

This is a section of [doi:10.7551/mitpress/14201.001.0001](https://doi.org/10.7551/mitpress/14201.001.0001)

Copyright's Broken Promise

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

By: John Willinsky

Citation:

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DOI: [10.7551/mitpress/14201.001.0001](https://doi.org/10.7551/mitpress/14201.001.0001)

ISBN (electronic): 9780262371483

Publisher: The MIT Press

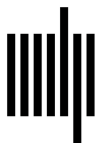
Published: 2022

OA Funding Provided By:

- Author
- MIT Press Direct to Open

OA Funding from Author

OA Funding from MIT Press Direct to Open



The MIT Press

A Copyright Amendment for Science

Everything up to this point in this book has been directed toward making sense of why those involved in scholarly publishing have reason, if not a responsibility, to advocate amending the Copyright Act so that it can better serve research and the public interest. In this chapter, I present what I consider to be a feasible structure for such legislative reform after much counsel and critique involving scholarly publishing stakeholders and legal scholars as well as much consulting of the recent music copyright reform that won strong congressional support. What follows is not the result of a consensus or even a partial agreement among them. Rather, it is my best effort at weaving whole cloth out of the threads and nub of their concerns—my best effort, that is, at making copyright an ally of open access research.

As I introduced earlier, I am recommending that research publications be subject to statutory licensing “upon the ground that the welfare of the public be served and progress of science and useful arts will be promoted.”¹ The wording is borrowed from the House committee that advised Congress on the Copyright Act of 1909. The act introduced statutory licensing into copyright for the mechanical reproduction of musical works. It ensured that copyright holders of musical works were compelled, once a work was released, to grant a recording license to anyone who was prepared to pay them the royalty fee set out in the legislation. The statutory licensing of research publications takes a different form: it will require scholarly publishers to make research freely available on publication, for which they will be fairly compensated by the research’s principal institutional users and funders.

1. To Amend and Consolidate the Acts Respecting Copyright, H.R. Rep. No. 2222, pt. 1 (1909), 7, OA. The report also reiterated that “the enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings.” Rather, copyright was intended to promote the progress of science or at least benefit the public.

As a first step, the Copyright Act will have to be modified to recognize “research publications” as a discrete and well-defined body of work in light of how such works differ from other forms of intellectual property. This statutory recognition of research publications will not disrupt other areas of publishing or copyright activity. This might be cast as correcting a legislative oversight in which one of the two intended subjects of intellectual property law—namely, “science”—is finally earning its place as a distinct type of work over the last two centuries.

The Copyright Act sets out eight categories of works under “Subject Matter of Copyright: In General”:

Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings;
- (8) architectural works.²

Each category has found its way into the law through a desire to make distinctions in the act’s coverage, expanding outward from its original specification of “map, chart, or book or books” in the Copyright Act of 1790.³ For example, the category “dramatic works,” which could be said to fit comfortably within “literary works,” was introduced by a public performance amendment of the Copyright Act in 1856. It created a legal category for play scripts that granted the copyright holder “the sole right also to act, perform, or represent” such works, building on what distinguished the particular economy of these texts.⁴ On the other hand, protection for “pantomimes,” which first appeared in the Copyright Act of 1976, grants mimes exclusive rights “to perform the copyrighted work publicly” and “to display the copyrighted work publicly.”⁵ This turns out not to be, as one might imagine, the result of American School of Marcel Marceau lobbying but resulted from the “carelessness of the [law] drafters,” as one

2. Copyright Act of 1976, 17 U.S.C. § 102 (2021).

3. Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124 (1790). Written musical compositions, which play an important part in this chapter, were added as works of authorship to the Copyright Act in 1831.

4. Copyright Act Amendment, 11 Stat. 138 (1856), OA.

5. Copyright Act of 1976, 17 U.S.C. § 106 (2021).

legal scholar has put it, with its origins in a Berne Convention amendment to protect silent motion pictures (rather than pantomimes).⁶

Now, in recommending that “research publications” be introduced into the act, my strategy for how such works are defined and designated—following Pamela Samuelson patiently warning me that “line drawing is *really* hard” in matters of the law—is to rely on the careful tracing of existing contours of academic life, as that life has been devoted to making such distinctions for some time.⁷ The first thing to note is that the category is limited to “publications,” much as copyright law only applied to published works until the Copyright Act of 1976 (while unpublished work was subject to common rather than statutory law).⁸ Prior to publication, research studies will be treated much like other “literary works.” As such, unpublished work is subject to traditional copyright protections. Authors will retain exclusive rights to the reproduction, derivatives, distribution, and display of working papers, grant proposals, lab notebooks, and preprints.⁹ At this earlier stage in the life of the text, authors will be in a position to decide whether to submit it to, for example, a trade publisher for commercial sale in bookstores and online or to a scholarly journal or book publisher so that it will be subject to open access statutory licensing.

As I will set out in some detail below, this copyright amendment will involve establishing a board to determine a work’s designation as a research publication. The general principle is that the scholarly publishing of journals and books is distinguished by its reliance on editorial oversight by recognized scholars, in their role as editors and editorial board members, and by discerning review by relevant experts. Now, this combination of editorial oversight and peer review by no means guarantees flawless science, but it does set research publications apart from other literary works.¹⁰ The process of determining research publications, largely

6. Brian L. Frye, “Copyright in Pantomime,” *Cardozo Arts & Entertainment Law Journal* 34 (2016): 307–355, OA.

7. Similarly, Stephen Breyer warns, “Any system of protection that attempts to distinguish among different types of books may create legal classifications that are difficult for courts to administer”; Breyer, “Uneasy Case,” 322.

8. Zvi S. Rosen, “Common-Law Copyright,” *University of Cincinnati Law Review* 85 (2017): 1055–1133, OA.

9. Copyright Act of 1976, 17 U.S.C. § 106.

10. The blog *Retraction Watch* attests to the regularity of peer-review shortcomings, representing the literature’s distinguishing vigilance as well as serving as a scandal sheet for researcher malfeasance; *Retraction Watch* (blog), Center for Scientific Integrity, New York, OA.

by publisher, will involve the Copyright Office establishing a “scholarly publishing review board” consisting of research librarians who will determine the journals, books, and book series, as well as other types of works, that the review board deems to be worthy of research library and funder support. These works will be listed in a “research publications registry.”

