Epilogue: Toward a Global Public Good

Although this book may contribute to advancing open access in several ways, it is fair to ask how I might expect Congress to take up such an idea for copyright reform. Such legislative action will first require a considerable mustering of support and endorsement from research library organizations, scholarly publishers, learned societies, and funding agencies. The bigger players in this realm might then have their lobbyists assess the congressional appetite for a legislative move on behalf of science. It might work well, for example, in conjunction with other copyright proposals, or it might work riding on a postpandemic wave of gratitude toward research. Ideally, support for this open access initiative would attract bipartisan support, which, as rare as it has been, has led to successful NIH budget increases in recent years (in defiance of Trump's cuts).

If the interest among sitting members of Congress was sufficient, it may well lead to an official request that the US Copyright Office conduct a study of the issue. This request would lead to the Copyright Office issuing a notice of inquiry, intended to inform Congress on whether legislative action is warranted by reviewing and inviting public and expert opinion on the larger topic of copyright and scholarly publishing. Judging by recent examples, the notice will include a statement produced by the Copyright Office that is likely to pose provocative questions about how well copyright serves publishers, scholars, and the public, as well as about different strategies for improving the law's handling of this important area of human endeavor. It is worth noting, for example, that close parallels between this book's proposal and the questions raised by the Copyright Office's most recent notice of inquiry, entitled "Publishers' Protections Study: Notice and Request for Public Comment."[1] The notice's "Supplementary Information" reviews the current market failure

1. US Copyright Office, "Publishers' Protections Study: Notice and Request for Public Comment," *Federal Register*, Washington, DC, October 12, 2021, OA.

of journalism today before asking respondents to address a wide range of questions, with three of particular relevance to this book—namely, those about (1) the "effectiveness of current protections [of copyright] for press publishers," (2) creating a new legal category for "press publishers," and (3) instituting "a right of remuneration" (statutory licensing) for aggregating news stories. Although the digital-era issues are radically different between the press and science, given their critical presence in the early formation of this democratic state, the parallels should not be surprising, if still a little distressing, as this interest in legal reform comes some time after the entertainment industries have had their digital-era concerns met.

In the case of copyright's service to open access research, the notice of inquiry from the Copyright Office will likely include a summary of the relevant research, some of it included in this book. On the extent to which this open research will be consulted and read and by whom, the Copyright Office will likely draw on the Piwowar, Priem, and Orr study from 2019, cited in chapter 4, which found that readership was close to 70 percent greater for open access articles.[2] It could call on Alperin's 2015 study, cited in chapter 1, of Latin America's almost universal open access, in which he found that a quarter of those turning to this research are members of the public from outside the university community.[3] The Copyright Office might also turn to what is known about the current use of freely accessible research by professionals and policymakers. Here the sources of insight are on a smaller scale. For example, Lauren Maggio, at Uniformed Services University, and Laura Moorhead, at San Francisco State University, joined me in 2012 to see what happens when you provide over three hundred physicians with free access to the biomedical literature holdings of Stanford University for a year. While two-thirds of the physicians did not take advantage of it, one-third downloaded an article a week on average, and did so, they told us, as clinicians, educators, researchers, learners, administrators, and advocates (in order of frequency of use).[4] A physician explained how this extended access served both her own interests and that of her patients: "Basically [I] was looking for more information and for review articles that I could actually print out and share with the patient. . . . I've given out the consensus

2. Piwowar, Priem, and Orr, "Future of OA."

3. Alperin, "Public Impact."

4. Lauren A. Maggio, Laura L. Moorhead, and John Willinsky, "Qualitative Study of Physicians' Varied Uses of Biomedical Research in the USA," *BMJ Open* 6, no. 11 (2016): e012846, OA.

statement article to probably three patients."[5] Another physician related how what he had found in the literature compelled him to challenge the hospital's policies: "So I have to take this [set of papers] to the administration and say, 'Look. These are the new guidelines that are being published. These are what people are saying. We need to switch.'"[6] When we asked about their research practices outside of our study, some participating physicians said they had stopped looking for research articles after being confronted by a request for a credit card to view them: "I won't pay, because it's so expensive," is how one physician put it. "I'm never going to pay $45 for an article. I just do without."[7]

Once issued by the Copyright Office, the notice of inquiry is likely to attract submissions that touch on many of the issues raised in this book, from the consensus that has emerged on the value of open access to the ways in which the market is falling short in providing open access with all due speed at a fair and sustainable price. Statutory licensing is bound to attract passionate statements on it undermining market forces as well as encomiums on its benefits. And of course, more copyright consequences of such licensing will be set out than are dreamt of in my philosophy of open access. The Copyright Office will then synthesize this considerable influx of opinion, experience, research, and evidence for reporting to Congress and the public.

