

“In the Open” Blog

March 2016-October 2019

By

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Who We Are

Wed, 02 Mar 2016 10:03:13, Kevin L. Smith

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Introduction

The *In the Open* blog was a joint effort amongst a dozen colleagues with professional interests in issues of scholarly communications and open access to provoke thought and dialogue on these issues. Because it included librarians, a university press publisher, and a representative of a major funder, the potential for this site was great, and some very significant ideas have been aired in this blog. We hope you will enjoy reading!

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What “In the Open” is all about

Tue, 22 Mar 2016 10:23:27, Kevin L. Smith

[Category: all-posts, uncategorized]

The title of this new blog should not surprise folks. It is born out of the conviction that scholarship should be open because...

Scholarship in the open is better business – it provides a clearer perspective on what it actually costs to produce articles, books and other scholarly output.

Scholarship in the open is better for libraries – it connects us more directly with our researchers and with the life entire life cycle of research. It improves our ability to disseminate the outcomes of research and get the materials they need into the hands of students, teachers and others quickly and efficiently.

Scholarship in the open pushes us towards better copyright laws — it encourages us to think about how copyright could better align with author incentives and reminds us that, because the reasons creators create are so various, the law needs more flexibility than it currently has.

Scholarship in the open is better scholarship – it can be read and evaluated by a much larger and more varied audience. It takes the initial process of evaluating works of scholarship out of the hands of a small elite, some of whom are ill-prepared for the task, and offers the potential for more diverse ways of measuring impact and providing more complete information for the hiring, tenure and promotion process.

Our first substantive blog post at IO: In the Open, by Ellen Finnie of MIT, will focus on the vital issue of how we spend our money in libraries, and how we can think in broader terms about the value of scholarly resources. Ellen’s post, with its interesting analogy to food-supply chains, will be published on IO within the next day or so.

What organic food shopping can tell us about transforming the scholarly communications system

Wed, 23 Mar 2016 08:15:02, Ellen Finnie

[Category: all-posts, uncategorized]

In the MIT Libraries we've just launched a new and innovative approach for our scholarly communications program — and for our collections budget: the collections budget is now part of the scholarly communications program.

Yes, you read that right: through the vision and leadership of new Associate Director for Collections Greg Eow and Director Chris Bourg, the collections budget has been incorporated into, essentially *under*, the scholarly communications program. Not the other way around.

We made this change because we want to use our collections dollars — in a more systematic and strategic way — to transform the scholarly communications landscape towards more openness, and toward expanded, democratized access.

I like to think of this as voting with our collections dollars, an idea I first grasped through Michael [Pollan's powerful and influential prose about food](#):

“Depending on how we spend them, our food dollars can either go to support a food industry devoted to quantity and convenience and ‘value’ or they can nourish a food chain organized around values—values like quality and health. Yes, shopping this way takes more money and effort, but as soon you begin to treat that expenditure not just as shopping but also as a kind of vote—a vote for health in the largest sense—food no longer seems like the smartest place to economize.”

— [Michael Pollan, In Defense of Food: An Eater's Manifesto](#)

Pollan has encouraged us to leverage consumer power to transform food systems toward health for people and the planet. In the MIT Libraries, we believe that by adopting this vote-with-your dollars approach to spending our collections budget, we will be contributing to transforming the scholarly communication system towards a healthier environment for people and the planet, too.

This will mean, as Pollan suggests, assessing value in a broader, more holistic way than relying primarily on traditional measures like list price versus impact or cost per download. For as Pollan points out, when evaluating cost, we need to incorporate *full* costs in our assessments. Some foods come cheap but cause health or environmental problems that are not included in the price we pay. In the same way, some pay-walled purchases may seem to offer value in the moment, but may cost us dearly in lost opportunity through artificially limited access, less efficient science and scholarship, and the resulting slower progress working on the greatest problems facing humanity.

In making a more holistic and values-based assessment, we will be using a new lens: assessing potential purchases in relation to whether they transform the scholarly communication system towards openness, or make a positive impact on the scholarly communication environment in some way, whether via licensing, access, pricing, or another dimension. Of course, like shoppers in the supermarket, we'll need to view our purchase options with more than just one lens. We have finite resources, and we must meet our community's current and rapidly evolving needs while supporting other community values, such as diversity and inclusion (which I will write about in a future post). So the lens of transforming the scholarly communications system is only one of many we will look through when we decide what to buy, and from what sources. How we will integrate the views from multiple lenses to make our collections decisions is something we will be exploring in the coming months – and years.

I hope others will join us in this exploration, though we recognize not all libraries will feel positioned to do so. The MIT Libraries are relatively well-resourced, and are privileged in having a bit of wiggle room to take this values-based approach. Our aim is to use that privileged position to act for the collective good. Ultimately, though, as Pollan tells us — and as the evolution of food markets has demonstrated — the power to transform a market comes not from one individual, or one library, but in the aggregated purchases all of us make, placing our votes for healthier options.

The Cost to Publish a Monograph is Both Too Low and Too High

Tue, 29 Mar 2016 07:35:48, John Sherer

[Category: monographs, subventions, university-presses]

Last Fall, consultants from Ithaka S&R visited the University of North Carolina Press to gather data they would use in writing a report on the costs of publishing a scholarly monograph. At the time, I couldn't help but wonder whether the Press staff felt like they were being [interviewed by the Bobs from "Office Space."](#) We were being asked how much time we spend on individual projects? How do we allocate our days? What work do we perform in-house versus outsourcing? And we were being told we would be given tools to measure our productivity and costs against our peers.

In February, Ithaka released their [study](#). No PC-Load Letter printers appear to have been harmed in the process.

Here's what's great about the report. It reveals in granular detail the amount of care and talent required to produce a high quality humanities monograph. And it isn't cheap. The costs range from a baseline number of around \$25,000 per book to figures three and four times that amount. By some estimates, American university presses produce upwards of several thousand monographs a year. A quick calculation suggests that UPs are covering a minimum of \$50 million in expenses to make this scholarship available. I can make the argument it's twice that amount.

But here's what gives me pause about the report. It's not about the data itself, which is very illuminating; but it's about how people might use it. There's some speculation that this report was commissioned as a step toward developing a pre-funded or supply-side funded model for publishing humanities monographs in digital open access. I certainly support efforts to rethink the economic model for publishing, especially ones where more pre-funding can be paired with a mandate to make them more broadly accessible. The paywall model has been under duress for decades, and is now almost completely broken. But with a number like \$25,000 being tossed around as the equivalent of a monograph processing charge, the conversation about open access for books may end before it begins.

I agree with the consensus forming around this report that these books cost more to publish than people generally think. But I disagree with the notion that per-book subventions to presses should be in amounts like this.

