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Copyright's Broken Promise

How to Restore the Law's Ability to Promote the Progress of Science

By: John Willinsky

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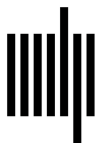
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There's an odd historical twist to the photocopier turning science into copyright's problem child. After all, "learning" had held pride of place since the initial copyright legislation of the eighteenth century. First off, Britain's Statute of Anne 1710 was nothing less than "an act for the encouragement of learning." The US Constitution followed suit with its intellectual property clause—"to promote the progress of science"—and the country's first Copyright Act in 1790 was also "an act for the encouragement of learning." This Enlightenment emphasis on learning went hand in hand with the democratic pursuit of press autonomy. It was an explicit rejection of sixteenth- and seventeenth-century printing regimes in which the king bestowed printing rights in exchange for press censorship on behalf of crown and church. The introduction of modern copyright in the eighteenth century advanced the rights of authors and the independence of the press. Yet for all the inspiration drawn from learning in the formation of the laws, copyright did less for the trade in scholarly books and journal subscriptions, which contributed much to the circulation of learning in the age of print, than might have been expected.

To start with, copyright did not initially cover periodicals, including journals, until well into the nineteenth century in Britain (1849) and even later in the United States (1909). Even then, at least in Britain, scholarly societies showed little interest in exercising their copyright and were all too ready to distribute copies and grant reprint permissions without recompense, as Aileen Fyfe and Julie McDougall-Waters at St. Andrews and Noah Moxham at the University of Kent explain, using the Royal Society as their principal nineteenth-century example: "Copyright was in fact a poor tool for learned institutions like the Royal Society, which were more concerned with reputational credit than with financial credit and were adept at managing the delicate balance between institutional interests

and those of individual authors.”¹ Yet the differences between research and commercial publications—which “put learned-society publishing out of kilter with contemporary trends in copyright reform,” note Fyfe and McDougall-Waters—run beyond the institutional and sponsored economies that sustain scholarship and set it apart from trade and commerce.²

The subsequent eras of photocopying and digital publishing only added to this sense of a copyright economy that was not well aligned with the interests of researchers and scholars when it came to accessing and sharing research. This misalignment speaks to the ways in which research publications differ from other sorts of writing, as I review in this chapter. This difference forms a basis for special treatment within the Copyright Act in order to facilitate open access through the application of statutory licensing so that publishers have a legal means of recovering their investment in publishing that does not depend on exercising an exclusive right in their publications, which is all that copyright currently offers them.

What the photocopying era first brought to the fore was that researchers saw advantages to having their work copied for distribution given how it extended the work’s contribution. They had little to no stake, as other authors do, in copyright’s particular “access versus incentives” trade-off. Consider how William Landes and Richard Posner, University of Chicago economist and legal scholar, respectively, formulate the balance between these two aspects of copyright law: “Unless there is power to exclude, the incentive to create intellectual property in the first place may be impaired.”³ When it comes to research, the access versus incentives trade-off is better restated: *unless the researcher has the power*

1. Aileen Fyfe, Julie McDougall-Waters, and Noah Moxham, “Credit, Copyright, and the Circulation of Scientific Knowledge: The Royal Society in the Long Nineteenth Century,” *Victorian Periodicals Review* 51, no. 4 (2018): 597.

2. Fyfe, McDougall-Waters, and Moxham, “Credit, Copyright,” 610. I noted in the first chapter my work on the history of scholarship’s distinct economy, while that of the contemporary university lab is captured by Clémence Pinel in the form of two prevailing economies: “A commodity-based model whereby laboratories mobilize their assets to produce results, which can be converted into publications for the accumulation of credibility capital, and a rentier model of accumulation whereby laboratories own valuable assets, which they rent out to others outside their lab against revenue”; Clémence Pinel, “Renting Valuable Assets: Knowledge and Value Production in Academic Science,” *Science, Technology, and Human Values*, March 13, 2020, OA.

3. William Landes and Richard Posner, *The Economic Structure of Intellectual Property Law* (Cambridge, MA: Harvard University Press, 2003), 21.

to access (rather than exclude), the incentive to create intellectual property in the first place may be impaired. For researchers, access is an incentive. If “economists point out that there is an asymmetry: everyone has an incentive to ‘privatize knowledge,’” as Columbia University economists Claude Henry and Joseph E. Stiglitz observe, then the researchers’ incentive is generally limited to attribution, as opposed to the publishers’ interest in privatizing access.⁴ Researchers’ work is inspired, energized, and advanced by *access*—that is, others’ access to their work and their access to others’ work.

Just how integral *access* is to research’s knowledge claims is apparent at a glance. The work a scholar has *accessed* (if not thoroughly read) is duly and formally noted throughout the text before being neatly stacked up for display in the bibliography, whether it be a grant proposal or a research publication. If occasionally ornamental and obseisant in use, the referencing of others’ publications offers a breadcrumb trail leading readers back to those on whom authors have built their case. The failure to access and cite the relevant literature is often held against a scholarly author, even as such access may reflect geopolitical circumstances.⁵ Then beyond what the author has been able to consult in writing the work, there is the question of who will be able to access and cite the author’s work in turn, for its contribution depends on the right researcher seeing it.

Now, of course, novelists and poets are deeply influenced by what they read. More than a few footnote their reading in their literary works (notably David Foster Wallace).⁶ Journalists attend closely to their sources, seeking corroboration and verification. Nonfiction writers, who certainly document their sources in endnotes, are not part of the cite-and-be-cited economy that underwrites academic appointments, tenure, promotion, and grants. Judges in a court of law regularly cite “authorities” as

4. Claude Henry and Joseph E. Stiglitz, “Intellectual Property, Dissemination of Innovation and Sustainable Development,” *Global Policy* 1, no. 3 (2010): 242.

5. This is to borrow from Steven Shapin’s sense of a “natural tension” between the personal virtues that go into making knowledge and the impersonal standard to which we hold such knowledge amid the “intense and accelerating *normative uncertainties* of late modernity”; Steven Shapin, *The Scientific Life: A Moral History of the Late Modern Vocation* (Chicago: University of Chicago Press, 2008), 1, 5.