The notice of inquiry report from the Copyright Office may then succeed in convincing one or two members of Congress to engage in the drafting and sponsoring of a bill. The drafting may take some time, but if the interest in the bill is sustained, it will be assigned to a committee to consider the legislation's potential impact. While the bill seeks a relatively narrow and limited amendment of the Copyright Act's handling of research publications, the implementation of universal open access will have consequences for important realms of human activity. The committee might consider the bill's impact on (1) the human right "to share in scientific advancement and its benefits," as set out in the Universal Declaration of Human Rights; (2) the ability of researchers and scholars on an international scale to consult, without restriction, the literature most relevant to their investigations and to have their work consulted in turn; (3) the billion-dollar US taxpayer investment in research through federal agencies, from the National Institutes of Health to the National

5. Maggio, Moorhead, Willinsky, "Qualitative Study," 5.
6. Maggio, Moorhead, Willinsky, "Qualitative Study," 6.
7. Maggio, Moorhead, Willinsky, "Qualitative Study," 3.

Endowment for the Humanities; (4) the financial viability of research libraries through a judicial means of ensuring fair pricing; and (5) the digital-era alignment with copyright's original constitutional intent—"to promote the progress of science"—if only after decades of intellectual property reforms that have served everything but science.

The committee will also consider the economic benefits of such legislative reform. It might, for example, consider how the legislation will contribute to the "learning society" portrayed by Joseph E. Stiglitz and his colleague at Columbia, Bruce C. Greenwald, in which "the pace of learning (innovation) is the most important determinant of increases in standards of living."[8] The economic gains achieved by such a society have everything to do with research's contribution, according to Stiglitz and Greenwald, "from basic research—typically financed by government, occasionally by a government sanctioned monopoly (like Bell Labs), and typically produced by research universities and government research laboratories—to applied research, sometimes building on these basic ideas, at other times refining and developing 'prior art.'"[9] Greater access to research, among other forms of knowledge, is the key to growth for these two economists: "More diffusion of knowledge [leads to] more learning; it is these achievements in learning that largely account for the ever-rising standards of living in these successful economies."[10] While the learning that concerns them often takes place on the shop floor, which leads them to a focus on patents rather than copyright, Stiglitz and Greenwald recognize that, when it comes to innovation, "most advances occur" in "an academic community."[11] Just as importantly, their critique of current legal structures is no less applicable to copyright's part in science: "Poorly designed 'strong' intellectual property regimes actually impede learning and innovation," and "policies that in any way impede learning . . . may, over the long run, lower well-being."[12]

Stiglitz identifies, in another relevant publication, how the congressional committee might consider that "knowledge is one of the keys to

8. Stiglitz and Greenwald, *Creating a Learning Society*, 15–16.

9. Stiglitz and Greenwald, *Creating a Learning Society*, 16.

10. Stiglitz and Greenwald, *Creating a Learning Society*, 18.

11. Stiglitz and Greenwald, *Creating a Learning Society*, 74. Stiglitz and Greenwald draw on Kenneth J. Arrow's learning by doing, and yet Arrow also acknowledges the economic role played by that education and research institutions; Kenneth J. Arrow, "The Economic Implications of Learning by Doing," *Review of Economic Studies* 29, no. 3 (1962): 156, 172.