The danger with the numbers in this report is that they describe how much it costs presses to put a book into the marketplace using our conventional model. But in order to produce an edition that is openly available in digital format, our activities would look very different. Or they *should* look very different. Any new funding model for publishing humanities monographs in open access must be paired with markedly different workflow and dissemination models. Fully subsidizing existing practices will cement existing practices, and may well introduce moral hazards: if a press is made financially whole upon the

arrival of a first draft of a manuscript, our incentives to improve quality and maximize dissemination are seriously eroded. It could lead to business practices where volume and haste replace the care and quality which currently characterizes much of the output of university presses.

The encouraging news is that a digital first, open access dissemination model should be much less expensive for presses to utilize than what they're currently doing. I'm looking forward to an analysis that reveals those true costs, as well as the expenses of shifting university presses to such a model. But those numbers are outside the scope of the Ithaka report. So I encourage you to read it, but use it as a tool to begin a larger conversation about what it is the scholarly communications ecosystem wants from its university press partners. Once we've developed that understanding, we can start assigning price tags.

Here we go again — new GSU decision an odd victory for libraries

Fri, 01 Apr 2016 09:24:30, Kevin L. Smith

[Category: copyright-law]

[Note that this posting is also found on the Scholarly Communications @ Duke site. I decided to post it on both the venue I am leaving and this new, group undertaking, because the issue is so important. But I apologize for the repetition that many readers of both sites will experience]

My first thought when I read the [new ruling in the Georgia State copyright lawsuit](#) brought by publishers over e-reserves was of one of those informal rules that all law students learn — don't tick off your judge. From the first days of the original trial, the arrogant antics of the attorneys representing the publisher plaintiffs — Oxford University Press, Cambridge University Press, and Sage Publishing — clearly put them in a bad light in the Judge Evans' eyes. Those chickens came home to roost in this latest opinion, especially where the plaintiffs are chided for having filed a declaration about what licenses were available for excerpts back in 2009, even after the Judge told them not to, since that information had not been introduced as evidence in the original trial. All of that evidence was stricken, and the Judge based her new opinion on the evidence that was before her in that first trial. I can imagine that the publishers might use that ruling as a basis for yet another appeal, but if they do so, they had better be able to prove that the evidence is genuine and reliable, and to explain why, if it is, they did not produce it at trial back in 2011.

But I have put the cart before the horse; let's look at the ruling we just received from the District Court. In case some have lost track, this case was originally decided by a 2012 ruling by Judge Evans that found infringement in only five of 74 challenged excerpts, and awarded court costs and attorney's fees to GSU as the "prevailing party" in the case. The publishers appealed that decision to the Eleventh Circuit Court of Appeals, which vacated the trial court holding in 2014, sending the case back to Judge Evans with a set of instructions on how to improve the fair use analysis for these challenged excerpts. As has been noted many times before, the publishers lost nearly all of the big principles they had wanted to establish in the case; the Court of Appeals refuted most of the publishers' arguments even as it did what they asked and vacated the first ruling.

Now, using the new fair use analysis directed by the Court of Appeals, Judge Evans has handed the publishers yet another loss. One wonders how many times they will have to lose this case before they finally learn something about the state of copyright law today. Still, this loss for the publishers is only the oddest sort of victory for libraries.

The new fair use analysis that Judge Evans uses is carefully designed for situations where the challenged use is not transformative; the non-transformative nature of the use means that the small portions used must be scrutinized very carefully, and it means that the fourth factor — the potential impact of the use on the market for or value of the original — gets extra weight. It is very important to notice this fact,

because it means that this analysis used by Judge Evans will not be applicable in many other situations, especially in academia, where the uses are, unlike with e-reserves, transformative.

Even though both the trial court and the Court of Appeals have held that e-reserves are not transformative, both courts have affirmed that the first fair use factor — the purpose and character of the use — will still favor fair use when that purpose is non-profit and educational. So throughout this new decision, Judge Evans continues to hold that the first factor always favors fair use.

The analysis of the other factors has changed, however. For factor two, the nature of the original, Judge Evans does not make a blanket assumption, owing to instructions from the Eleventh Circuit, but looks at the nature of each excerpt. In most cases, she finds that informational matter is mixed with more individualized scholarly commentary, and the result is that this factor is usually neutral — neither favoring nor disfavoring fair use. In the few cases where it counts against fair use, it has little impact (the Judge says this factor is only 5% of each decision).

In the same way, factor three now gets a more careful and specific analysis. The 10% or one chapter rule that Judge Evans used in her first opinion is gone, at the instruction of the Court of Appeals. Instead, Judge Evans looks at each excerpt and evaluates its appropriateness to the allowable purpose (from factor one) and its potential to substitute for a purchase of the book (market substitution, anticipating factor four). In many cases, she finds that the excerpts are a very small number of pages and a small percentage of the entire work (so not a market substitute), are also narrowly tailored to accomplish a specific teaching objective. In those cases, this factor will favor fair use.

Factor four, which the Judge now believes should constitute 40% of the fair use decision *in this particular situation*, is where most of the action is in this ruling. The analysis, the Judge says, is two-fold, looking at both harm to the potential market for the original and harm to the value of the work, which means looking at the importance of the licensing market. About this latter source of potential value, the Judge says that she must decide “how much this particular revenue source contributed to the value of the copyright in the work, noting that where there is no significant demand for excerpts, the likelihood of repetitive unpaid use is diminished” (p. 9). The result of this inquiry is that a lot of financial information about each book — its sales over time and the amount of revenue derived from the permissions market — is very important in the fourth factor analysis. The charts for many of the books that reflect this information make for fascinating reading, and contain information I suspect the publishers would rather not have made public. This is where it becomes most difficult for libraries to apply the analysis that Judge Evans is using, because the Court has access to information, and time to analyze it, that is not available to libraries as they consider e-reserve requests. Still, I think it is important to note that the standard the Judge is using in this evaluation is pretty high and it is focused on value to the authors and to users:

[W]e must determine how much of that value (the value of the work to its author and the potential buyers) the implied licensee-fair users can capture before the value of the remaining market is so

diminished that it no longer makes economic sense for the author — or a subsequent holder of the copyright — to propagate the work in the first place (page 8, quoting the 11th Circuit).

In other words, this analysis is opening up a significant space in the idea of market harm, which permits potential fair users to diminish the value of the work in question to some degree, as long as that reduction in value is not so steep as to discourage writing and publishing these academic books. Licensing, in this analysis, is the remedy only for that kind of steep loss of value; it is not a mere right of the copyright holder to obtain all the value from the work that is possible.