6. David Foster Wallace’s novel *Infinite Jest* (New York: Little, Brown, 1996) has 388 endnotes, some with their own footnotes. See also William Denton, “Fictional Footnotes and Indexes,” Miskatonic University Press, 2022, OA.

precedents for their judgments; lawyers make appeals to prior rulings.⁷ And while parallels abound between the law and scholarship (as the term *citation* suggests), in a very practical sense, the legal profession has less of a digital-era access issue than other professions and academic disciplines. Matters of federal law and legislation, including court rulings, are the “work of the United States Government” and do not qualify for “copyright protection.”⁸

Scholarship’s citation economy is, however, to a large extent self-governing and extralegal. It essentially operates outside of copyright. The 1976 Copyright Act brought statutory clarity to this point: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”⁹ This is a remarkable list from a research perspective. Each identified element, from “idea” to “discovery,” characterizes what researchers value most about others’ work

7. Bruno Latour finds scientific writing wants for the greater authority that judges provide in their writing: “The objectors to whom a scientific article is addressed are not true judges because (a) they are of the same professional category as their author (b) they cannot bring discussion to an end (c) they themselves are judged (sometimes very harshly) by the claimant (d) with whom they share the same rights to extend, re-open, or close the discussion”; Bruno Latour, “Scientific Objects and Legal Objectivity,” in *Law, Anthropology, and the Constitution of the Social: Making Persons and Things*, ed. Alain Pottage and Martha Mundy, trans. Alain Pottage (Cambridge: Cambridge University Press, 2004), 7, OA. Latour claims without substantiation that scientific works undercite—“imagine a scientist being obliged to cite each of the sources he used”—compared to court judgments, “which have to reference all of the relevant text” (7).

8. Copyright Act of 1976, 17 U.S.C. § 105. The legal profession has commercial research services that are making advances in machine-learning strategies, such as Westlaw Edge’s KeyCite Overruling Risk tool, which is “the only citator that warns you when a point of law in a case has been implicitly undermined”; Westlaw Edge, June 24, 2020, OA. Jessica D. Litman notes how, given that the journals are student run, “law journal publishing is one of the easiest cases for open access publishing”; Jessica D. Litman, “The Economics of Open Access Law Publishing,” *Lewis & Clark Law Review* 10, no. 4 (2006): 779–796, OA.

9. Copyright Act of 1976, 17 U.S.C. § 102. Highlighting the point of copyright’s contrast with the patenting of an idea, Justice O’Connor held in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.* “that free exploitation of ideas will be the rule, to which the protection of a federal patent is the exception”; *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.* 489 U.S. 146 (1989).

and for which they cite those works.¹⁰ In that sense, most research citations are not covered by copyright.

Another point of misalignment between the realms of copyright and citation is what the law does and does not protect. The Copyright Act does grant it to be “fair use” to quote for purposes of research and teaching; it permits a researcher to copy an article.¹¹ And yet the Copyright Act does not require that authors’ works be properly attributed to them (which Jane S. Ginsburg terms “an international embarrassment”).¹² Nor

10. Eugene Garfield, who turned the citation into tools of analysis, evaluation, and business (i.e., Institute for Scientific Information), offers these reasons, “among others,” for scholarly citation: “Paying homage to pioneers; giving credit for related work (homage to peers); identifying methodology, equipment, etc.; providing background reading; correcting one’s own work; correcting the work of others; criticizing previous work; substantiating claims; alerting researchers to forthcoming work; providing leads to poorly disseminated, poorly indexed, or uncited work; authenticating data and classes of fact-physical constants, etc.; identifying original publications in which an idea was discussed; identifying the original publication describing an eponymic concept or term as, e.g., Hodgkin’s disease . . . ; disclaiming work or ideas of others (negative claims); or disputing priority claims of others (negative homage);” Eugene Garfield, “Can Citation Indexing Be Automated?,” in *Essays of an Information Scientist*, vol. 1, 1962–1973 (Philadelphia: ISI, 1977), 85, OA.

11. Copyright Act of 1976, 17 U.S.C. § 107.

12. Jane C. Ginsburg, “The Most Moral of Rights: The Right to Be Recognized as the Author of One’s Work,” *George Mason Journal of International Commercial Law* 8 (2016): 44. In the US law, “only the author of a work of visual art has . . . the right—(A) to claim authorship of that work”; Copyright Act of 1976, 17 U.S.C. § 106. In contrast, attribution is regarded as an author’s moral right in the French legal tradition of *droit d’auteur*, as found in the Berne Convention for the Protection of Literary and Artistic Works, dating back to 1887. In a review of the United States’ 1988 signing of the Berne Convention, Deborah Ross concludes that “no federal statute protects the right of an author to be known as the creator of her own work”; Deborah Ross, “The United States Joins the Berne Convention: New Obligations for Authors’ Moral Rights,” *North Carolina Law Review* 68, no. 2 (1990): 367, 370. More recently, Roberta Rosenthal Kwall notes that “when Congress enacted the *Digital Millennium Copyright Act* in 1998, it included a de facto right of attribution through the copyright management information provisions. Section 1202(a) of the statute prohibits the provision of false copyright management information (CMI) that will ‘induce, enable, facilitate, or conceal’ copyright infringement”; Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford: Stanford Law Books, 2010), 26.

does copyright serve as a registry for making claims of scientific discoveries.¹³ It offers no recourse against those who commit scientific fraud, except to disqualify the work for copyright.¹⁴ It provides no protection against the intricate and duplicitous gaming by which a small number of researchers pursue recognition and reputation by manipulating citations, data, figures, peer reviewing, coauthorship, ghost authorship, and publication, generally.¹⁵ Whatever scholarly allowances the Copyright Act of 1976 made for fair use in the age of photocopying, there has been no comparable updating, despite major amendments of this act—with the DMCA a major instance—to accommodate scholarly communication in the internet era. What was once treated as the fair use of photocopiers to advance the sciences no longer makes sense for articles digitally available through researchers' libraries or labs. Researchers are not able to browse databases outside their libraries' collections as a means of discovering articles and journals. As far back as 2012, Jerome Reichman and Ruth Okediji began analyzing “the shrinking realm of scientific users’

13. Csiszar records how the president of the Astronomical Society of London in 1828 questioned whether “public communication can be regarded as evidence” on priority questions and notes the irregularities of publication dating and other disputes over determining priority; Csiszar, *Scientific Journal*, 162–168. Aileen Fyfe reports that periodicals, including journals, did not qualify for copyright in the UK until the 1842 Copyright Act, with the Royal Society failing to register its *Philosophical Transactions* for copyright or expressing much interest in the topic until the 1950s; Aileen Fyfe, “What the History of Copyright in Academic Publishing Tells Us about Open Research,” *LSE Impact Blog*, June 3, 2019, OA.