While this registry may seem an enormous undertaking, the choices and judgments involved are already part of the day-to-day life of the board members. That is, the participating librarians will have already reviewed most of this work, which is also being tracked and indexed by multiple indexes and library systems, although there’s no doubt that edge cases will be hotly contested.¹¹ The publishers, scholarly societies, and other sources of these research publications will form a collective management organization, following the music industry example, that will handle the licensing arrangements with research libraries and funders.

The Collective Management Organization

Daniel Gervais explains that collective management organizations (CMOs) “facilitate the establishment of unified methods for collecting and dispersing royalties and negotiate licensing arrangements for works.”¹² A CMO is able, Gervais points out, “to license (or collect) and create the repertory of works, performances or recordings.”¹³ Most countries have one CMO per topic of licensing, such as music performance, although the United States has three in this area.¹⁴ In some cases, the

11. Still, it is worth acknowledging that the Google Books settlement, proposed unsuccessfully in 2009, included \$34.5 million for establishing a book rights registry; Pamela Samuelson, “Extended Collective Licensing to Enable Mass Digitization: A Critique of the US Copyright Office Proposal,” *European Intellectual Property Review* 38, no. 2 (2016): 3, OA.

12. Daniel Gervais, “Collective Management of Copyright: Theory and Practice in the Digital Age,” in *Collective Management of Copyright and Related Rights*, 2nd ed., ed. Daniel Gervais (Netherlands: Wolters Kluwer, 2010), 5. He stresses that the CMO is all about “organizing access” (emphasis in the original) in response to the ways in which copyright offers “exclusive rights to prohibit many forms of use of the knowledge” (13).

13. Gervais, “Collective Management of Copyright,” 6. Gervais emphasizes the efficiencies of centralization and standardization in data management, which justify the operation of CMOs while warning that financial transparency and data confidentiality can prove to be issues (8, 10, 12, 27).

14. In the United States, ASCAP (the American Society of Composers, Authors and Publishers) started in 1914, SESAC (originally the Society of European

CMO and clients are free to negotiate license fees while having recourse to the courts if needed to reach an agreement.¹⁵ In this case, scholarly publishers would form a CMO that enabled them to collect royalties from the institutional users and funders of research for dispersal among its members. I do not want to minimize the effort that it will take to set up a new CMO for scholarly publishing, especially in ensuring that it does not succumb to the sorry international record that such organizations have for mistreating authors and mismanaging funds.¹⁶ Still, a few of the differences in the music industry are in scholarly publishing's favor.

Scholarly publishing does not lack reliable information on copyright ownership, nor is scholarly publishing subject to nine different types of licenses, as is the case with music (of which five are regulated by the government).¹⁷ This open access collective will be consolidating (and automating) the long-standing operations by which publishers and other sources have distributed their work within library collections and indexes. Scholarly publishing takes place within an environment of advanced data management systems, directed by information science professionals. Industry organizations, such as Crossref, monitor article, journal,

Stage Authors and Composers) in 1940, and BMI (Broadcast Music Inc.) in 1941, with others developing more recently.

15. The music performance rights organization ASCAP is subject to a decades-old consent decree because of antitrust concerns that require setting "reasonable fees," which is enforced by the US District Court for the Southern District of New York. See Lunney, "Copyright Collectives and Collecting," 332.

16. Jonathan Band and Brandon Butler demonstrate on an international scale how collective rights organizations have "all the profit maximization of a private business with none of the market discipline of competition, all the power of a government agency with none of the political accountability"; Jonathan Band and Brandon Butler, "Some Cautionary Tales about Collective Licensing," *Michigan State University College of Law International Law Review* 21, no. 3 (2013): 728.

17. Reed notes music's general lack of a centralized record of copyright information, with the forthcoming mechanical licensing collective intended to address the issue with "a public database of ownership information for musical works"; Reed, *Unrealized Promise*, 167. Different copyright licenses pertain to the work of composers, lyricists, performing artists, and producers as well as to users that include radio stations, hotels, bars, shops, music services, and so on. Daniel Gervais holds that with music, "15 different rights analyses are required if one considers both offline and online uses"; Gervais, *(Re)structuring Copyright*, 26.

book chapter, and book publication information.¹⁸ Crossref also tracks research funder sponsorship involving thirteen thousand international organizations. Project COUNTER (Counting Online Usage of Networked Electronic Resources) is another industry nonprofit, this one providing standardized measures for the digital use that is made of research publications, a necessary part of publisher compensation.¹⁹ By building on existing structures and introducing new technologies, this CMO has a reasonable chance of proving more efficient than the current subscription and big-deal negotiations that take place between so many publishers, libraries, and library consortia.²⁰

Under this reform of the Copyright Act, Congress will instruct the Copyright Office to create a “research licensing collective” made up of publishers and publishing entities, such as scholarly societies, as well as independent groups of scholars engaging in scholarly publishing. The research licensing collective will manage the open access licensing of research publications by collecting payments from the institutional users and funders and distributing those funds to its members. It will follow the example of the “mechanical licensing collective,” which was established for the music industry because of the Music Modernization Act of 2018. The research licensing collective will have the advantage,

18. As the nonprofit Crossref describes itself, “Over 100 million unique scholarly works are distributed into systems across the research enterprise 24/7 via our metadata APIs, at a rate of around 607 million queries a month”; Ginny Hendricks, “Who Relies on Crossref Metadata?,” Crossref, Lynnfield, February 24, 2019, OA. In 1998, Tom W. Bell proposed that an automated rights management system would offer users of information systems “fared use”—framed as “reciprocal quasi-compulsory licensing”—in the face of shrinking fair use, which would “require consumers to pay for the right to access and reuse information, rather than appealing to a statutory fair use exception” with a contract to which both parties had a (reciprocal) say; Tom W. Bell, “Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright,” *North Carolina Law Review* 76, no. 2 (1998): 561.

19. Project COUNTER, May 26, 2002, OA. SUSHI (Standardized Usage Statistics Harvesting Initiative) protocol “allows the automated retrieval of the COUNTER usage reports into local systems.”