Judge Evans applied this complex formula for fair use to 48 challenged excerpts. It was only 48 because for 26 of the ones discussed in her original ruling she found that there had been no *prima facie* case for copyright infringement made out, either because the publishers could not show they held the copyright or because there was no evidence that any students had used the excerpt. This part of the ruling was not challenged, so only these 48 fair use rulings had to be redone. Bottom line is that she found **fair use for 41 of the 48**, and infringement only in seven cases. As Brandon Butler points out in [his discussion of the ruling](#), even that might overestimate the infringement, since it appears that the summary in the decision may list at least some instances of infringement that were actually found, in the specific analysis, to be fair use.

So this ruling, like each ruling in the case, is clearly a disaster for the plaintiff publishers. Once again it establishes that there is significant space for fair use in higher education, even when that use is not transformative. Nevertheless, it is a difficult victory for libraries, in the sense that the analysis it uses is not one we can replicate; we simply do not have access to the extensive data about revenue, of which Judge Evans makes such complex use. So what can libraries do, now that we have this additional “guidance” about e-reserves from the courts? I think there are two fundamental takeaways.

First, we should continue to do what we have been doing — making careful fair use decisions and relying on those decisions when we feel the use is fair. While we do not have much of the information used by the Court in this latest ruling, we still do have the security provided by [section 504 \(c\)3 of the copyright law](#), which tells us that if we make good faith fair use decisions we, as employees of non-profit educational institutions or libraries, are not subject to statutory damages. This greatly lowers our risk, and adds to the disincentive to sue academic libraries that must surely stem from the GSU experience. All we can do, then, is to continue to think carefully about each instance of fair use, and make responsible decisions. We still have some rules of thumb, and also some places where we will need to think in a more granular way. But nothing in these rulings need fundamentally upset good, responsible library practice.

The second takeaway from this decision is that we should resort to paying for licenses only very rarely, and when there is no other alternative. The simple fact is that the nature of the analysis that the Court of Appeals pushed Judge Evans into is such that licensing income for the publishers narrows the scope for fair use by libraries. To my mind, this means that whenever we are faced with an e-reserves request that may not fall easily into fair use, we should look at ways to improve the fair use situation before we decide to license the excerpt. Can we link to an already licensed version? Can we shorten the

excerpt? Buying a separate license should be a last resort. Doing extensive business with the Copyright Clearance Center, including purchase of their blanket campus license, is not, in my opinion, a way to buy reassurance and security; instead, it increases the risk that our space for fair use will shrink over time.

Unizin's content strategy, the meaning of open and musings on textbook licensing

Tue, 05 Apr 2016 14:47:54, Claire Stewart

[Category: oer, textbooks]

Interesting things are happening over at the [Unizin](#) project. In early February the Unizin board shared some of its thinking about course content in a post, [An Evolutionary Unizin Approach for Commercial and OER Content](#). Outside of project teams & meetings directly related to Unizin activity (disclosure and disclaimer: my institution is a Unizin member, so although I'm partly drawing on some of our experiences, this post only reflects my personal views) I've not heard a lot of chatter about the strategy or Unizin in general, so I don't know how many eyeballs it's attracted. It may be that, on balance, not a huge number of us know what Unizin is, but assuming the strategy was posted to stimulate response and conversation, here are a few thoughts.

Unizin is a consortium of universities collectively investing in technologies and collaborations around teaching and course content. One of the (many) taglines is "Unizin is a university-owned service for universities with the goal to improve learner success." To date, the project has done things like secure a Canvas contract for its members, purchase the [Courseload Engage](#) digital content delivery platform, and begin to work in a number of ways on learning analytics issues. Unizin member institutions have the option to participate in initiatives around any of these activities, or none.

There is a lot to like about the board's content strategy, starting with the strong statement that Open Educational Resources (OER) will be by far the best option, over time, for students and faculty. Recognizing that it will take time and significant resources to advance OER scale and adoption, however, and that a significant existing corpus of commercial material is heavily used in teaching, pushing ahead on multiple fronts simultaneously is imperative (the evolutionary approach). As part of this, the strategy statement confirms that leveraging access to library-licensed content will be an important means to achieve the overall goal of reducing costs for students. And it puts course content in its full context, noting that it will not be sufficient merely to reduce textbook costs if the status quo is maintained through increased costs for ancillary materials, or if universities lose access to learning analytics and other user data. As we know from the world of scholarly publishing, there are huge and growing markets for secondary products built on journal content and usage data: from abstracting and indexing databases to citation databases to recommender services to research networking, productivity tracking and other bibliometrics-based tools. It only makes sense for universities to try to keep all of their needs and potential developments in view from the start. It also, hopefully, will better position universities to assert our values in the areas of student privacy and data control. Brigham Young University is [engaging in an interesting project](#) to give students control of their own data. There are vigorous conversations taking place in multiple settings (at [CNI](#) and its [fora](#), and [NISO](#), among many others) about analytics and privacy that are well worth following.

Some things about the strategy and [related comments from Unizin](#) are a little more confusing, and one or two create a rather unpleasant feeling of déjà vu for libraries that have grappled, sometimes quite painfully, to promote access and to work with bundling and big deals.

The first of these is a few words in the section on OER: “Pushing on all things that enable the creation, discovery, and adoption of Open Educational Resources (OER) whether without fee *or partially subsidized*” [emphasis added]. I assume, or at least hope, that what the board is talking about here is content that is actually free to use, reuse and remix (and [all of the other R’s](#)), but that either its production has been financially supported by some entity, or that some version of the content, like a print copy, is available for a small fee. I think those are both reasonable and acceptable, but precision around the meaning of open is important, particularly at this early stage in the Unizin project’s life. See David Wiley’s recent [‘The Consensus Around Open’](#) for a discussion of some of the issues here.

Another stated goal is “Enabling academy ownership and/or access to the data and technologies that generate and track student engagement and analytics.” It’s not clear whether “ownership” and “access” are both meant to modify both “data” and “technologies,” but having access to data instead of owning data (whatever that would mean) are two very different things. And there are two sides to the data question: whether the faculty and other teaching partners at the university have a full and unfettered right and ability to use the data to further educational goals, and whether the members of the university have control over what other uses are made of this data. Both are important in this context. Later in the document, there’s a mention of needing at least non-exclusive, perpetual rights to these data, which is a good start. I hope over time the board will develop some ideas around appropriate and ethical uses of these data by others.