14. Mario Biagioli, “The Instability of Authorship: Credit and Responsibility in Contemporary Biomedicine,” *FASEB Journal* 12, no. 1 (1998): 6, OA. Graham Dutfield and Uma Suthersanen advise that “copyright protection can be denied to works that are found to be . . . fraudulent. These are generally based on ancient manifestations of the public interest rule”; Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law*, 2nd ed. (Cheltenham, England: Edward Elgar, 2020), 105.

15. See Mario Biagioli and Alexandra Lippman, eds., *Gaming the Metrics: Misconduct and Manipulation in Academic Research* (Cambridge, MA: MIT Press, 2020), OA; Helen Shen, “Meet this Super-Spotter of Duplicated Images in Science Papers,” *Nature* 581, no. 7897 (2020), OA; Evelyne Decullier and Hervé Maisonneuve, “Have Ignorance and Abuse of Authorship Criteria Decreased over the Past 15 Years?,” *Journal of Medical Ethics* 46, no. 4 (2020): 255–258, OA. Also see footnote 10 above on Eugene Garfield, who is rightly credited for originating the field of bibliometrics.

rights,” pointing to the “variety of technological protection measures (TPMs)—so-called electronic fences and digital locks.”¹⁶

Yet another wrinkle in copyright’s fit with scholarship is raised by Mario Biagioli, professor of law and communication at UCLA, when he dares to question the qualifications of research publications as the “original works of authorship” addressed by the Copyright Act.¹⁷ After all, scientists eschew, Biagioli reminds us, “personal creativity and original expression (the kind of claim one has to make to obtain copyright)”; they seek only to represent “the truth of scientific claims,” which are “facts (like the landscape represented in a painting) [and thus] cannot be copyrighted.”¹⁸ And to consider an example of how this works in practice, the phrase “original works of authorship” hardly does justice to what Laura Riva and twenty-nine collaborators from various places around the world achieve in their paper “A Large-Scale Drug Repositioning Survey for SARS-CoV-2 Antivirals,” in which they collectively assess twelve thousand drugs to identify the thirty that are capable of “inhibiting viral replication” of COVID-19.¹⁹ Although the “authors” collaborated on an astonishingly

16. Reichman and Okediji, “When Copyright Law and Science Collide,” 1397, 1367. Michael Carroll points out how “publishers of most scientific and scholarly journals that rely on a subscription revenue model rather than an open access publication model generally use this contractual power to limit researchers’ ability to engage in text and data mining by imposing restrictions on access and use of their content in exchange for making this content available”; Michael W. Carroll, “Copyright and the Progress of Science: Why Text and Data Mining Is Lawful,” *University of California Davis Law Review* 53 (2019): 893.

17. Copyright Act of 1976, 17 U.S.C. § 102; Biagioli, “Instability of Authorship.”

18. Biagioli, “Instability of Authorship,” 4. By way of an example from modern science’s formative period, Steven Shapin characterized the seventeenth-century scientist Robert Boyle as cultivating a “disengaged and nonproprietary presentation of authorial self” to establish that “he was the sort of man who had no reason to misrepresent how matters stood in nature”; Steven Shapin, *A Social History of Truth: Civility and Science in Seventeenth-Century England* (Chicago: University of Chicago Press, 2011), 179–180. More recently, Mark L. Meyer notes that “much space in court reporters and law journals has been dedicated to the proposition that research, particularly scientific research, represents no more than a recitation of facts, and the labor of the researcher is akin to that of a recording secretary”; Mark L. Meyer, “To Promote the Progress of Science and Useful Arts: The Protection of and Rights in Scientific Research,” *IDEA: The Journal of Law and Technology* 39, no. 1 (1998): 33.

19. Laura Riva, Shuofeng Yuan, Xin Yin, Laura Martin-Sancho, Naoko Matsunaga, Sebastian Burgstaller-Muehlbacher, Lars Pache, et al., “A Large-Scale Drug Repositioning Survey for SARS-CoV-2 Antivirals,” bioRxiv, preprint, submitted

tively contribution to the research literature, this “original” achievement ultimately seems far removed from a law intent on “securing for limited Times to Authors . . . the exclusive Right to their respective Writings.”²⁰ Biagioli concludes that “a scientist qua scientist is, literally, a nonauthor.”²¹ While calling a scientist a “nonauthor” strikes me as extreme, his corresponding observation rings true that “nature (or claims about it) cannot be a form of private property, but belongs in the public domain.”²² This is congruent with the sense that scientific research data, in its raw state, is not subject to copyright.²³ And I am heartened by his observation that a “partial analogy between science and IP [intellectual property] may be found in the legal notion of ‘compulsory licensing,’” which trades off IP’s exclusivity for giving everyone access in the interests of science.²⁴

I have a similarly largely supportive response to the ambitious project of Daniel Gervais, Milton R. Underwood Chair in Law at Vanderbilt University, to “(re)structure copyright.”²⁵ To begin with, I applaud his

April 17, 2020, OA. On “corporate authorship,” see Biagioli, “Instability of Authorship,” 6–7, as well as the emerging standard for author roles set by the Consortia Advancing Standards in Research Administration Information (CASRAI), which identifies fourteen “author” roles from “conceptualization” to “writing—review & editing,” with two of the roles using the term “writing”; “CRediT—Contributor Roles Taxonomy,” CASRAI, May 15, 2020, OA.

20. U.S. Const. art. I, § 8, cl. 8.

21. Biagioli, “Instability of Authorship,” 4. In 1890, Ernest Renan offered a statement about the nonauthorship of scientists: “[The scientist’s] goal is not be read, but to insert one stone in the great edifice. . . . The life of the scientists can be summarized in two or three results, whose expression will occupy a few lines or disappear completely in more advanced formulations”; quoted in Shapin, *Scientific Life*, 7.