20. Ariel Katz writes, “It will therefore be highly advisable for policy-makers to begin examining right-holders’ claims about efficiencies more critically: to allow the very few cases where [a CMO] makes sense and challenge the rest”; Ariel Katz, “Copyright Collectives: Good Solution: But for Which Problem?,” in *Working within the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, ed. Rochelle Dreyfuss, Diane Zimmerman, and Harry First (Oxford: Oxford University Press, 2010), 32, OA.

from the outset, of working with research libraries and funders that are already supporting this form of publishing, with all parties sharing a widely expressed interest in moving to open access.

Designing Statutory Licensing for Open Access

In what follows, I outline this licensing model's constituent parts rather than setting out draft legislation, although I rely at various points on the Music Modernization Act (as indicated in footnotes). In outlining the ways and means by which such licensing *can work*, I do not mean this "can work perfectly" or "can work without giving rise to numerous objections." I remain convinced, however, that amending copyright will work better than the current pileup of scholarly publishing approaches moving us ever so slowly toward an imperfect and potentially unsustainable open access.

1. Preliminary considerations

a. This form of statutory licensing is applied to research publications, as determined and managed by the process described below, to ensure both immediate open access for such publications and reasonable compensation to its publishers from its principal institutional users and funders in order to promote the progress of science.

b. Not less than two years prior to a January 1 initiation of the statutory licensing requirements for research publications, the US Copyright Office will establish a scholarly publishing review board and a research publications registry, with the works included in the registry leading to the formation of a research licensing collective made up of their publishers and other sources.

c. In the preliminary period in which "no rate or terms have [yet] been established by the Copyright Royalty Judges, the [research] licensing collective and any [libraries and funders] may agree to an interim rate and terms for [scholarly publishing services], and any such rate and terms shall be treated as nonprecedential and not cited or relied upon in any rate setting proceeding before the Copyright Royalty Judges or any other tribunal; and shall automatically expire upon the establishment of a rate and terms for such covered activity by the Copyright Royalty Judges."²¹

21. Orrin G. Hatch–Bob Goodlatte Music Modernization Act, 17 U.S.C. § 115 (2018), OA.

2. Scholarly publishing review board

a. The Register of Copyrights will approach academic and industry research-and-development library organizations to coordinate the staffing of a scholarly publishing review board, with a goal of ensuring board representation of subject-area expertise from across the disciplines.²²

b. The scholarly publications review board will accept and review applications for including works from scholarly publishers and other publishing entities that, in meeting the academic community's standard of peer-reviewed research, warrant the listing in the research publications registry to be maintained by the Copyright Office.²³

c. In maintaining the research publications registry, the scholarly publishing review board will hear petitions and appeals and propose changes to the constitution of the registry, subject to its governance by the Register of Copyrights.

3. Research publications registry

a. "To be entitled to receive royalties under a statutory license," the publisher or publishing entity must have works under active use that are listed in the research publications registry, maintained by the Copyright Office.²⁴

b. The database will be used to track the usage of research publications by research libraries as well as funders' sponsorship of publications.

c. The Register of Copyrights will invite publishers and publishing entities that have works in the research publications registry to form a nonprofit research licensing collective.

d. A publisher or publishing entity that believes that its application to have works included in the research publications registry "was improperly rejected" by the scholarly publications review board "may

22. The research and development department libraries in the industry accounted for 16 percent of journal subscriptions by revenue in 2008; Heather Morrison, "Economics of Scholarly Communication in Transition," *First Monday* 18, no. 6 (2013), OA.

23. It is worth noting how the publisher selection processes once operated in the music industry, as it was reported in 1940 that "once a composer or a publisher is admitted to [ASCAP] membership, he must serve a probationary period of about one year during which he receives no royalty whatever regardless of the number of performances"; quoted in Stanley M. Besen, Sheila N. Kirby, and Steven C. Salop, "An Economic Analysis of Copyright Collectives," *Virginia Law Review* 78 (1992): 395n45.

24. Music Modernization Act, 17 U.S.C. § 115 (2018).

seek review of such rejection in an appropriate district court of the United States. The district court shall determine the matter *de novo*, based on the record before the scholarly publications review board and any additional evidence presented by the parties.”²⁵

4. Research licensing collective

a. The research licensing collective designated by the Copyright Office will be “a nonprofit entity, not owned by any other entity, that is created by copyright owners to carry out responsibilities under this subsection” and as such is “able to demonstrate . . . that the entity has . . . the administrative and technological capabilities to perform the required functions of the [research-]licensing collective . . . [and] is governed by a board of directors” with representation from the publishers and publishing entities as well as having “a dispute resolution committee.”²⁶

b. The members of the research licensing collective will publish open access research for which they will have been granted the right of first publication by its authors (who will retain the copyright, including a right of attribution for this work). The viewing, reading, and other forms of use of these publications will qualify the collective to solicit compensation, according to rates set by the copyright royalty judges, from research libraries and funders and for distribution among the collective’s membership.

c. The research licensing collective will maintain a publicly accessible database of members with links to their works in the research publications registry.

d. The governing board of the research licensing collective will include a licensee coordinator, representing libraries and funders, who will serve as a nonvoting member and will participate in proceedings before the copyright royalty judges to establish the administrative assessment for the collective.²⁷

e. The research licensing collective will place the electronic editions of journal back issues under statutory licensing as well as engage in further digitization of back issues at a pace for which libraries and funders are willing to support processing and maintenance costs.

