crucial, including **funding mechanisms and more recent market trends and underlying factors**. The analysis of impacts, economic and otherwise, should be expanded to rightsholder groups other than academic publishers. A “policy option 0” (status quo) looking at no legislative measures and at non-legislative measures aimed at fostering stakeholder relations and identifying meaningful routes to Open Access and Open Science should also be investigated. A regulatory approach is not necessarily the most effective, especially in a field already characterised by “regulatory complexity” as described in the summary.

Annex I – STM analysis of green and gold OA in EU Member States with SPR and Transformative Agreements in place

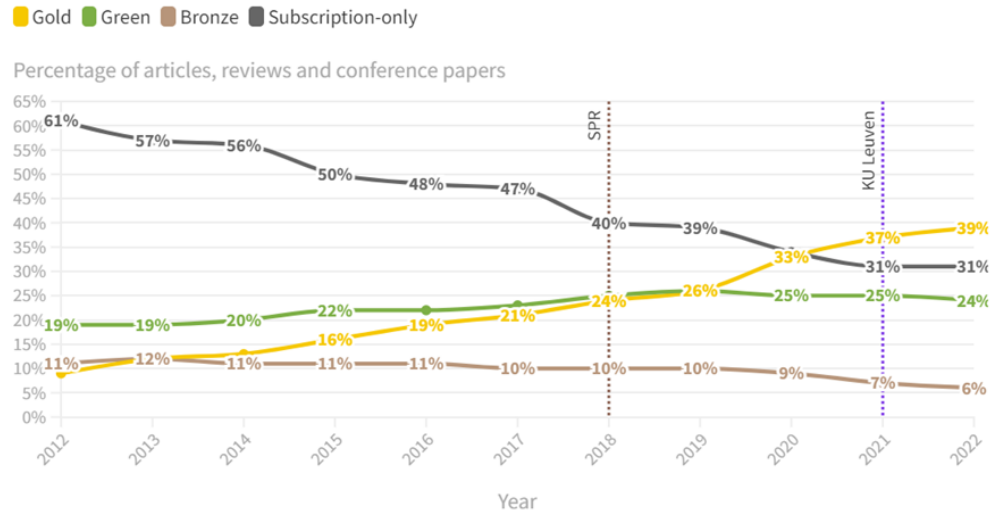
Figure 5, Share of publications authored in Austria by access type, 2012-2022



Source: [Scopus, 2024](#)

Vertical annotations indicate the first year of adoption of Transformative Agreements for a large number of publications or major consortiums.

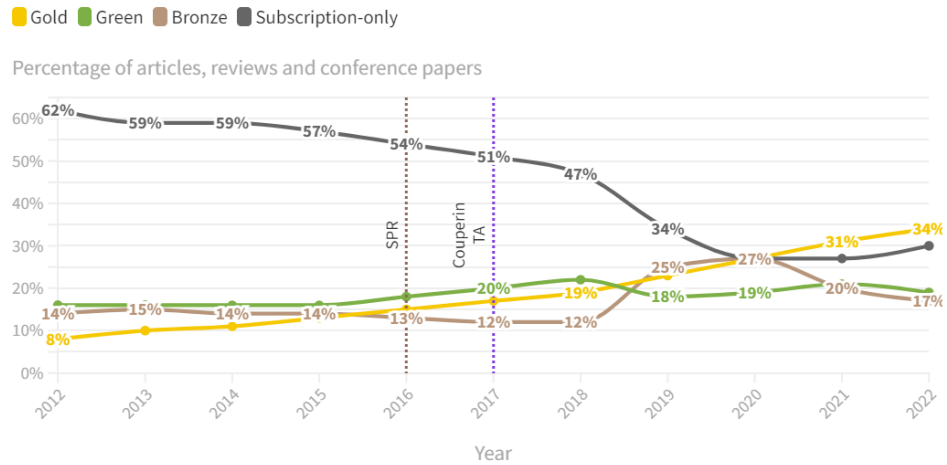
Figure 6, Share of publications authored in Belgium by access type, 2012-2022



Source: [Scopus, 2024](#)

Vertical annotations indicate the first year of adoption of Transformative Agreements.