22. Biagioli, “Instability of Authorship,” 4. Adrian Johns also takes up this instability theme during science’s formative period in “The Ambivalence of Authorship in Early Modern Natural Philosophy,” in *Scientific Authorship: Credit and Intellectual Property in Science*, ed. Mario Biagioli and Peter Galison (New York: Routledge, 2003), 67–90.

23. In defending this point, Richard H. Jones points to other legal options for researchers protecting their data involving invasions of personal rights; Richard H. Jones, “Is There a Property Interest in Scientific Research Data?,” *High Technology Law Journal* 1, no. 2 (Fall 1986): 481–482.

24. Mario Biagioli, “Rights or Rewards: Changing Frameworks of Scientific Authorship,” in Biagioli and Galison, *Scientific Authorship*, 258.

25. Gervais, *(Re)structuring Copyright*, 5. The restructuring that Gervais calls for is to limit the law to curtailing uses that have a commercial impact: “A right to prohibit uses that demonstrably interfere with actual or predictable commercial exploitation” (213).

“abandoning the fiction of homogeneity of authorship that pervades current policy and instead develop[ing] a taxonomy of authorship, with direct policy effects.” In place of such a fiction, Gervais offers a comprehensive four-quadrant taxonomy of author interests and needs. The distinctions I make, for example, around academic authors fit neatly in his second quadrant: “QII: Parent [of research publications] cares only or mostly about attribution. These parents are often otherwise compensated for their work.”²⁶ Where we differ is over Gervais’s effort to avoid a collision between “science and copyright” by trying “to find [a] balance” that will “limit the reach of exclusive rights” granted publishers to “a short period of exclusivity (six, 12 or 18 months are possible options) followed by either open access, or a paid unrestricted use license.”²⁷ On the other hand, I take this open access embargo period—introduced well over a decade ago by the NIH and discussed in chapter 2—as a legal work-around and sign of market failure that exemplifies how, as Gervais himself warns, “contractual patches no longer work well.”²⁸

In contrast to Biagioli’s “nonauthor” and Gervais’s “QII” author, I posit that scientists are the authors of an order of intellectual property that is not currently recognized in today’s Copyright Act. This is intellectual property for which authors are credited not for the writing itself but for the breakthroughs they report on, whether from the lab, archive, library, field, or mind.²⁹ The writing’s fidelity to the research process, as well as to others’ research on which it builds, is the primary, although not the only, concern of the “peer review” process that has distinguished scholarly publishing since at least the Royal Society’s beginnings in the seventeenth century, although the term “peer review” only gained currency in the 1970s.³⁰ Copyright has little to offer on this writing process.

26. Gervais, *(Re)structuring Copyright*, 193.

27. Gervais, *(Re)structuring Copyright*, 91.

28. Gervais, *(Re)structuring Copyright*, 2.

29. Some of the earliest recorded instances of such authorship demands from researchers are credited to Hanover privy councilor Gerlach Adolph Freiherr von Münchhausen, who participated in the founding and early administration of the University of Göttingen in 1734; William Clark, *Academic Charisma and the Origins of the Research University* (Chicago: University of Chicago Press, 2006), 247.

30. Noah Moxham and Aileen Fyfe, “The Royal Society and the Prehistory of Peer Review, 1665–1965,” *Historical Journal* 61, no. 4 (2017): 863–889, OA. Csizsar points to the Royal Geological Society’s 1817 instructions for journal “referees,” although peer review was not standard practice for journals until the mid-twentieth century; Csizsar, *Scientific Journal*, 136–157.

It has little bearing on the distinctive ways in which research publications originate and operate as *intellectual* properties in their respective fields. The intellectual qualities at issue occupy not the law but the sister scholarly fields of intellectual history, history of ideas, and history of science. Scholarly publishing is possessed by its own set of infractions of power, prejudice, and neglect, which are of little interest to the law but still prove a duty and a pleasure for some scholars to pursue.³¹

Now, the courts can and do intervene when research's distinctive economy goes terribly awry. Consider the classic academic malfeasance in *Weissmann v. Freeman* (1998). Here, senior scientist Leonard M. Freeman felt free to literally "white out" the authorship of lab member Heidi S. Weissmann on a paper before adding himself as the sole author prior to submitting it for publication. When the appeals court overturned the lower court's denial of Dr. Weissmann's infringement claim, Judge Cardamone observed that, "particularly in an academic setting, profit is ill-measured in dollars. Instead, what is valuable is recognition because it so often influences professional advancement and academic tenure."³² That legal redress for such an egregious harm to author rights is available, if only after seven years, is encouraging.³³ It does not, however, testify to copyright's efficacy in promoting the progress of science.

The courts have also upheld the common-law distinction known as the "academic exception" or "teacher exception" (frequently referred to as "the controversial 'teacher exception'").³⁴ The relevant rulings have

31. To offer one extended, well-crafted report on the controversies over attribution in scholarship involving the extended dispute over what the philosopher Saul Kripke may have owed the late Ruth Barcan Marcus, see Jim Holt, "Whose Idea Is It Anyway?," *Lingua Franca*, January/February 1996, 29–39, OA. On a cautionary note, Pierre Bourdieu observed that "the market in scientific goods has its laws, and they have nothing to do with ethics"; Bourdieu, "Specificity of the Scientific Field," 26.

32. *Weissmann v. Freeman*, 868 F.2d 1313 (1998), OA. See Corynne McSherry, "Uncommon Controversies: Legal Mediation of Gift and Market Models of Authorship," in Biagioli and Galison, *Scientific Authorship*, 225–250; and Jeffrey Mervis, "Bitter Suit over Research Work Asks 'Who Deserves the Credit?,'" *Scientist*, April 16, 1989, OA.