By far the most interesting questions that arise, for me, from Unizin’s large scale engagement are around the wisdom and likely success of collective commercial electronic textbook licensing. For libraries, with our decades (or centuries, if you count up the efforts of all of the librarians who have worked on this problem) of experience licensing electronic content from publishers, we may well ask whether there is something so fundamentally different about textbook licensing that the experience will be different from the one we’ve had with journals? Publishers* charge what they charge because they can, and the market has been relatively captive as long as students were required to buy the books assigned by their faculty. Open textbook and other OER projects are experimenting quite vigorously with substitution, and it may very well be that an open statistics textbook will work just as well as that one that sells for \$200 a copy and creates huge profits for its publisher. That could shift the power balance enough to keep publishers eager to engage in volume discounts with universities. But again, it might not, and if success depends on open substitutions being available, and they don’t emerge in sufficient numbers or meet faculty needs, it’s possible that initial discounted pricing may not hold. The low prices we’re seeing might be the equivalent of introductory offers, until enough of us are captivated by this method and mode for prices to rise again. This makes the board’s multi-faceted strategy all the more important: don’t forget about the ancillary materials, keep pushing on OER, and look out for the data.

I’ve only selected a few points to discuss in my comments here, and there’s a lot more to dig in to in the rest of the content strategy statement. I hope others will.

*A caveat about publishers and about bookstores. Not all publishers charge outrageously for their textbooks, and, if you believe the bookstores are contributing to this pain for our students (read some of Unizin's thoughts about bookstore markups in [Everyone wins with the institutional model](#)), not all bookstores are problematic. As with anything, there are good actors and less good actors. A shout out to the University of Minnesota Bookstore, who has been a great partner with the Libraries on our [Digital Course Pack](#) and [Student Savings](#) projects.

Fair Use is the Lifeblood of Academia

Thu, 07 Apr 2016 14:09:26, Lisa Macklin

[Category: copyright-law, fair-use]

If the library is the heart of a university, then exercising fair use is the lifeblood. Teachers, researchers, students, librarians and publishers exercise fair use in countless ways every day. It is fair use that facilitates re-using and re-mixing, if you will, the knowledge preserved and made available by libraries into new discoveries and interpretations. This process of research and scholarship has been referred to as ‘standing on the shoulders of giants’ because we all rely on that which has gone before to provide insight, context and meaning for today.

As frequently as we rely on fair use, making a fair use determination can be difficult, and I would assert that it was never intended to be easy. When Judge Story first articulated fair use in the 1841 case of [Folsom v. Marsh](#), he stated:

“In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”

Judge Story did not create an easy-to-apply bright line rule, he articulated a balancing test which has since been codified in [U.S. Copyright Law Section 107](#), and expanded upon by subsequent court cases which found transformativeness as another consideration weighing in favor of fair use.

Despite having fair use articulated in the US for 175 years, fair use is a continuing point of contention, with two copyright infringement lawsuits brought against libraries. In 2008, Cambridge University Press, Oxford University Press and Sage sued Georgia State University for reserve readings (see Kevin’s [post](#) for the latest news in April 2016). The vast majority of readings were found to be a fair use. In 2011, the Authors Guild sued HathiTrust for the HathiTrust digital archive of scanned library books. The court found the HathiTrust digital archive was a fair use.

We all know that exercising fair use means accepting some risk. The most careful analysis and investigation doesn’t guarantee that a rights holder won’t consider the use an infringement. However, not exercising fair use represents a different kind of risk, what I think of as mission risk. The enduring mission of a university is generating new knowledge, and if we accept the premise that generating new knowledge relies upon what has gone before, then the mission of a university relies upon exercising fair use.

Although the threat of copyright infringement lawsuits now hangs over universities in a way that it did not when I began my career (aka the pre-internet days), I am heartened by the many ways I see libraries, presses, and individuals exercising fair use and asserting that fair use is important. For example, there is now an annual [Fair Use Week](#) in February (you know you’ve made it when you have a week named after you). At the end of this February, the Rauschenberg Foundation announced a pioneering [fair use image](#)

[policy](#), which was noteworthy enough to be covered in the [New York Times](#). I think the rationale the Rauschenberg Foundation provides for making this change is particularly noteworthy.

First, due to the prohibitive costs associated with rights and licensing, many scholars and professors limit themselves to using freely available images in their lectures, presentations, and publications, which in turn can alter how art history itself is written and taught.

In addition, the College Art Association followed it's own [Code of Best Practices in Fair Use for the Visual Arts](#) with new [publication agreements](#) for their journals which include fair use (h/t to [Kyle Courtney](#) for bringing this to my attention). These are only a few examples, and I invite you, our knowledgeable readers, to highlight other examples in the comments.

Merriam Webster's online dictionary gives one [definition of lifeblood](#) as "the most important part of something, the part that provides something its strength and vitality." The exercise of fair use is the lifeblood of the academy and the generation of new knowledge. The library, as the heart of the university, provides strength and vitality to the research and teaching mission, just as scholarly presses are an important part of the dissemination of new scholarship. Scholars, the scholarship they create, and society, benefit from fair use policies like that of the Rauschenberg Foundation and the College Art Association. When we engage in the balancing test that is a fair use analysis, and try to determine the risks and benefits of proceeding with using a copyrighted work, let's not forget to keep our mission in mind.

Using library content licenses to shape the scholarly communications landscape

Mon, 11 Apr 2016 10:49:56, Ellen Finnie

[Category: all-posts, institutional-repositories, license-agreements, uncategorized]

As [announced Friday](#), the MIT Libraries have included [innovative language in our agreement with Springer](#): a provision that MIT-authored articles will automatically be deposited into our campus repository.

This partnership reflects the strategy mentioned [in my previous post](#) – our newly created Department of Scholarly Communications and Collections Strategy is assessing potential purchases using a new lens: whether purchases transform the scholarly communication system towards openness, or make a positive impact on the scholarly communication environment in some way—to take one example, through licensing.

Like many libraries, we've been using our library content licenses as a significant and important opportunity to meet campus needs related to scholarly communication. Some key language we focus on to promote access that is as open as possible includes fair use rights; [author rights for reuse of articles](#) they authored that appear in the licensed content; [scholarly sharing language](#); use in MITx classes (i.e. MOOCs, or Massive Open Online Courses); interlibrary lending; off-setting strategies to support open access publishing in relation to toll-access publishing; access for walk-in users; perpetual access; and text/data mining rights. As part of our support for author reuse rights, we aim for publisher agreements that allow us to fulfill the wish of our faculty, as stated in their [Open Access Policy](#), that “compliance with the policy” be “as convenient for the faculty as possible.”

Through our new agreement and partnership, Springer will send final peer-reviewed manuscripts of MIT-authored scholarly papers directly to the [Open Access Articles Collection](#) of DSpace@MIT, the Institute's open access repository. This will reduce the burden on authors to locate and deposit the correct version of their manuscripts, and, because we can pass metadata through from Springer and apply our own automatically during the deposit process, this arrangement will also speed deposit and cataloging time for library staff.