25. Music Modernization Act, 17 U.S.C. § 115 (2018).

26. Music Modernization Act, 17 U.S.C. § 115 (2018).

27. Music Modernization Act, 17 U.S.C. § 115 (2018).

While newly published books from the collective will be licensed on publication, older and out-of-print books, including those in Google Books, will require a separate agreement (given previous litigation) before being included as part of the research licensing collective.

f. The operational costs of the collective will be covered by publishers and publishing entities included in the collective through “voluntary contributions” and “an administrative assessment” set by the copyright royalty judges.²⁸ The collective will “invest in relevant resources, and arrange for services of outside vendors and others,” as well as “engage in legal and other efforts to enforce rights and obligations . . . to support the activities of the . . . collective.”²⁹ The collective will set aside a proportion of its revenue for the development of scholarly publishing innovations.³⁰

g. “In every fifth calendar year, the collective shall retain a qualified auditor that shall examine the books, records, and operations of the collective; prepare a report for the board . . . for the receipt, handling, and distribution of royalty funds . . . to guard against fraud, abuse, waste, and the unreasonable use of funds, and to protect the confidentiality of information . . . [with the report submitted] to the Register of Copyrights and . . . to the public.”³¹

h. “The Register shall, every 5 years . . . after the initial designation, publish notice in the Federal Register . . . soliciting information concerning whether the existing designation should be continued, or a different entity meeting the criteria described.”³²

28. The Music Modernization Act defines “the total costs” of the collective as involving “establishing, maintaining, and operating the mechanical licensing collective to fulfill its statutory functions, including—(i) startup costs; (ii) financing, legal, audit, and insurance costs; (iii) investments in information technology, infrastructure, and other long-term resources; (iv) outside vendor costs; (v) costs of licensing, royalty administration, and enforcement of rights; (vi) costs of bad debt; and (vii) costs of automated and manual efforts to identify and locate copyright owners”; Music Modernization Act, 17 U.S.C. § 115 (2018).

29. Music Modernization Act, 17 U.S.C. § 115 (2018).

30. See Gervais, “Collective Management of Copyright,” 9, for how this commonly holds with music collectives.

31. Music Modernization Act, 17 U.S.C. § 115 (2018).

32. Music Modernization Act, 17 U.S.C. § 115 (2018).

5. “Determination of reasonable rates and terms”³³

a. Once the research licensing collective is established, the parties involved in scholarly publishing will “gather and provide documentation for use in proceedings before the Copyright Royalty Judges” to determine reasonable rates and terms for the publishing costs to be covered by funders on an article and by different classifications of research libraries.³⁴

b. “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” for such publishing services, which will then hold “during the 5-year period . . . or such other period as the parties may agree. The parties to each proceeding shall bear their own costs.”³⁵

33. Music Modernization Act, 17 U.S.C. § 115 (2018).

34. Music Modernization Act, 17 U.S.C. § 115 (2018). On a classification system that might well be applied to university libraries based on the host institution, see “The Carnegie Classification of Institutions of Higher Education,” Indiana University School of Education, Bloomington, 2017, OA. The fee-setting examples from the music industry suggest consideration is given to historic rates, although as Lunney describes it, “while relevant if otherwise comparable [such historic prices] were not controlling” and could be discounted if felt to reflect monopoly-pricing practices (which may be judged pertinent in this case); Lunney, “Copyright Collectives and Collecting,” 338–389. Lunney points to an interesting parallel with how reasonable prices are set in the case of utility company monopolies, for which “the rate is set so as to ensure the utility a reasonable return on its investment given its operating costs” (339). Compare Besen, Kirby, and Salop on music, in which it is assumed “that the individually negotiated licenses would permit unlimited performances of each licensed song in exchange for a fixed license fee. This is an efficient arrangement because the true marginal cost of each additional use of a song is zero”; Besen, Kirby, and Salop, “Economic Analysis of Copyright Collectives,” 408.

35. Music Modernization Act, 17 U.S.C. § 115 (2018). Jane Ginsburg points out that this willing-buyer/willing-seller concept, “as currently administered by the Copyright Royalty Judges, involves presentation of written and testimonial direct evidence and rebuttal testimony, legal briefing, arguments of counsel, and judicial review”; Ginsburg, “Fair Use for Free,” 1444. On noting in 2014 that “the most recent ratemaking took over five years from the initial notice-and-comment period until the Judges’ final determination” (1444), she proposes “baseball arbitration” or “last best-offer arbitration” (first developed around baseball player contracts), in which each side makes its best offer, with the judges choosing the more reasonable proposal, as it encourages an expeditious convergence of offers among parties that can be wrapped up in a few months (1437).

- c. “The schedule of reasonable rates and terms determined by the Copyright Royalty Judges will be binding” on all research publications and will be tiered to reflect demonstrated levels of editorial care, rejection rates, textual complexity, backlists maintained, and other relevant factors, including reasonable profit or surplus in support, for example, of scholarly society activities and technological innovations.³⁶
6. Research libraries and funders
- a. Research libraries, under the terms of statutory licensing, approved by the Register of Copyrights, will be invoiced by the research licensing collective for the publication of studies that do not have a sponsor, based on the library’s classification, its areas of study, and its usage levels, at a fee rate set by copyright royalty judges.
- b. Research funders, under the terms of statutory licensing, approved by the Register of Copyrights, will be invoiced for the publication of studies for which they have sponsored the research at a fee rate set by copyright royalty judges. When more than one funder is acknowledged as a sponsor of a publication, the fee will be distributed evenly among the identified funders.
- c. Funders will be able to designate grants that are not appropriate for covering publishing costs (e.g., travel grants to present a paper) as well as the number of papers per grant or the amount of a book-publishing subvention they are willing to sponsor.³⁷
7. Researchers as authors
- a. Authors of research publications will retain the copyright for their work, unless they are government employees whose works are not entitled to copyright protection.

36. Music Modernization Act, 17 U.S.C. § 115 (2018). “Such rates and terms shall distinguish among the different types of services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including the quantity and nature of . . .”; Music Modernization Act, 17 U.S.C. § 101 (2018), 3723.

37. The argument for such payments, according to John-Arne Røttingen and David Sweeney of the Plan S consortium of funders, is the efficiency of directly paying publishing costs, which would otherwise go through a good number of transactions involving institutions and authors. Plan S has announced that it plans to move to this model—making payments directly to publishers—in 2024; Røttingen and Sweeney, “Financing Open-Access,” 586.