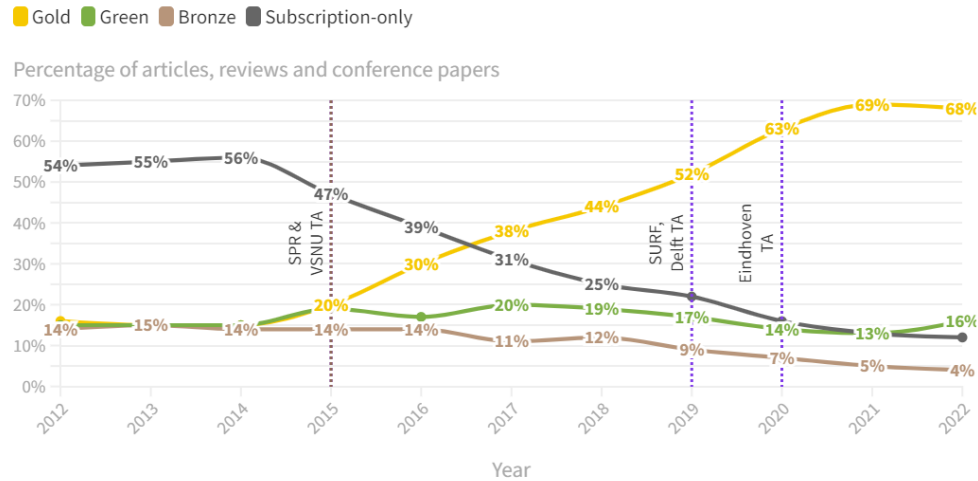
Figure 7, Share of publications authored in France by access type, 2012-2022



Source: [Scopus, 2024](#)

Vertical annotations indicate the first year of adoption of Transformative Agreements for a large number of publications or major consortiums.

Figure 8, Share of publications authored in the Netherlands by access type, 2012-2022



Source: [Scopus, 2024](#)

Vertical annotations indicate the first year of adoption of Transformative Agreements.

Annex II – Study team’s track record on copyright

Previous work by lead academics in the study team shows their strong positions in advocating for expanded copyright exceptions and the weakening of certain protections. These pre-established views suggest a predisposition that may influence their conclusions.

E.g., Prof. Martin Senftleben has consistently argued for greater flexibility in copyright law, particularly in adapting to digital advancements. His work argues for a reverse interpretation of the three-step test and expanded exceptions to allow for broader reuse of copyrighted works, particularly in academic and research contexts.

- “It would be preferable to change the configuration of the EU L&E infrastructure altogether and implement the three-step test in a way that allows judges to devise new L&Es on the basis of the abstract test criteria case-by-case”, Senftleben, M. (2022). EU Copyright 20 Years After the InfoSoc Directive – Flexibility Needed More Than Ever. In G. Ghidini, & V. Falce (Eds.), *Reforming Intellectual Property* (pp. 185-207). Edward Elgar Publishing. <https://doi.org/10.4337/9781803922256.00018>.
- “Clarify that, regardless of the volume of use, scientific research constitutes a “special case” in the sense of the three-step test”, European Commission, Directorate-General for Research and Innovation, Senftleben, M., Study on EU copyright and related rights and access to and reuse of data, Publications Office of the European Union, 2022, <https://data.europa.eu/doi/10.2777/78973>.

Caterina Sganga has published extensively on copyright exceptions (rebranded as “flexibilities” in her work), emphasizing the need for reforms and expansion thereof, especially concerning the Secondary Publication Right. She was part of the reCreating Europe Consortium, together with other academics also involved in the DG RTD study, which put forward [policy recommendations](#) that can be retraced in the report for DG RTD.

- *“One of the most pressing needs is that of aligning EU copyright law with EU policies on Open Access and Open Science”, and “Necessary steps may be the introduction [...] of an EU-wide secondary publication right limited to OA via self-archiving, not overridable by contracts and attributed to authors”, Sganga, C. Is There Still a Policy Agenda for EU Copyright Law?. IIC 54, 1407–1417 (2023). <https://doi.org/10.1007/s40319-023-01365-0>.*

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STM, 2024. The STM Open Access Dashboard. [Online]. Available from: <https://www.stm-assoc.org/oa-dashboard/>

ESAC, 2024. The ESAC Transformative Agreement Registry [Online]. Available from: <https://esac-initiative.org/about/transformative-agreements/agreement-registry/>

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About FEP

The [Federation of European Publishers](#) (FEP) is an independent, non-commercial umbrella association of European book publishers’ associations. FEP represents 29 national associations of publishers of books, learned journals and educational resources from all over Europe. FEP is the voice of the great majority of publishers in Europe. Founded in 1967, FEP deals with European legislation and advises publishers’ associations on copyright and other legislative issues. Based in Brussels, FEP in Brussels and acts on behalf of its members in discussions and negotiations with the institutions of the European Union, according to its core principles: freedom to create and to publish, respect of copyright, cultural diversity, reading promotion.

About STM

[STM](#) supports members in their mission to advance research worldwide. Our over 140 members based in over 20 countries around the world collectively publish 66% of all journal articles and tens of thousands of monographs and reference works. As academic and professional publishers, learned societies, university presses, start-ups and established players we work together to serve society by developing standards and technology to ensure research is of high quality, trustworthy and easy to access. We promote the contribution that publishers make to innovation, openness and the sharing of knowledge and embrace change to support the growth and sustainability of the research ecosystem.