Springer has been on the forefront of commercial publishers working with us on making access to MIT's research— and research in general— as widely accessible as possible. In recent months, Springer has signed a license with us that allows researchers to [text and data-mine](#) Springer materials for noncommercial purposes, and language that allows [MITx course teams to use Springer e-journals and e-books](#) in MOOCs. As our Director Chris Bourg said in the press release about automatic deposit: “We are grateful for Springer's partnership in expanding [the] impact” of “work emerging from MIT.”

We don't know exactly what the future of scholarly publishing looks like, but we know that to benefit MIT researchers, the broader community of scholars and scientists, and all the potential beneficiaries of

the science and scholarship they produce, we want to move toward more openness. This innovative partnership with Springer allows us to take steps in that direction.

We hope this model will encourage other publishers to consider automatic deposit. And we hope that the library community will continue to develop, advocate for, and use model licensing language that advances our joint objective of transitioning the scholarly communication landscape towards more openness.

Good News in two important fair use cases

Mon, 18 Apr 2016 08:58:41, Kevin L. Smith

[Category: copyright-law, fair-use]

There have been developments, of the sort that don't make headlines, in two major copyright cases that folks in higher education need to know about.

First, today the Supreme Court announced that it would not review the opinion issued by the Second Circuit in the Authors Guild v. Google, the case about the Google Books project that offered a strong reaffirmation of fair use. So the Authors Guild finally and definitively loses another in its string of anti-fair use cases. This was what [I and many others expected](#), but it is nice to be able to say that this case is done. And the broad, flexible approach to fair use that is outlined in the Second Circuit's decision stands, which is great news.

Second, in the Georgia State University lawsuit, brought by three publishers over electronic reserves in academic libraries, the judge has clarified her decision due to an inconsistency that several of us noticed. Specifically, in the summary of the decision, the judge listed seven instances of infringement from amongst the 48 excerpts that she was evaluating. [Lots of reporting on the case therefore noted that the "score" in the decision was 41 examples of fair use to 7 infringements](#). Certainly a victory for GSU, and the university was declared the prevailing party for the purpose of collecting costs and attorney's fees from the publisher plaintiffs. But three of those seven excerpts were the subject of considerable confusion, since in the item-by-item analysis, those three had been found to be fair. So after the error was pointed out, Judge Evans has issued a clarification that confirms what we expected — there were only four infringements found out of the 48 excerpts, so that score is now 44 fair uses versus 4 that were not. Not a big deal, but still a slightly stronger affirmation of fair use for such e-reserves.

By the way, that the number of infringements has gone down since the first trial ruling, where there were five infringements found, should not be surprising. When they vacated and remanded the case, the Eleventh Circuit Court of Appeals specifically told the trial court to employ more flexible standards to factors two and three in the fair use analysis. Flexibility, which is the primary virtue of fair use, is a two-edged sword. The publishers "won" the point in the Appeals Court, but when it was actually applied to the circumstances, it turned out to work against them.

This case has just passed its eighth anniversary in our courts. Over that time the three publisher plaintiffs have amassed a spectacular string of losses. Even when they seemed to win at the appellate level, they lost on all of the radical changes in copyright and fair use that they have been trying to push. If there is any common sense left in the academic publishing industry, which I am beginning to doubt, this case should be dropped.

Partnerships for Openness Built on a Shared Foundation

Mon, 18 Apr 2016 14:18:51, Will Cross

[Category: oer, textbooks, university-presses]



Love on a Book by Sebastien Wiertz licensed under CC-BY 2.0

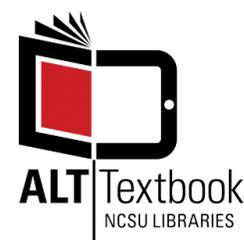
This week I had the opportunity to speak at the University System of Georgia's *Teaching and Learning Conference*. We had a great discussion about the [role of libraries supporting open educational resources](#) (OERs) as part of a daylong track sponsored by [Affordable Learning Georgia](#), a program that connects faculty, librarians, the press, and external partners to support course redesign and open education. ALG is a relatively new project but has already shown outstanding results, saving students more than \$16 million in its first two years. In light of these results, it's no surprise that the university system gave ALG such a prominent role in the event. In fact, an OER track has become increasingly common in many academic conferences, including special emphasis at this month's [CNI Executive Roundtable](#), a daylong [event at ALA Midwinter](#), and sessions at most of the major library-focused conferences in 2015 and 16.

The open education community has similarly recognized the increasing importance of partnerships that connect with higher education allies such as librarians. This month the Open Education Consortium [awarded SPARC's Nicole Allen a Leadership award](#) and the major open education conference [OpenEd](#) is

currently reviewing a record number of proposals for a third year of the “libraries track.” I had the pleasure of being at OpenEd14 for the first libraries track and the [impact was dramatic](#). At the start of the 2014 meeting the keynote speaker asked first-time attendees to stand and be recognized. Almost half the room stood up - the [librarians had arrived!](#)

As exciting as it has been to see these new partnerships developing, however, we still have some work to do negotiating the values and models for best practice. Conversations about openness reveal deep fault lines across academic culture. Just as open access is a response to the capture of scholarly journals by multinational for-profit publishers, OER advocates recognize that the unsustainable cost of textbooks is rooted in a system where a [small group of commercial publishers leverage a broken marketplace](#). The conversation about open, then, is one about the perils of outsourcing and privatizing academic practice at the expense of our public-service mission.

This conversation about public values informs much of what we do and the most successful partnerships will be those that reflect these values. When my own institution launched our [Alt-Textbook program](#) three years ago, our campus bookstore was quick to reach out and offer to help. Since we had the [common goal of supporting student success](#) it was easy to find common ground, sharing information and partnering so that the Libraries and faculty provided content and the bookstore picked up print-on-demand services. My colleagues at institutions with a for-profit bookstore, on the other hand, often report an adversarial response to OER efforts that impedes their programs. I worry that as our [friends across the University of North Carolina system consider privatizing their bookstores](#) they may not find the same support we enjoy in Raleigh.



I have no such concerns about our system press. The University of North Carolina Press has been an eager and inspirational partner in our open education efforts, providing insight and collaborating on [new models for system-wide practice](#). I heard similar stories at the USG conference, and was blown away by the materials created in partnership between the University of North Georgia Press and USG faculty.

A shared academic mission provides the bridge that makes OERs work. Presses, libraries, and campus bookstores that make academic sharing and knowledge in service of society their focus are the best partners our faculty can find. They are focused on developing innovative ways to make education more accessible and to support student learning and retention. On the other hand, organizations whose first priority is keeping shareholders happy every quarter may be more likely to release [phony new editions](#) designed to undercut the used market or try “innovations” that only hurt students like [Aspen’s ill-fated property law textbooks](#) that perversely robbed students of all property rights in the materials they bought. As [players like Amazon throw their hats into the ring](#) we would do well to welcome their support but also have frank discussions about what values are being advanced.