33. Ray Delgado, "Einstein College to Pay \$900,000 in Sex Bias Case," *Los Angeles Times*, March 18, 1994, OA.

34. Eric Priest, "Copyright and the Harvard Open Access Mandate," *Northwestern Journal of Technology and Intellectual Property* 10, no. 7 (2012): 378, OA; Pamela A. Kilby, "The Discouragement of Learning: Scholarship Made for Hire," *Journal of College and University Law* 21, no. 3 (1995): 458. The

tended, if not consistently, to protect faculty members from having to assign the copyright to their lectures and papers to their universities. What makes this an academic exception is that it does not follow the legal norm “work made for hire,” which was codified in the Copyright Act of 1909 as a protection of employers’ intellectual property claims to work they have hired others to create. The academic exception requires and reinforces the principle of academic freedom insofar as universities expect to see, as a condition of employment, original rather than employer-directed research from their faculty. Faculty members, in turn, insist that their academic freedom must be respected in order for them to undertake research worthy of the name as well as to be able to teach, informed by that research.³⁵

Among the notable applications of the academic exception is *Williams v. Weisser* (1969). In this case, the California appeals court recognized that Assistant Professor B. J. Williams (rather than his employer) held a copyright on his teaching notes, given the originality of such works—“University lectures are *sui generis*,” Judge Kauss noted. “Absent compulsion by statute or precedent, they should not be blindly thrown into the same legal hopper with valve designs” as an example of a work-made-for-hire.³⁶ The academic exception is also upheld in *Weinstein v. University of Illinois* (1987), with Judge Easterbrook observing that “the University concedes in this court that a professor of mathematics who proves a new theorem in the course of his employment will own the copyright to his article containing that proof. This has been the academic tradition since copyright law began.”³⁷ Then a year later, the academic exception

“academic exception” is not to be mistaken for the “research exemption,” which is another product of judicial doctrine dating back to the early nineteenth century that allows for the unlicensed use of patents for the purposes of research (without commercial interests), which is no less controversial amid calls to strengthen it involving statutory licensing; Christopher Getty, “The Research Exemption: Taking Academic Research Out of the Patent Law System,” *Federal Circuit Bar Journal* 29, no. 2 (2020): 237–260.

35. Eric Barendt writes, “It would be incompatible with individual academic freedom to allow the university to claim copyright, for that would give it the right to determine when and where academic work is published, or indeed to prevent publication altogether”; Eric Barendt, *Academic Freedom and the Law: A Comparative Study* (Oxford: Hart, 2010), 216–217.

36. *Williams v. Weisser*, Civ. No. 32615, Second Dist., Div. 5 (1969), OA.

37. *Weinstein v. University of Illinois*, 37 Ed. Law Rep. 1089 (1987), OA. In reviewing more recent cases on faculty ownership claims, in the years 2004 to 2011, Eric Priest found that “three of the five opinions leave open the possibility that a teacher exception applies to scholarly articles”; Priest, “Copyright,” 408.

was called into question by Judge Posner, when he observed in *Hays v. Sony Corp.* (1988) that although he still sees value in the exception, “to a literalist of statutory interpretation, the conclusion that the [1976] Act abolished the [academic] exception may seem inescapable.”³⁸

In 1999, the American Association of University Professors (AAUP), which formed as something of an academic freedom defense league in 1915, issued a statement on the inappropriateness of applying work-made-for-hire policies to “traditional academic work,” given that the “faculty member rather than the institution determines the subject matter, the intellectual approach and direction, and the conclusions.”³⁹ The AAUP regards the faculty’s retention of copyright to be part of “the very essence of academic freedom.”⁴⁰ Nearly a decade after the AAUP took this stance, the academic exception became something of an open access issue.

On February 12, 2008, Harvard’s Faculty of Arts and Sciences passed the first university open access mandate. The faculty members voted to grant the university “permission to make available his or her scholarly articles and to exercise the copyright in those articles,” as the resolution reads, for the purpose of making the articles freely available.⁴¹ And after thirty institutions followed Harvard’s lead (including Stanford’s Graduate School of Education that same year), Eric Priest, University of Oregon law professor, found that the courts do, in fact, have reasonable common-law grounds to uphold the faculty’s right to grant the university this nonexclusive right to their work (thus recognizing the academic exception), even as faculty members are also able to transfer the right of first publication to the publisher of their choice.⁴² As Judge Easterbrook

38. *Hays v. Sony Corp.*, 847 F.2d 412 (1988), OA. The 1976 Copyright Act set out the scope of work made for hire without specifying any exceptions, nor does the US Copyright Office’s “Circular 9 Works Made for Hire,” OA.

39. “Statement on Copyright,” American Association of University Professors, June 1999, OA. This position is defended at some length in Chanani Sandler, “Copyright Ownership: A Fundamental of Academic Freedom,” *Albany Law Journal of Science & Technology* 12, no. 1 (2001): 231–262. The AAUP’s “Declaration of Principles on Academic Freedom and Academic Tenure” refers to progress, access, and publication: “In all these domains of knowledge, the first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results”; “Declaration of Principles on Academic Freedom and Academic Tenure,” AAUP, 1915, OA.

40. “Statement on Copyright.”

41. “Harvard Faculty of Arts and Sciences Open Access Policy,” Harvard University, February 12, 2008, OA.

42. Priest, “Copyright,” 396.

noted in *Weinstein v. University of Illinois* (1987) of this exception, “This has been the academic tradition since copyright law began.” For all of the points at which the interests of scholarship diverge from those of copyright, much would be remedied by amending the law to recognize research publications, for which scholarly publishers should fairly be compensated, making research publications open access. This is sufficient to bring copyright back into alignment with its constitutional purpose.

The Case for Statutory Licensing

The apprehensions surrounding statutory licensing, noted in chapter 4, were further reinforced for me in 2019 by the patent lawyer Kelly McDow, who approached me after I presented my amendment to the Copyright Society of the USA, using the comparable term “compulsory licensing.” She told me, “I shudder on hearing the words ‘compulsory licensing.’” It is bound, she warned me, to invite legal troubles. A colleague of hers quickly added, with a chuckle, “Oh, the time I’ve spent in ‘rate court jail,’” referring to the prolonged hearings involved in determining a “fair” fee rate.⁴³ I have been advised by other lawyers to just call “compulsory licensing” something else or to consider such alternatives as Jane Ginsburg’s “permitted-but-paid” use, which falls between fair use and statutory licensing.⁴⁴ I can imagine a more attractive rebranding of the concept as “reduced-monopoly licensing,” which is no less accurate, or calling it more pointedly “fair-pricing licensing” or simply “access licensing.” Yet far be it for me to rename a long-standing legal concept that already possesses two monikers.