12. Stiglitz and Greenwald, *Creating a Learning Society*, 23.

development and . . . is complementary to private and public capital" yet, ultimately, is best regarded as "a global public good requiring public support at the global level."[13] What my reform of the Copyright Act will do, this congressional committee might realize, is go a long way in meeting Stiglitz's call for the public support of knowledge. It is a first step in moving research publications into the legally protected state of a global public good that circulates through the publishing services of private and public capital.[14]

If this suggests the advantages and benefits of copyright reform, what then of the projected expenses and unintended consequences of the bill? The committee will need to project budgets for operating the scholarly publishing review board as well as maintaining the research publications registry. Then there is the management of the research licensing collective, with the considerable legal and research costs associated with bringing cases before the copyright royalty judges. In chapter 6, I stressed how scholarly publishing is in a better position to take on such work, compared to the music industry, which will still be able to provide a basis for some estimates. Still, the point of budgetary comparisons for this new legislation will be to assess its impact on research-publishing transaction costs. As it stands, publishers engage with libraries and library consortia. On the library's side, these costs involve not only acquisitions personnel but the general counsel and contract managers, subject specialists, bibliographers, and others. For publishers, there is a sales team, subscription agencies, and more lawyers. The move to statutory licensing, with fixed prices and a research licensing collective, will change some of that and leave other parts in place, such as the lawyers. While reducing transaction costs is a common goal of statutory licensing, in this case, the foremost legislative aim is a legally binding and sustainable form of open access to research publications. Yet given the tendency, noted in chapter 6, for

13. Stiglitz, "Knowledge." More formally, a public good is "nonrivalrous" (i.e., without being diminished or used up by anyone taking advantage of it) and "nonexcludable" (as it is difficult to keep people from sharing in it).

14. This call for public support for research also speaks to Paul A. David's caution that "the methods of modern science themselves have not been, and still are not, sufficient to create the unique cultural ethos associated with the Republic of Science." A legislative intervention is needed to change the Copyright Act from one that impedes to one that supports "the peculiar institutional infrastructures and organizational conditions of the open science regime"; David, "From Keeping 'Nature's Secrets,'" 85.

rights management organizations to lack transparency, the introduction of financial checks may well be appropriate.

Among the unintended consequences of this legislation, which the congressional committee will also need to consider, is the disturbing pandemic instance of Scott Atlas in 2020, with which this book opened. His attack on masking recommendations, which included tweeting a study's claims on masks' low effectiveness, remains a troubling instance of research in the public domain. Research tweets are bound to be fraught given the context and background needed to assess a study's findings and conclusions. But ensuring that all tweeters have access to the studies in question may offer a greater degree of vigilance and provide some checks on egregious abuses. Yet as preprints have demonstrated, this greater openness can, on occasion, result in the wider circulation of notoriously flawed studies.[15]

Another potential unintended consequence for the congressional committee to review is the current political backlash against critical race theory. This is a field of scholarship developed by American legal scholars some five decades ago that exposed how the law continued to figure in forms of systemic racism from real estate to education.[16] Critical race theory is now treated in many states as an educational threat (to white supremacy), with sixteen states now having legislation in place restricting such teachings on race and this restriction pending in an additional nineteen states.[17] Although open access has not played a part in the misrepresentation of this theory (as little reading of the theory has been involved), the greater availability of social science scholarship may well feed anti-intellectual agendas and have a chilling effect on academic freedom. The counter to this concern is the hope that public debate and deliberation will be served by greater access, in which the work at issue

15. The unfortunate poster child here is the 2016 study of cell phone–induced brain cancer that remains available on the preprint server bioRxiv.org; David Gorski, "No, a Rat Study with Marginal Results Does Not Prove That Cell Phones Cause Cancer, No Matter What Mother Jones and Consumer Reports Say," Science-Based Medicine, May 30, 2016, OA.

16. Kimberlé Williams Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, eds., *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New Press, 1995).

17. Kiara Alfonseca, "Map: Where Anti-critical Race Theory Efforts Have Reached," ABC News, March 24, 2022; Emma Pettit, "The Academic Concept Conservative Lawmakers Love to Hate," *Chronicle of Higher Education*, May 12, 2021.

can be consulted and checked rather than simply accepted as described.[18] If open access tends to intensify disputes rather than settle them, being able to dig deeper can also raise the quality of engagement with the ideas in question.

Then there is the commercial exploitation of open access to be considered. The introduction of APCs to finance open access publishing in the early 2000s led, as noted in chapter 4, to a wave of "predatory journals" whose publishers were all too happy to accept even a modest APC in return for posting articles without the benefit of expert editorial oversight or peer review. Here, the congressional committee could point to the scholarly publishing registry, which would, for the first time, make publicly available a list of publications in which a panel of research librarians has confidence. I'm involved in efforts to further develop trust and authentication systems for the editorial oversight and peer review associated with research publications.[19] This involves corresponding educational initiatives in high schools and colleges on learning about what distinguishes this form of knowledge and how to navigate and assess it at a basic level as well as, depending on their field of study, at more advanced levels.