Of course, academic institutions themselves often struggle to navigate this fault line. Some campus bookstores may be suspicious of open education because they are concerned about cutting into the support they provide for worthy projects like student scholarships. Some faculty members are also

invested in their own lucrative commercial textbooks, as in the highly-publicized case last fall where a [department head reprimanded a colleague](#) for refusing to assign the expensive textbook he had written.

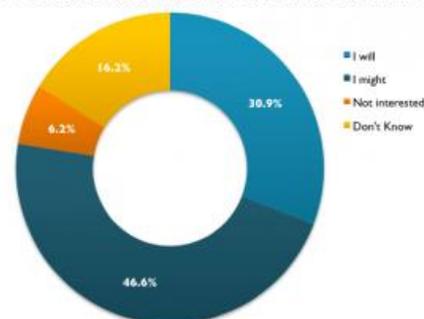
Earlier this year my own institution was ground zero for some of these tensions. At the start of 2016, comments were released on the [Department of Education's intention](#) to require recipients of federal grants to make these taxpayer-funded materials openly licensed. This matches the practice among other federal agencies who require open access to the fruits of taxpayer-funded research and data. It also aligns with the values of my Libraries' work on open education as well as our century-long commitment as a land grant to extension work. As such, the Libraries were proud to join SPARC's public comments [praising the DoE's commitment to public access](#). We were surprised, however, to discover that our university had submitted comments with a [very different point of view](#).

Several news outlets noted that the [official NCSU response opposed the DoE's plan](#), citing concerns about stifling innovation and entrepreneurship. This was an embarrassment for the Libraries philosophically - we have very publicly supported open education and were troubled by "our" institution writing in opposition - but also strategically. Our Office of Technology Transfer had been quicker and more effective at rallying our administration and thus the university's position reflected a skepticism about the DoE plan that we do not share.

This also served as a powerful reminder that we need to express our values and the value of openness to our partners on campus as well as those working beyond our campus walls. We have strong data indicating that innovation and entrepreneurship are in fact driven powerfully by openness. Indeed, the Obama administration explicitly pointed to these values when it [announced the OSTP mandate in 2013](#). But our colleagues in Technology Transfer, and thus our administration, hadn't heard the message.

When I speak about open education I often borrow David Wiley's important [insight that this is a pivotal moment for OERs](#) since most people have heard the term but don't have a firm sense of what an OER is. Erin Walker at ALG talked about this in terms of moving from "awareness to knowledge." We're doing great on awareness in higher education. As we develop new partnerships within and beyond campus, however, it is incumbent on us to share the stories that will define what we mean by OER and to make sure that knowledge includes the value of the academic and public mission at the heart of our efforts.

USE OPEN EDUCATIONAL RESOURCES IN THE NEXT THREE YEARS?



Clarity for our users

Wed, 20 Apr 2016 08:36:17, Sarah Shreeves

[Category: copyright-law, digital-collections, fair-use]

One of my favorite articles in the library literature is Melanie Schlosser's "[Unless Otherwise Indicated: A Survey of Copyright Statements on Digital Library Collections](#)" in the July 2009 *College & Research Libraries*. Schlosser looked at the copyright statements for digital collections of members of the Digital Library Federation and did an analysis of their content. She identified several trends in these such as "The Vague Ownership Statement" and "Protecting Ourselves and You", and, in general, found that these statements provided mixed messages about terms of use and copyright, and incomplete information about the actual copyright status of the items themselves. The examples she provides throughout the text give one a great sense of those mixed messages, incomplete information, and general CYA language that many libraries have used.

As she points out, the inconsistency and lack of information do our users a disservice and indicate a failure of libraries to take an opportunity to better educate our users, particularly about [fair use](#) and the public domain. I've certainly become more attuned to this as our digital collections become more enmeshed in the classroom, within digital scholarship (particularly in the humanities), and more visible to the broader public through large scale aggregations such as the [Digital Public Library of America](#) (DPLA). While simple access to content remains important, many users are interested in *re-use* of content which often requires a deeper understanding of rights.

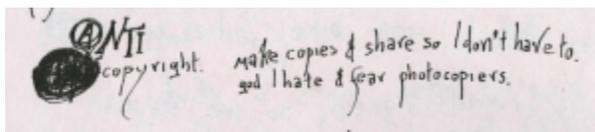
In 2009 Schlosser concluded that "The results of this study suggest that it is time for libraries active in digitization projects to examine the issues involved and develop a set of best practices for copyright statements on digital collections." Schlosser's call for best practices has felt largely unheeded (at least at a big tent community level) until recently when the DPLA and [Europeana](#) came together to develop a [set of standardized rights statements](#) - just released on April 14th - "that can be used to communicate the copyright and re-use status for digital objects to the public." Large scale metadata aggregators struggle with the sheer number and variety of rights statements; inconsistency or lack of a rights statements make functionality such as limiting to items in the public domain difficult. (For a flavor of the variety of rights statements in DPLA see <http://www.deanfarr.com/viz/rights.php>.)

[rightsstatements.org](#) is a big deal. The statements are international in scope, and, critically, are designed to be embedded within the semantic web so that they can be acted on programmatically. The 11 statements are fairly comprehensive and allow for cultural institutions to indicate various nuances of meaning within three broad categories: [In Copyright, No Copyright, and Other](#). They echo the structure of Creative Commons licenses (although are NOT to be confused with CC licenses). The simplicity of these obscures, I am certain, a huge amount of complex and time consuming work.



The [University of Miami Libraries](#) in partnership with several other Florida libraries are in the midst of putting together a DPLA service hub application, and we've been looking more closely at our metadata and discovering how many of our items either didn't have rights statements or displayed many of the problems that Schlosser described. Our generic copyright page for our digital collections was also unsatisfying and mentioned fair use and the public domain only in passing and instead contained mainly language that seemed designed to scare our users, rather than help them.

So we - specifically, our Head of Digital Production, Laura Capell, and our Digital Initiatives Metadata Librarian, Elliot Williams - have embarked on a project to align our rights statements on our digital collections with [rightsstatements.org](#). It's early days yet, but we've changed our [generic copyright page for digital collections](#) to be more descriptive and, we hope, provide a bit more clarity to our users. We've also started to add the standardized rights statements to our metadata records - see the metadata for this [letter from a Civil War Union soldier](#) as an example.



Copyright statement in Bay State Badass: a bike zine for the Bay State badass (page 3)

This is obviously time intensive work. Some designations can easily be made at a collection level, but for others we need to look more closely at the items. We are examining our deeds of gift to understand if there had been a transfer of rights or a contractual issue (covered by [No Copyright - Contractual Restrictions](#) statement). We are having

more conversations with our three distinctive collections units about copyright and access. We've uncovered gems like like [this zine](#) which states "ANTI copyright - make copies & share so I don't have to. god I hate & fear photocopies." And we are improving and clarifying the information that we are providing to our researchers, students, and the public.