Just as sobering, when it comes to concerns over statutory licensing, is the government’s reluctance to use it. For example, the National Institutes of Health has not once, over the past four decades, exercised its statutory licensing powers on patents arising from university research that have been identified as being applied in abusive and detrimental ways to people’s health.⁴⁵ As well, the US Copyright Office made its reservations

43. “Rate court” is a reference to the BMI and ASCAP consent decrees that operate much like a statutory license, as discussed earlier in this chapter.

44. Ginsburg, “Fair Use for Free,” 1383–1446.

45. The Bayh–Dole Act of 1980 (discussed earlier) permits NIH march-in rights to impose such licensing. A recent unsuccessful call for the NIH to march in arose with Myriad Genetics’ monopoly on breast cancer screening, with the company agreeing on its own to grant such licenses after a Supreme Court decision against it in *Association for Molecular Pathology v. Myriad Genetics*,

clear in a 2011 report on mass digitization, referring to “statutory licensing” as “a mechanism of last resort.”⁴⁶ The Copyright Office is very clear about how “any statutory license would have to be narrowly tailored to address a specific failure in a specifically defined market without interfering with the rest of the digital book marketplace.”⁴⁷ Having set out in chapter 4 the various dimensions of scholarly publishing’s market failure, as it slouches toward universal open access that still lies some decades out, I think a finely tailored instance of statutory licensing is particularly well suited to solving the problem of a Copyright Act that no longer comports with its constitutional mandate to promote the progress of science.

In fact, the signs of market failure are only one side of the case that I am making for statutory licensing. No less important to my argument is the Copyright Office’s explanation of why such licenses “are not favored as a policy matter.”⁴⁸ The Copyright Office notes that “Congress has enacted statutory licenses sparingly because they conflict with the fundamental principle that authors should enjoy exclusive rights to their creative works, including for the purpose of controlling the terms of public dissemination.”⁴⁹ In the case of research publications, open access is precisely the nonexclusive right “that authors should enjoy” in the digital era. As a matter of principle, no less than practice, the conflict between author and access rights vanishes in the case of scholarly work. Statutory licensing provides the best legal means for bringing about the enjoyment of the rights that authors and the public associate with research works.⁵⁰ The application of statutory licensing to open access extends the researcher’s rights rather than limits them, especially when it comes to “the terms of public dissemination.” Such licensing will improve

Inc., 569 U.S. 576 (2013), in which it lost one of its patents involving DNA and brought attention to its practices; Andrew Pollack, “Myriad Genetics Ending Patent Dispute on Breast Cancer Risk Testing,” *New York Times*, January 27, 2015, OA.

46. Maria A. Pallante, *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document* (Washington, DC: US Copyright Office, 2011), 30, OA.

47. Pallante, *Legal Issues*, 38–39.

48. Pallante, *Legal Issues*, 32.

49. Pallante, *Legal Issues*, 38.

50. James Madison in the *Federalist Papers* notes that with “the copyright of authors . . . the public good fully coincides . . . with the claims of individuals,” to which I am adding that this coincidence is all the more realized in the case of researchers and the statutory licensing of open access; quoted in Paul Goldstein, *Goldstein on Copyright*, 3rd ed. (New York: Wolters Kluwer, 2020), 1:43, OA.

their ability to conduct research in the first place, and once the resulting research is published, open access advances their contribution to research (and thus advances their careers) as it increases other researchers' rights to access their work.

This is to evoke an author's "moral rights," in the French legal tradition (*droit d'auteur*), which ensures the proper attribution and integrity of the work. These rights are encoded in the international agreement represented by the Berne Convention for the Protection of Literary and Artistic Works, which dates back to 1886 and currently has 178 signatory countries. The US government signed the Berne Convention in 1988.⁵¹ In doing so, Congress pointed to how such moral rights did not need to be added to the Copyright Act because they were protected in the United States by other state and federal laws. As the *House Report on the Berne Convention Implementation Act of 1988* put it at the time of the signing, "Under the U.S. Constitution, the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the authors' labors."⁵² Three decades later, in 2019, the US Copyright Office conducted a review of what it judged "the current moral rights patchwork" in US law.⁵³ The report concluded that if "generally working well . . . [moral rights] could be improved to the benefit of individual authors and the copyright system as a whole" by "narrow legislation in certain very specific cases."⁵⁴ Thus, in the very specific case of research publications, I seek a narrow application of statutory licensing, which will be "to the benefit of individual authors" (i.e., researchers)

51. This decidedly belated signing of this international copyright agreement has been attributed by Robert Spoo to an American tradition of "protectionism [that] rendered the United States an outcast from the international copyright community"; Robert Spoo, "Ezra Pound, Legislator: Perpetual Copyright and Unfair Competition with the Dead," in *Modernism and Copyright*, ed. Paul K. Saint-Amour (New York: Oxford University Press, 2011), 47.

52. House Report on the Berne Convention Implementation Act of 1988, H.R. Rep. No. 100-609, OA.

53. Karen A. Temple, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, A Report of the Register of Copyrights (Washington, DC: US Copyright Office, 2019), 4, OA.

54. Temple, *Authors, Attribution, and Integrity*, 4. It is also worth noting that although the Berne Convention holds that moral rights operate "independently of the author's economic rights," this is not the case for researchers; Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Stockholm on July 14, 1967, 828 U.N.T.S. 221, OA.

and, following the House report's direction, will "secure for the public the benefits derived from the authors' labors."

From the publisher's perspective, the application of statutory licensing to open access will overcome a major market stumbling block. In requiring the principal institutional users and funders of the research to compensate the publishers, this licensing provides an alternative business model that is as secure (legally and financially) as selling journal subscriptions while limiting the monopoly pricing that some publishers have been enjoying. It addresses what might be thought of as the publishers' right to recoup their investment in innovative, high-quality open access publishing. I would also claim that the two elements of this statutory licensing—namely, open access to research and fair compensation for its publishers—serve the interests of research librarians and funders. The librarians, after all, have always done everything in their power to provide to their users the whole world of learning in carefully curated and finely structured collections. Libraries are being asked to pay the publishing costs of the open access research publications used by their patrons because such publishing activity is vital to the research enterprise in which they are engaged. That the resulting research publications are open to everyone enables this work to better serve the larger community beyond the campus, including alumni, professionals in that community, and the surrounding schools.