- b. On publication, authors will, as the copyright holders of open access works, grant the public reproduction and translation rights as well as text- and data-mining rights to their work or portions thereof.
- c. Authors will retain a right of attribution that ensures they are credited for the work, however it is used, and will be able to grant nonexclusive publication rights to its publishers.³⁸

Related Considerations

With statutory licensing, publishers will be able to greatly reduce the financial risks—posed by Sci-Hub and other copyright circumventions—as well as the prolonged uncertainties posed by the pressure to establish a viable open access model, especially for publications in the social sciences and the humanities. What statutory licensing introduces is a refreshing level of accountability and transparency, as publishers, librarians, and funders present their case for “reasonable rates and terms” to the copyright royalty judges. The rates can allow for innovation and growth as well as profit and surplus. Arriving at rates and terms will, undoubtedly, be a complicated and protracted process. Still, it amounts to bringing greater order to an existing structure rather than starting from scratch. To take just one example, scholarly societies have long justified their publishing surpluses by pointing to how this extra revenue funds activities, such as professional workshops, that contribute to the research quality, which then goes into the journals. Such arguments should work with the copyright royalty judges. Among other related issues that this approach to copyright reform raises, I offer an environmental and economic impact statement that briefly considers the following: (1) incentives and innovations, (2) publishing costs and profits, (3) research libraries and funders, (4) publishing growth, (5) financial distress and exigency, (6) impact on trade publishing, (7) international implications, and (8) opting out.

1. Incentives and innovations. As things currently stand, the law encourages publishing by granting copyright holders a right to charge for

38. While this formulation of author rights is indebted to Creative Commons licensing, rather than spell out the points above, an argument can be made to simply have authors place their research publications under a basic CC BY license on publication, which has the advantage of being internationally recognized as open. Yet it can also be argued that it is time in this special case to make such terms a part of statutory law, given that such licensing was created out of an earlier legal shortcoming of the law that this reform seeks, in part, to address.

access to the work. To promote the progress of science, I hold that Congress should amend the Copyright Act to offer publishers similar legal assurances and encouragement for providing open access to research publications. They will be rewarded for attracting more submissions and increasing their publication rate by, for example, providing timely, helpful peer reviews and offering effective social media promotion. There can be incentives for increasing their readership as they raise journal profiles. Editorial and publishing efficiencies can increase profitability, as can selling publishing services to other publishers. Acquiring journals and publishers is another option (although the research licensing collective fee structure will prevent the current trend of raising prices on newly acquired titles). And such incentives are not for the publishers alone. Librarians are likely to value being able to bring well-substantiated cases for fair and transparent pricing before the copyright royalty judges. Such a copyright model will not stifle scholarly publishing ventures, even as it advances the constitutional point of the law. As well, the research licensing collective will have reason to invest in new publishing technologies that improve efficiencies and extend the reach and use of their publications. Contributions to research quality (such as interactive data modeling in research publications) will warrant fee rate increases to cover development costs. Libraries and publishers may collaborate on open-source software initiatives, sponsored by research funders, to improve article and indexing quality. Inventions could lead to licensing and service opportunities for software developers. The mix of open-source and proprietary software, nonprofit and for-profit ventures, is already part of the scholarly publishing ecology, and nothing in the terms or spirit of statutory licensing for open access needs to constrain that.

2. Publishing costs and profits. The “reasonable rates and terms” of this statutory licensing of open access can include reasonable profits and surpluses as incentives to improve and innovate. The case will be made, however, on the publishers’ investment in better serving the scholarly community rather than on exercising monopoly control of proprietary content. Still, the vast differences in an article’s publishing costs, which span from the hundreds (PeerJ) to the thousands of dollars (EMBO Press), will need to be addressed.³⁹ The library’s goal of rate setting for

39. In a rare example of a detailed breakdown, EMBO Press calculated it spent \$7,213 an article in 2017: “Editors and assistants spend about 17 hours on a paper that ends up being published, of which six hours are spent after final acceptance on pre-production checks, integrity checks and data curation. For papers that are not reviewed, slightly under two hours are spent on initial

article publishing expenses cannot, to be sure, be the clichéd race to the bottom of bargain pricing. Rather, publishers will be able to argue for quality-control elements for research publications, such as statistical consulting and figure graphic design, while the demands of different fields and thoroughness of editorial services may warrant a tiering of editorial service rates across different journals and publishers.

3. Research libraries and funders. With statutory licensing, research libraries will move from subscribing to a selection of the journals and books that focus on their institution's areas of research and instruction to underwriting their share of the publishing costs for research publications relevant to those areas, with the rates and terms decided by the panel of copyright royalty judges. The share will also depend on the classification of the library's size and research intensity but will not include publications that have a research sponsor.⁴⁰ Fortunately, international research libraries will have an incentive and precedent for also bearing a share of the cost involved in statutory licensing. For one thing, having research funders cover sponsored research will reduce the library's costs, as will having as many libraries as possible participating in sharing those costs, even as the extent of their access will greatly increase.⁴¹ The precedent for this international library cooperation is the three thousand libraries from forty countries supporting open access through SCOAP³, while the model for international funder collaboration is cOAlition S (both discussed in chapter 2). Based on the principle that publishing the world's research output will actually cost less with full funder participation and judicial pricing reviews, libraries everywhere need not worry that they will be asked to pay more for access to research than they are paying now. While this could take various forms, to use the SCOAP³ example, libraries in forty countries negotiate the price they will pay based on their national usage (by authors), with the results enabling researchers from ninety countries to publish in physics journals that are open to the world.

quality checks and editorial assessment"; Maria Leptin, "The Publishing Costs at EMBO," EMBO Press, Heidelberg, October 24, 2019, OA. The Plan S Price Transparency Framework holds promise for providing standardized data on publishing costs; Alicia Wise and Lorraine Estelle, "Launch of the Plan S Price Transparency Framework," Information Power, London, June 8, 2020, OA.

40. On library classification, see footnote 34 above.

41. One source of participation of international research funders is the group cOAlition S ("making full and immediate open access a reality"); "Organisations Endorsing Plan S and Working Jointly on Its Implementation," Strasbourg, June 25, 2020, OA.