Our one quibble with the statements so far is that one statement - Undetermined - which had appeared in an earlier draft of the statements is not present here. We've discovered plenty of items where we just don't have enough information to make a determination because of a lack of provenance or date information. None of the other statements quite fit this situation - we've done an evaluation so the [Copyright Not Evaluated](#) doesn't apply. We don't feel comfortable assigning either a [No Known Copyright](#) or an [In Copyright - Rights-Holder\(s\) Unlocatable or Unidentifiable](#) statement. I've heard that there's an effort to get Undetermined back into [rightsstatements.org](#) which would be good news for many of us!

I'm really pleased that we are doing this work - as time intensive and difficult as it is - to aid our users. And I want to commend DPLA and Europeana who have done the larger cultural heritage community a huge service in developing [rightsstatements.org](#); I look forward to seeing how this work continues.

On copyright, translations and moral rights

Mon, 25 Apr 2016 13:36:00, Kevin L. Smith

[Category: copyright-law]

In a recent discussion about Sci-Hub, I took some heat for bringing up the history of copyright and the shifting attitudes over time about what it is good for. So I should probably know better than to appeal to history again as I begin some thoughts about the unique place of translations in copyright law. Nevertheless, I think it is important to note that translations were not explicitly protected by U.S. law until 1870, and that 17 years earlier, an author of no less stature than Harriett Beecher Stowe lost a lawsuit in which she tried to prevent the publication of an unauthorized translation into German of *Uncle Tom's Cabin*. As [this article about the case](#) tells us, the judge asserted that once it was published, Stowe's expression was as available to translators — as much “public property” — as were the works of Homer or Cervantes.

Today the peculiar place of translations is still a subject of some debate in copyright discussions. For one thing, the ability to control translations is often asserted as something that academic authors should not give up, as they seem to do when they are required, usually by funding agencies, to license their works under a CC-BY license. Since these requirements usually apply to (mostly) scientific articles, it is legitimate to ask [how serious this concern really is](#). But, to my mind at least, this concern raises a much bigger issue, the place of translations in the attempt to draw a line between derivative works, over which the author holds an exclusive right, and transformative fair uses. Can we make the case (as my colleague Will Cross recently did in conversation) that translations are, at least some of the time, more like transformative uses that should be permitted by fair use, instead of derivative works that are entirely under the control of the original author?

It certainly seems true that translation is a highly creative act and results, by definition, in new expression. So it is possible to imagine that the idea/expression dichotomy in copyright could be used to argue against the appropriateness of giving the original author exclusive rights over translations. Consider a highly creative work like a poem or play; once it is translated into a new language, all of the expression has changed, the aesthetic is very likely quite different, and what remains seems very much like the underlying idea of the original. Should Arthur Rimbaud's estate (hypothetically, since there is a good chance the original poem is in the public domain) be able to control Samuel Beckett's translation into English of *Le Bateau ivre*, which [critics acknowledge](#) deserves to be considered a great poem in its own right? Or could that control undermine the purpose of copyright by stifling new creativity? Even if idea/expression does not create space for translations, the central notion of transformation in the fair use analysis points toward recognizing that what Beckett created as *The Drunken Boat* could well be justified, even if Rimbaud executors objected.

Academic works, of course, are different than poetry in most cases. On the one hand, there is likely to be more room for fair use when a work is critical or factual than there is for a highly creative poem. On the other hand, there may be a stronger argument for giving the academic author some level of control

over translations of her work, precisely because it is intended to inform and educate, purposes which could be undermined by a poor translation.

These reflections point up to me the [need for more flexibility in copyright law](#), even beyond what fair use already provides. Ideally, the law should recognize the diverse motivations and incentives that different authors have, and adjust to that diversity. Poets and physicists write and publish for very different reasons. Fair use might be able to account for this diversity with a more sensitive analysis of the second factor, but we have never seen that analysis develop. Instead, I want to suggest two approaches — both hypothetical — that might help us with the problem of translation outlined here.

The first place to look for a better approach to translations would be the moral rights tradition, which is strong in the copyright laws of much of the world, but quite weak in the U.S. The moral right of attribution gives a creator the right to have her name associated with her work, and also, importantly, to have her name removed from any alteration of the work that might impair her reputation. It is reputation, of course, that academic authors care most about, since all of the economic rewards they receive, indirectly, for their published work come through acknowledgement, citation and other reputational mechanisms. So if the U.S. had strong moral rights, an academic author would be able to demand that her name be removed from any incompetent translation of her work. Indeed, the strong appeal of the CC license for academic authors is that it creates a contractual obligation to cite an original creator and to remove that creator's name from a derivative work if she demands it. Recognizing the moral right of attribution more broadly in the U.S. would help deal with problems of plagiarism and poor, unauthorized translations more directly, rather than via licensing.

My second suggestion is even more speculative, involving the idea of liability rules, which [I first wrote about](#) over five years ago. In contrast to an exclusive right, which is what copyright now grants to creators, a liability rule would not prevent someone other than the creator from making a specified use of the work, but would require compensation in certain conditions (such as harm to the creator's reputation). Under a liability rule regime, then, an author could not prevent a translation by asserting an exclusive right over that form of derivative work, as she can today, but would have to be compensated if, for example, the translation was detrimental to her reputation, or even if, perhaps, it enjoyed commercial success. So in my example above, Samuel Beckett would not need to ask permission from Rimbaud or his estate in order to translate the poem, but might be obligated to share profits if successful or pay damages if harmful. This kind of liability rule could introduce into copyright the kind of flexibility to deal with the different motivations for creativity and the uncertainty around translations.

Both of these ideas are more thought-experiments than they are practical suggestions. I do not believe either one is going to become part of our copyright jurisprudence anytime soon. But it is instructive to think creatively about the relationship between rights holders and users, in order to get past the either/or dichotomy between exclusive rights and fair use. Copyright can be described as a negotiation between the interests of creators and users, and in negotiation it is always helpful to get behind the status quo and ask where the real interests lie for all sides. I hope these speculative attempts to push

into that realm can provide some useful perspective on a difficult and unclear area of copyright — the nature, status, and right to control translations.

Compliance Considerations as Institutional Open Access Policies Grow

Mon, 09 May 2016 13:57:31, Shan Sutton

[Category: institutional-repositories, open-access-policies]

At my home institution, the University of Arizona, the Faculty Senate recently passed an Open Access policy that follows the standard model of directing faculty authors to deposit the final accepted manuscripts of their articles into our institutional repository. As an Arizona alum and OA advocate, I'm doubly pleased that the Faculty Senate embraced the principle of making the university's scholarship more widely accessible. Having gone down this path twice, once at Oregon State University and now at Arizona, I've been thinking about faculty motivations and how they relate to OA policy compliance.