Statutory licensing was first passed into law by the Copyright Act of 1909. It followed from the Supreme Court ruling in *White-Smith Music Publishing Company v. Apollo Company* (1907) that Apollo's piano rolls of White-Smith's music did not infringe copyright because the rolls were not recognized as "copies within the meaning of the *Copyright Act*."⁵⁵ The law had fallen seriously behind the technology of player pianos. Under pressure from the music publishers, Congress introduced a form of licensing into the 1909 act in which the copyright holder had no choice but to grant a license. "Upon the payment of a reasonable royalty, all who desired might reproduce the music" was how it was described to Congress, with the act itself identifying such means as "disks, rolls, bands, or cylinders."⁵⁶ The composer or copyright holder possesses a right to the first recording. After that, anyone could record—and reinterpret—the

55. *White-Smith Music Publishing Company v. Apollo Company*, 209 U.S. 1 (1907), OA.

56. To Amend and Consolidate the Acts Respecting Copyright, H.R. Rep. No. 2222, pt. 1 (1909), OA; Copyright Act of 1909, Pub. L. No. 60-349, 320 Stat. 1081 (1909).

piece by notifying the copyright holder and paying a royalty rate of “two cents on each such part manufactured.”⁵⁷

The Copyright Act of 1976 refined the pricing for licensing by instituting a Copyright Royalty Tribunal that was to hear from all parties before setting the rates. The act also applied statutory licensing to the public broadcasting of nondramatic musical compositions, jukeboxes, satellite TV, and cable retransmissions. In 2006, the act was applied to internet radio and the manufacturing of digital transmission and recording equipment. Then the Music Modernization Act of 2018 instituted market-based pricing: “The Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.”⁵⁸

One indication of the music industry’s regard for such licensing can be found in reviews conducted by the US Department of Justice of the consent decrees first applied to the nonprofit performance-rights organizations ASCAP and BMI in 1941. These decrees operate as a form of statutory licensing by subjecting the rates charged by ASCAP and BMI to judicial review.⁵⁹ Although the Department of Justice has not yet released the findings for the most recent review (initiated June 5, 2019), ASCAP and BMI’s joint opening statement to the department is telling. While believing that “a free market with less government regulation” is best, they held that it would be too disruptive for their businesses to remove the decades-old decrees.⁶⁰ They ask only that the rules be updated to match the Music Modernization Act of 2018’s statutory licensing terms. Most music industry submissions to this review also support continuing the decrees.⁶¹ It appears that the industry favors working within

57. An Act to Amend and Consolidate the Acts Respecting Copyright, 320 Stat. 1076 (1909), OA.

58. Orrin G. Hatch–Bob Goodlatte Music Modernization Act, 17 U.S.C. § 114 (2018), OA. The copyright royalty judges are employed by the Library of Congress for six-year terms.

59. Adam Candeub, “Keep the BMI-ASCAP Consent Decrees: Despite New Technology, Their Licensing Duopoly Endures,” *Forbes*, January 13, 2020, OA; Jem Aswad, “ASCAP, BMI Submit Final Arguments to DOJ to Modernize ‘Outdated’ Consent Decrees,” *Variety*, August 9, 2019, OA.

60. “BMI President & CEO Mike O’Neill and ASCAP CEO Elizabeth Matthews Issue Open Letter to the Industry on Consent Decree Reform,” ASCAP, New York, February 28, 2019, OA.

61. Chris Cooke, “Alternative Views from within the Music Industry Feature among 877 Submissions to the BMI/ASCAP Consent Decree Review,” *Complete Music Update*, September 12, 2019, OA.

the bounds of the known world. As for the legal constraints that statutory licensing imposes on the industry, the fact that the United States' \$43 billion music industry continues to dominate the world suggests that statutory licensing will not unduly constrain the finances of the scholarly publishing industry.⁶²

I would also invoke a second market condition that speaks to the limits of statutory licensing. The emergence of cable television in the 1970s and satellite television in the 1980s both led to statutory licensing intended to further protect copyright owners (from infringement) and consumers (from monopolies), respectively. Now that the market for these transmission systems is well established—if about to be eclipsed by online streaming—the US Copyright Office has been exploring ways to “phase out these statutory provisions” with “the possible transition to market models.”⁶³ The degree of stability and predictability that statutory licensing introduces into a new emerging market is a strong advantage of this legal remedy. The prospect of being able to persuade the Copyright Office or Congress to phase out the statutory licensing of research publications after universal open access has been achieved in favor of market mechanisms may make the introduction of this strategy into scholarly publishing more palatable for publishers.

Another, perhaps surprising source of support for applying statutory licensing in the narrowly defined domain of research publications can be found among the legal scholars who take exception to this form of licensing. For example, Daryl Lim allows that only one principle can warrant such licensing—namely, “clear instances of consumer harm.”⁶⁴ When it comes to the long road to open access, I find traces of such harm in the 28 million research article downloads from the illegal repository Sci-Hub over half a year or the 150 million article requests that JSTOR

62. Dmitry Pastukhov, “Music Market Focus: Sizing Up the US Music Industry,” *Soundcharts Blog*, March 17, 2019, OA; Reed, *Unrealized Promise*, 167. This music industry success is not evenly distributed, of course, as Hua Hsu reports that musicians averaged a \$21,300 median income in 2017, while “71 percent of music industry revenue goes to the top one percent of content producers”; Hua Hsu, “Starving Artists,” *New Yorker*, September 14, 2020.

63. Maria A. Pallante, *Priorities and Special Projects of the United States Copyright Office, October 2011–October 2013* (Washington, DC: US Copyright Office, 2011), 8, OA.