As for the research funders, one point to be clear on is that their statutory licensing payments to publishers—to cover the work they have published—will not divert funds from these organizations' support of research. Rather, this legal model represents a more direct, efficient, and accountable form of support for scholarly publishing.⁴² As things stand, universities charge funders overhead or indirect costs on awards made to their faculty, with a portion going to library subscriptions. Funders also allow researchers to budget for APCs. With statutory licensing, funders will be billed directly by the research licensing collective, at a rate in which funders will have had some say, for the publication of research that they have sponsored in whole or in part.⁴³ So while this is not a new expense for these organizations, the bottom line is far more about funders' interest in increasing the impact of their contributions: "In general, funders are supportive of grantees seeking to disseminate their work as widely and openly as possible," observes Greg Tananbaum, who directs the Open Research Funders Group, consisting of seventeen philanthropic organizations.⁴⁴

4. Growth in research, journals, book series, and publishers. Research journal articles have been growing at a rate of 9 percent annually in recent decades (after a long run at 3 percent).⁴⁵ This reflects an expansion

42. The Gates Foundation's Chronos system offers a model of direct payment to publishers for funder-sponsored articles; see Jennifer Hansen, "Providing Support and Solutions for Open Science to Achieve Impact" (Toward an Open Science Enterprise Conference, National Academies of Sciences, Engineering, and Medicine, Washington, DC, September 18, 2017), OA.

43. We've analyzed the proportion of articles with sponsored research, which varies from a high in the 80 percent range for biomedical journals, to 70 percent for the sciences generally (with 60 percent for mathematics), to 25 percent for the social sciences, and less than 10 percent in the humanities; John Willinsky and Matthew Rusk, "If Research Libraries and Funders Finance Open Access: Moving beyond Subscriptions and APCs," *College & Research Libraries* 80, no. 3 (2019): 340–355, OA.

44. Cited by Lindsay McKenzie, "A Landmark Open-Access Agreement," *Inside Higher Ed*, June 17, 2020, OA. Tananbaum adds on philanthropic support for publication: "Many philanthropies encourage grantees to work with their program officers to get the funding they need to publish their work. This includes, but is not limited to, the ability to come back after a grant budget is set and seek additional support."

45. Lutz Bornmann and Rüdiger Mutz, "Growth Rates of Modern Science: A Bibliometric Analysis Based on the Number of Publications and Cited References," *Journal of the Association for Information Science and Technology* 66, no. 11 (2015): 2215–2222; Richard Van Norden, "Global Scientific Output

in research funding as well as in higher education, more generally, and, as such, contributes additional support for scholarly communication. Then there are the new discipline-initiating journals, pathbreaking book series, and enterprising publishers, with such developments having long been a vital intellectual force in academic life. Music collectives often set aside incubation funds for innovation and experimentation, which is a practice that might serve scholarly publishing well. Checks would need to be in place to avoid the type of “regulatory capture” that some publishers may seek to exercise around these new organizations to keep newcomers out of the research licensing collective.⁴⁶ On the other hand, new scholarly publishing ventures could opt to initially operate outside of the collective, at least until it qualifies as a welcomed listing in the research publications registry.

5. Financial distress and exigency. When economic downturns lead to reduced library budgets, statutory licensing offers options that include petitioning copyright royalty judges for temporary rate adjustments to the scholarly publishing review board and cutting its holdings (requiring library payments) based on a review of journal usage patterns. That is, the board could consult with its larger community on titles or even portions of publishers’ bundles that can no longer be afforded under current conditions. On the other hand, if a publisher facing financial duress had to suspend the publication of a journal (perhaps due to their temporary removal from the research publications registry), then the research licensing collective would be obliged to preserve the availability of the work to maintain the scholarly record.

6. Impact on trade publishing. Will open access to a narrow, well-regulated band of research publications be a threat or a boon for the larger realm of trade publishing? For example, as it gradually becomes clear to readers that the research referenced in news media, books, Wikipedia articles, and other sources is now open to them, public traffic to these cited scholarly works may well increase. Although I’ve no ready study at hand to support this speculation, the ability to dip into scholarly sources could foster a greater interest in long-form nonfiction, as we now call it, whose authors deepen their work through access to research. Readers might deepen the critical engagement with literary figures in

Doubles Every Nine Years,” *Nature*, May 7, 2014, OA; Michael Mabe, “The Growth and Number of Journals,” *Serials* 16, no. 2 (2003): 191–197, OA.

46. Ernesto Dal Bó, “Regulatory Capture: A Review,” *Oxford Review of Economic Policy* 22, no. 2 (2006): 203–225.

ways that would boost trade publishing. A trade publisher could, in turn, set up a scholarly imprint to bring its marketing talents to bear on such areas as the humanities, where there is already considerable intellectual movement within and beyond the academy. Below, I turn to the opting-out options for licensing for scholarly publishers and authors who want to enter the trade publishing. There is no reason to think, in other words, that statutory open access poses a threat to trade publishing. Another related area of publishing is the substantial textbook trade. Although they can be an influential intellectual force, textbooks are not typically judged to be works of original research and scholarship by the academic community. Thus, this licensing model will not bear on the textbook trade. Still, it is worth noting that parallel to open access (and open-source software) is an open educational resources (OER) movement with multiple open textbook projects, which might draw inspiration from this legislative move on behalf of research publications.⁴⁷

7. International implications. Given the global reach of scholarly publishing, its multinational publishers, and the goal of universal open access, how this reform works on an international scale is obviously an issue of consequence. An initial question may be raised over which scholarly publishers will be subject to this US copyright law reform. Among the big five scholarly publishers, only Wiley has its headquarters in the United States. Yet consider how Elsevier, headquartered in London, chose to bring its lawsuit against Sci-Hub for copyright infringement before the US District Court for the Southern District of New York (discussed in chapter 4), which hears many such infringement cases, while Elsevier does 45 percent of its business in North America.⁴⁸ This sort of international engagement is common among large scholarly publishers, with the United States playing an influential role in intellectual property matters.

47. Andrew P. Feldstein, Mirta Martin, Amy Hudson, Kiara Warren, John Hilton III, and David Wiley, "Open Textbooks and Increased Student Access and Outcomes," *European Journal of Open, Distance and E-Learning* (2012), OA.

48. R. Anthony Reese, "The Story of *Folsom v. Marsh*: Distinguishing between Infringing and Legitimate Uses," in *Intellectual Property Stories*, ed. Jane C. Ginsburg and Rochelle Cooper Dreyfuss (New York: Foundation Press, 2006), 291. In claiming before the district court that the company had suffered "irreparable harm," its lawyers stated that "Elsevier's ScienceDirect database is located on multiple servers throughout the world and is accessed by educational institutions and their students and qualifies as a computer used in interstate commerce, and therefore as a protected computer under the CFAA [Computer Fraud and Abuse Act]"; Elsevier Inc. et al. v. Sci-Hub et al., No. 1:2015cv04282—Document 53 (SDNY 2015), OA.