If I can predict these aspects arising, I also need to allow that the thing about unintended consequences is that they are unexpected until they seem all too predictable. It is not as clear at this point, for example, how the large publishing corporations will find the financial advantage they are used to enjoying with the copyright royalty judges. I noted in chapter 4 that these companies are showing signs of diversifying their portfolio beyond publishing as they move toward an integration of research services and data analytics. At the same time, this legislation should not be mistaken for an antitrust measure intended to break up these publishing giants. The legislative review committee is not looking for what cannot reasonably be realized, which would be foolproof and ungameable legislation. It is looking for legislation that can demonstrably improve the intent and goals of the law for the benefit of all.

Statutory licensing for open access amounts to a legally sound advance over the currently intolerable impasse in achieving what is widely recognized as best for the advancement of knowledge. It is my belief that as the

18. See this example, although without open access to the sources cited, by Victor Ray, "Trump Calls Critical Race Theory 'Un-American.' Let's Review," *Washington Post*, October 2, 2020.

19. Khanna and Willinsky, "What Those Responsible."

benefits of this proposed legislation appear to outweigh its costs, the congressional review committee will recommend this legislation. Should this proposal for the statutory licensing of research publications be successfully incorporated into the Copyright Act, then the US Copyright Office will guide and advise Congress on the successes and challenges of its implementation, which may well lead to further adjustments to the law.

One concluding consideration in that regard could well be the potential reversibility of open access statutory licensing. This could follow from the eventual impact of statutory licensing on a global scale in making universal open access the norm for the circulation of research and scholarship. This development would be accompanied by the infrastructure needed to track and manage an open economy among publishers, libraries, and funders. At that point, a case is very likely to be made by members of the community that the statutory licensing of open access is no longer necessary or best for scholarly publishing. They would point to signs of the open access publishing market maturing, reflected in, say, the stability of pricing, the quality, and the integration of open data and other aspects of open science. When it comes to advancing the quality of research publication, they might claim that—in addition to containing publishing costs through competitive ventures—it is time to set aside statutory licensing in favor of a free market for open access publishing services. Others may reject the idea outright, much as the consent decrees that have held ASCAP and BMI in their grip for eighty years continue to win industry support. But it could also be that the scholarly publishing community, in another moment of consensus, ends up approaching Congress, WIPO, and the other relevant bodies worldwide with guidance on how best to take the steps needed to set open access statutory licensing aside. It would mean that scholarly publishers of every sort will once again contract with research libraries everywhere, only this time it will be to ensure that the open access to research publications needed to promote the progress of science will continue its promise of a brighter future.

Two decades ago, Lawrence Lessig shared a warning that he'd received—namely, that "this field of copyright law was filled with crazies."[20] After he became involved in the court battle over the constitutionality of the copyright term extension, he saw that the problem is more specifically "fanatics . . . who could see no limit, or no balance,

20. Lawrence Lessig, "Copyright's First Amendment," *UCLA Law Review* 48, no. 5 (June 2001): 1058.

to the law that they were promoting."[21] For Lessig, the sane and necessary approach to this area of the law is to find "the deep, and as it struck me, obvious balance that this law of copyright must strike."[22] In the face of that cautionary note, I have done my best to develop a thoroughly sane and obvious balance for the Copyright Act in the digital era of open science. Achieving that balance begins with the law recognizing the distinct nature of the intellectual property produced by the scholarly economy of "research publications." Within this narrow category of works, the law can find a stable balance between the needs of researchers and readers for open access, on the one hand, and the needs of publishers, including scholarly societies, for the revenue that sustains the distinct qualities of scholarly publishing, on the other. This will also introduce a balance into the Copyright Act between the sponsored public service of scholarly publishing and the commercial economy of professional writers and their publishers. Nothing too crazy about that, I'm hoping.

21. Lessig, "Copyright," 1058.

22. Lessig, "Copyright," 1059.

Copyright's Broken Promise

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

By: John Willinsky

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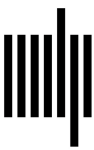

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