64. Lim, “Copyright under Siege,” 485.

denies annually to nonsubscribers.⁶⁵ At the same time, this application of statutory licensing will not prevent, to address another of Lim's concerns, "creators of newly copyrighted works from reaping the full benefit of their efforts."⁶⁶ Just the opposite, in fact, as I have been at pains to point out: researchers benefit from open access to others' work as well as to their own work. Nor can it be argued, to turn to the late Howard B. Abrams's reservations with statutory licensing, that such licensing will, in this case, "accomplish little that a free market would not accomplish," as the scholarly market has shown that it will take decades to approach universal open access while continuing to push the academic to the very edge, if not beyond, of sustainability.⁶⁷

Robert P. Merges takes a similar market-affirming stance in his critique of statutory licensing, especially for online media, when he argues that "private negotiations are much cheaper and more flexible over the long term" than rulings by copyright royalty judges, using the example of how "anyone can [in 2004] legally download music from all five of the 'major' record labels for as little as 49 cents per song."⁶⁸ This bargain pricing needs to be compared to the cost of research articles today, which can run, according to recent encounters on my part, from \$20 for two-day access (Cold Spring Harbor), to \$35.95 for PDF download (Elsevier), and, most relevantly to the discussion here, to \$39.95 to download "Scholarly Publishing at a Crossroads: Scholarly Perspectives on Open Access" from Springer Nature. The "Crossroads" article (for which I can freely access only the final draft) reports that 75 percent of the 274 faculty and doctoral students "agreed or strongly agreed that their research should be freely available to all readers."⁶⁹ This would seem to belie Merges's point, at least for research publications, that "the Internet

65. Bohannon, "Who's Downloading?," 508–512; Alexis C. Madrigal, "Every Year, JSTOR Turns Away 150 Million Attempts to Read Journal Articles," *Atlantic*, January 12, 2012, OA.

66. Lim, "Copyright under Siege," 524. Note that Lim is referring here to the EFD, which is a legal doctrine that can require the holder of a monopoly to provide access to a facility that is deemed essential to downstream operations.

67. Howard B. Abrams, "Copyright's First Compulsory License," *Santa Clara High Technology Law Journal* 26, no. 215 (2009): 242, OA.

68. Robert P. Merges, "Compulsory Licensing vs. the Three 'Golden Oldies': Property Rights, Contracts, and Markets," *Policy Analysis* 508 (2004): 1, 4, OA.

69. Sarah Rose Fitzgerald and Zhehan Jiang, "Scholarly Publishing at a Crossroads: Scholarly Perspectives on Open Access," *Innovative Higher Education*, May 8, 2020, OA.

has reduced the transaction costs that once served as a key rationale for compulsory licensing.”⁷⁰ Instead of using it for cost reduction, publishers have turned the internet into a new marketing opportunity for selling individual articles, which ends up defeating appeals to fair use (as fair use of the articles would now affect this new market).

On the other hand, I can see that it would be worthwhile conducting economic modeling and research to address what Merges identifies as the “significant influence costs [involved in presenting a case to the copyright royalty judges] that make [copyright royalty tribunals] generally more expensive as a mechanism for setting prices” than market forces.⁷¹ More generally, what is best for the circulation of research and scholarship is bound to differ from that of music, on which Merges, Abrams, and Lim base their critique of statutory licensing in favor of what Merges calls out as “the Golden Oldies—property rights, contracts, and markets.”⁷²

On the expense issue, Michael Carroll offers a test for assessing the value of introducing further complexity and administrative cost into intellectual property law. He asks that we compare the costs of tailoring the law to accommodate research, in this case, to the “uniformity cost” of “failing to supply fine-grained rights tailored to the economic circumstances of different classes of authors and inventors.”⁷³ By “uniformity cost,” Carroll is referring to all that is lost through a one-size-fits-all approach to intellectual property law. The principal cost, in this case, lies in the research opportunities that are missed due to the restrictions that publishers place on readers (through subscriptions) and authors (by levying APCs).

The COVID-19 pandemic has demonstrated just how much scientific progress can be made in the face of a global health crisis through strategies that include opening up the research literature. The publishers’ copyright suspension for COVID-19 literature, even before the pandemic

70. Merges, “Compulsory Licensing,” 4. This needs to be reconciled with how Rob Johnson, Anthony Watkinson, and Michael Mabe report that “the cost per download [is] at historically low levels (well under \$1 per article for many large customers)” of STM publishers; Rob Johnson, Anthony Watkinson, and Michael Mabe, *The STM Report: An Overview of Scientific and Scholarly Publishing*, 5th ed. (London: International Association of Scientific, Technical and Medical Publishers, 2018), 7, OA.

71. Merges, “Compulsory Licensing,” 9.

72. Merges, “Compulsory Licensing,” 12.

73. Carroll, “One Size,” 1389.

was declared, provides one source of insight into the costs of the current law. That is, how many other circumstances and conditions might be better addressed by extending open access to all research? Though we are seeing that this right to exclude customers until they pay for access continues to work well for literature, film, music, and, increasingly, journalism, thousands of university libraries and many research funders today have demonstrated through SCOAP³ and subscribe-to-open initiatives (introduced in chapter 2) a willingness to continue paying for research publications without such restricted access.

The value of tailoring copyright can also be assessed, Carroll advises, by asking whether such changes to the law will stimulate investment in a desired public good. I'm tempted to turn this on its head to say that the current investment in open access to research, stimulated by this desired public good, is being undermined by a lack of adequate tailoring of copyright to achieve open access. The investment to date in open access includes federal and private foundation research grants paying publishers' APCs. It also involves the NIH's operation of PubMed Central and all the university open access repositories. Then there are the research libraries that host and support local open access journals; research-and-development infrastructure initiatives, such as Public Knowledge Project; and the list goes on. Still, all that is currently invested in open access, at perhaps as much as a billion dollars worldwide, will only increase in public value with a tailoring of copyright to support open access. As more research becomes publicly available, after all, its readership will grow considerably, as we saw in chapter 4.

While I am encouraged by Carroll's conclusion that "ultimately, intellectual property law still needs tailoring," I recognize that arriving at an initial agreement over such tailoring, not to mention seeing through its implementation, will be a costly and slow process.⁷⁴ But these up-front sunk costs in bringing this change about and the operating expenses needed from year to year need to be compared to the slow and terribly uneven rate of progress that open access is making across scholarly publications, disciplines, and the globe. This is all taking place without clear signs or prospects of a market solution that will "promote the

74. Carroll, "One Size," 1434. In considering copyright's "protection of research," Mark L. Meyer takes a similar stance in examining the legal protection of research, concluding that "until a regime specifically tailored to scientific research is in place . . . the existing regimes of intellectual property are ill-suited to the protection of scientific research." Meyer, "To Promote the Progress," 33, 34.

progress of science” without bankrupting the principal users of these publications. The next chapter is intended to assist in arriving at relatively efficient processes for forming a collective of vetted publishers and publications that will engage with research libraries and funders to determine the path to a fairly compensated open access to research and scholarship.

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