So while copyright reform for science has to start within a legal jurisdiction in order for it to be effective in extending open access to research publications, prior work will be needed to prepare for a global rollout. The place to turn for this is WIPO, the United Nations agency that seeks to bring “stakeholders together to develop global IP agreements.”⁴⁹ WIPO already coordinates collective management organizations on a global scale. It also addresses the copyright limitations and exceptions currently associated with “scientific research,” to which this reform is intended to provide an effective alternative by placing copyright more squarely in the service of researcher, publisher, and the public.

A starting point with WIPO is to establish how statutory licensing, in the case of research publications, follows from existing “global IP agreements.” In 1967, for example, during WIPO’s Intellectual Property Conference in Stockholm, a “three-step test” was introduced into the Berne Convention that has a bearing on my amendment. The test was intended to assist member countries in deciding whether it was legitimate “in certain cases to introduce compulsory [statutory] licenses, or to provide for use without payment,” as the provision read.⁵⁰ The WIPO website currently relates that “the extension of existing or the creation of new limitations and exceptions is allowed if the conditions of the ‘three-step’ test are met.”⁵¹ It makes sense, then, to ask how open access statutory licensing stands up to a test that is clearly critical to the international scope of this reform. To begin with, statutory licensing will apply, as required by the first step of this test, only to “certain special cases.”⁵² While debates will abound over what constitutes a special case, I have reviewed the distinctive qualities and clear boundaries that give research publications a special standing among copyright materials in chapter 4.

49. World Intellectual Property Organization (WIPO), Geneva, April 5, 2020, OA.

50. World Intellectual Property Organization (WIPO), *Records of the Intellectual Property Conference of Stockholm: June 11 to July 14, 1967* (Geneva: WIPO, 1971), 2:1145, OA. A proposal at the conference for statutory licensing for teaching failed to win sufficient support; see Gervais, *(Re)structuring Copyright*, 45.

51. “Summary of the WIPO Copyright Treaty (WCT) (1996),” World Intellectual Property Organization, Geneva, June 28, 2021, OA. The three-step test also forms part of Article 13 of the World Trade Organization’s TRIPS Agreement, December 2020, OA.

52. On the three-step test’s “certain special cases,” including “purpose-specific” and “fair use,” see Gervais, *(Re)structuring Copyright*, 62–66. Gervais also notes that the test has “become the cornerstone of exceptions to all copyright rights due to its broad use in the TRIPS agreement” (42).

The test's second step calls for establishing that the new measure "does not conflict with a normal exploitation of the work."⁵³ Now, to be sure, one could argue that open access licensing conflicts with the current *commercial* exploitation of the work through monopoly subscription pricing over the course of the last half century. Yet statutory licensing will replace this with a new normal that involves establishing a fair price between publishers and libraries that is less exploitive and still enables publishers to carry on their business. Yet open access statutory licensing can also be said to enhance, rather than conflict with, researchers' "normal exploitation" of research publications by increasing the circulation and use of such works.

This leads directly into the third step of the test, as this licensing of open access does not "unreasonably prejudice the legitimate interests of the authors."⁵⁴ Rather, it can be seen to reasonably advance researchers' legitimate interests in the progress of science to the benefit of humankind. All of which is to say that this statutory licensing of research publications to achieve universal open access appears to pass the three-step test with flying colors. This success may well encourage other signatories to the Berne Convention to consider implementing this copyright reform in their own countries, given that member states have been using the test in their own legislative processes concerning intellectual property law.⁵⁵

To take a second instance on this internationalization front, the 1996 WIPO Copyright Treaty also offers guidance that bears the introduction of open access statutory licensing. The treaty introduced a new digital-era right for authors that entails "making [their works] available to the public . . . in such a way that members of the public may access these works from a place and at a time individually chosen by them."⁵⁶ While this was ostensibly intended to address the business opportunities created by a

53. Berne Convention. The test has since become part of the TRIPS Agreement, the 1996 WIPO Internet Treaties, the Beijing Audiovisual Treaty, and the Marrakesh Treaty.

54. Berne Convention.

55. Graham Dutfield and Uma Suthersanen describe how "the three-step test has evolved from an international norm addressed to governments to one that is applied by national judges in order to test the parameters of national copyright exclusions"; Dutfield and Suthersanen, *Global Intellectual Property Law*, 137.

56. "Summary of the WIPO Copyright Treaty." On the compatibility with statutory licensing for wireless on-demand communications, see Jane C. Ginsburg, "The (New?) Right of Making Available to the Public," in *Intellectual Property in the New Millennium: Essays in Honor of William R. Cornish*, ed. David Vaver and Lionel Bently (Cambridge: Cambridge University Press, 2004), 13, OA.

digital expansion of intellectual property markets, shifting the legal force of copyright from the exercising of *exclusive* rights to affording *availability* rights applies equally well to researchers and research publications under statutory licensing: “This world of access presents,” writes Cheryl Foong, lecturer at the Curtin Law School, “a new paradigm—rather than controlling copies, copyright owners seek to control various means of access.”⁵⁷ My argument has been that the distinct nature of research publications warrants a law that maximizes availability for the digital era, given that this promotes the progress of science, even as it ensures that publishers are fairly compensated.

International discussions of open access statutory licensing for research are also likely to involve the TRIPS Agreement of the World Trade Organization (WTO). The spread of open access would alter the intellectual property rules involved in multilateral trading systems by freeing up the circulation of research in areas such as public health as well as the public interest more broadly.⁵⁸ This copyright reform, insofar as it demonstrates American leadership in open access and open science, will serve as a welcomed counterweight, if not an indicator of a new direction, in international governance of intellectual property.⁵⁹ It may be counted as a turning away from the United States’ reputation since

57. Cheryl Foong, *The Making Available Right: Realizing the Potential of Copyright’s Dissemination Function in the Digital Age* (Cheltenham, England: Edward Elgar, 2019), 5. Pamela Samuelson draws attention to two challenges in international regulation of information, involving a “rapidly changing technological and business environment,” that make it harder for the “development of legal norms capable of adaptation,” which in this case involve a statutory license that is not particular to a technology beyond the internet while containing some of the business aspects through regulation; Pamela Samuelson, “Five Challenges for Regulating the Global Information Society,” in *Regulating the Global Information Society*, ed. Christopher Marsden (London: Routledge, 2000), 317.

58. “TRIPS—Trade-Related Aspects of Intellectual Property Rights,” World Trade Organization, Geneva, April 5, 2020, OA. Elaine B. Gin identifies overlap while contrasting WIPO’s norm setting versus the TRIPS Agreement’s sanctions and incentives; Elaine B. Gin, “International Copyright Law: Beyond the WIPO and TRIPS Debate,” *Journal of the Patent and Trademark Office Society* 86, no. 10 (2004): 763–791.

59. Although Henry and Stiglitz address patent reforms, they conclude that given that “the current global intellectual property regime, as well as serving the interests of the international electronic and pharmaceutical companies, is an impediment to the kind of global cooperation necessary . . . some form of corrective action will be necessary, in particular in the form of compulsory licenses”; Henry and Stiglitz, “Intellectual Property,” 245.

the 1970s of treating “compulsory global rules on the protection of intellectual property” as a means of “regulating free trade among nations,” which is how Columbia University economists Claude Henry and Joseph E. Stiglitz characterize it, pointing to Global South hardships in accessing drugs as a consequence.⁶⁰ As well, the European Union would be another body of interest in this reform, given the European Commission’s leadership in open access research initiatives and the European Union’s efforts to coordinate copyright law among its member states.⁶¹ Again, what will be informing these internationalization efforts will be the example of the music industry, with its long history of successful international recognition of reciprocal agreements among collective management organizations under the auspices of copyright laws in many jurisdictions.

8. Opting out. Researchers and scholarly publishers will be able to opt out of statutory licensing, should they wish to place a work in the realm of trade publishing. For reasons of academic freedom and First Amendment rights, authors can choose their publishing venues. And scholarly publishers are quick to point to how being able to achieve a few trade and commercial successes subsidizes their scholarly monographs. The trade option will make sense for best-selling academic writers, such as Jill Lepore and Steven Pinker, as well as great literary authors, such as Lorrie Moore and Adam Johnson, who hold academic positions. The nonfiction works, in this regard, are typically written for wider audiences rather than as contributions to the research literature while still serving scholarship in the broader reach, even as the authors draw on their own and others’ research. Art monographs offer an interesting border case. While scholarly in intent, a high-quality printing and large-format book, along with the permissions for the reproductions and the book’s support for public exhibitions, may make trade publishing the only option. On the other hand, articles published in art history journals can be part of the statutory open access program. Research funders may also step in to subsidize the trade

60. Henry and Stiglitz, “Intellectual Property,” 243. This compulsory IP-rules approach was followed in the 1980s with trade-restriction enforcement against Brazil, Korea, and Thailand (244). Henry and Stiglitz write, “While developing countries would have to pay more for drugs, the drug companies invested little in the diseases that afflicted the poor, especially the poor in developing countries” (244). See also Graham Dutfield, *Intellectual Property Rights and the Life Science Industries: A Twentieth Century History* (London: Routledge, 2016), 196–197.

61. Reto M. Hilty and Valentina Moscon, eds., *Modernisation of the EU Copyright Rules* (Munich: Max Planck Institute for Innovation and Competition, 2017), OA; “Open Access,” European Commission, Brussels, April 5, 2020, OA.

publishing options of an art monograph, making it even more of a viable option for some expensive editions. But then there may also be runaway open access successes that scholarly publishers are tempted to have their authors recast in a trade edition to be marketed to a wider public.

While this chapter ventures deep into the administrative intricacies of this Copyright Act amendment, I am not so naive as to imagine that I have it right with each structure and process set out in these pages, even after carefully lifting what I could from the Music Modernization Act of 2018—or perhaps because I did. I recognize that the legal reforms set out here are perhaps as likely to end up succeeding in bringing about change, if at all, through the other ways and means they inspire. That is, my best efforts at setting out a path for legislative reform may simply serve as a provocation for others. Having seen it done poorly, those with more experience and wisdom in congressional matters will perhaps feel obliged to step forward, whether out of pity or contempt, with a better plan for redirecting copyright toward the support of open access and what is best for science. That would be all the more satisfying for me, certainly, than seeing my proposal either ignored or summarily dismissed without bringing us any closer to this agreed-upon goal of open access. But then, by another turn, the very prospect that I raise in this book of reforming what is currently a very industry-friendly Copyright Act may serve as a call to action. This statutory licensing amendment has already attracted some attention, after all, including a couple of early endorsements from smaller publishers. Having a viable program of copyright reform for research publications in circulation might just inspire sufficient market advances from publishing leaders to bring us that much closer to universal open access. That, too, would be no less satisfying considering what is ultimately at stake in promoting the progress of science.

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The MIT Press would like to thank the anonymous peer reviewers who provided comments on drafts of this book. The generous work of academic experts is essential for establishing the authority and quality of our publications. We acknowledge with gratitude the contributions of these otherwise uncredited readers.

This book was set in Sabon by Scribe Inc. Printed and bound in the United States of America.

Library of Congress Cataloging-in-Publication Data

Names: Willinsky, John, 1950– author.

Title: Copyright’s broken promise : how the law now impedes the “progress of science” and how it can be fixed / John Willinsky.

Description: Cambridge, Massachusetts : Massachusetts Institute of Technology, [2023] | Includes bibliographical references and index. | Summary: “How US Copyright law should be reformed to ensure open access to research and scholarship”—Provided by publisher.

Identifiers: LCCN 2022003112 (print) | LCCN 2022003113 (ebook) | ISBN 9780262544412 (paperback) | ISBN 9780262371476 (epub) | ISBN 9780262371483 (pdf)

Subjects: LCSH: Copyright—United States. | Open access publishing.

Classification: LCC KF2994 .W55 2023 (print) | LCC KF2994 (ebook) | DDC 346.7304/82—dc23/eng/20220801

LC record available at <https://lcn.loc.gov/2022003112>

LC ebook record available at <https://lcn.loc.gov/2022003113>

10 9 8 7 6 5 4 3 2 1