The trend among institutional OA policies in the United States has been to express expectations for faculty members to deposit their article manuscripts with a non-exclusive license to the university, but with no mechanisms to ensure compliance. In this approach, faculty participation seems primarily motivated by the benefits of wider readership of one's work, potentially leading to more citations while lowering economic barriers that prevent some readers from accessing research articles.

These are excellent reasons to pursue deposit in an institutional repository, and to validate them libraries look to expand the ways in which the uses of deposited manuscripts are tracked. Statistical measures (traditional and alt-metric alike) are important in this regard, and I think qualitative approaches such as the stories gathered from repository users on Harvard's "[Your Story Matters](#)" site will become increasingly popular.

While some institutions have achieved respectable levels of faculty uptake with this approach, one wonders if a right-sized compliance mechanism would secure higher levels of faculty participation. OA policies developed by research funders certainly don't rely solely on author buy-in to the notions of wider readership and the benefits of public access. They tend to implement compliance strategies involving the direct or implied threat of lost future funding if a grantee doesn't comply with article deposit requirements. Universities are not going to mimic this approach with threats of wage garnishment for non-compliance with their OA policies. Yet, I've been a little surprised that none of the fifty-plus American universities with OA policies have taken a page from the University of Liège's playbook by putting passive compliance measures in place.

The Liège model is pretty simple: faculty are free to publish in whatever journals they wish, but for articles to be considered as part of their evaluations for annual performance, promotions, and similar matters, their final accepted manuscripts must be deposited in the institutional repository. Once ingested, the manuscript becomes Open Access if publisher policies and embargoes allow.

While there is no direct penalty to faculty who neglect to deposit, University of Liège Rector Emeritus [Bernard Rentier explains](#) a system of passive compliance pressures, “What happens is that when we make decisions about promoting a researcher, or awarding a grant, we can only take into consideration those publications that the researcher has deposited in ORBi. All staff are told that publications submitted by any means (hard copy, disk, email, etc.) other than depositing them in the repository can no longer be processed in our new system, so they can no longer be taken into consideration.” He continues, “[The policy] does not impose sanctions on anyone who chooses to be refractory. Of course, they cannot expect any help or support from the institution, and they will feel largely underestimated by the authorities, by their colleagues, by external researchers, and by the public at large. But that’s the only consequence of not depositing. Nevertheless, that does generally provide a sufficient stimulus to encourage everybody to comply!”

The University of Liège’s policy is based on its commitment to comprehensively collect and provide access to the scholarship of its faculty. It seems reasonable for this objective to be accomplished by linking an OA policy with efforts to compile the official record of faculty scholarship for performance and promotion evaluations. In an American context, this approach would appear consistent with the mission of public, and especially land grant, universities.

So why haven’t any American universities taken this path? Is it a fear of faculty backlash, and the prospect of turning off faculty by connecting an OA policy to the performance review process? Is the ubiquity of the Harvard model, which grants the university a non-exclusive license to faculty manuscripts but doesn’t include direct or indirect compliance mechanisms, an underlying factor? Or is it just too complicated in terms of coordinating all of the moving parts compared to launching “traditional” OA policies?

Over the past few years I have encountered Deans who were potentially interested in taking a Liège-like position in their respective colleges. While nothing tangible has resulted from these discussions yet, I suspect this kind of approach might actually work best at the level of colleges, schools, or other academic units. Once the concept is successful at those levels, perhaps this practice could find its way into future institution-wide OA policies.

At any rate, it’s encouraging to see OA policies continue to be approved by faculty senates and comparable bodies. As the number of such policies increases it seems advisable to consider how their implementations might link to faculty activity tracking systems as a passive compliance mechanism to facilitate greater participation and impact.

The People's Content: Diversifying What is Open and How We are Open

Wed, 11 May 2016 08:44:05, Patricia Hswe

[Category: digital-collections, oer, open-access-outreach, workflows]

Pointing an OA lens on cultural heritage objects

Last fall at the Penn State University Libraries, one of the ways that we observed Open Access (OA) Week was to dedicate half a day to a series of presentations and discussions about the topic. Organized by the Libraries Open Educational Resources (OER) Task Force, the event was conducted also for internal outreach purposes, particularly since the previous semester the [Library Faculty Organization, our governance body, passed an OA Policy](#). The talks included a "Scholarly Communications 101" presentation; a progress report by the chair of our Open Access Monographs Team; tips on how to be an OA ambassador; priorities for implementing the OA Policy; and a "technical update/year in review" that addressed federal funding agency requirements since the responses to the OSTP mandate began pouring in. It was a compilation of informative talks, put together by colleagues who have become, over the years, increasingly adept at addressing OA and schol comm issues.

A question-and-answer period followed the presentations, and one question in particular has stayed with me. Our [Associate Dean for Technology and Digital Strategies, Karen Estlund](#), asked about the NEH, digitization, and cultural heritage objects (CHOs), since the "technical update/year in review" had been, not surprisingly, STEM-centric and IR-centric and thus emphasized research publications and research data as the main outputs. Karen, on the other hand, was encouraging attention, as well, to digitized CHOs as examples of OA content and thus not to omit them as such. The humanist in me appreciated Karen raising this angle. The concept isn't unheard of, but CHOs can be neglected, or overlooked, in much of the OA outreach that we do.

As service manager for ScholarSphere, Penn State's open access repository service, I often find myself laser-focused on the type of research that conventionally populates an IR. It's par for the course when one is an OA evangelist, so to speak. Yet, since my department, Publishing and Curation Services (PCS), has oversight of our CHO collections, both digitized and born-digital, I have been keen, of late, to point an OA lens more purposefully at these materials, too, and raise their profile in the portfolio of scholarly content that PCS works with others to produce, describe, host, publish, and make openly discoverable and available. As I do so, the following ambitions especially resonate with me: to diversify what we make open and to be transparent about the "how" of open - all toward expanding what we call, and mean by, "open." The timing could not be more ideal in our Libraries for such evolving and shifting of intent. Since the start of 2016 a number of us have engaged in two "digital retreats," led by Karen and designed to revisit and refine processes as well as to plan for future improvements to our infrastructure, our workflows supporting digital collection development, and our services around digital scholarship and research data management - to name a few priorities.

I'm taking the opportunity of this blog post to report briefly on ways we're already making progress and to call out and define more specifically how I hope we continue to make progress.

Being transparent about the “how” of open

This aspiration relates to the growing importance of sharing how research and scholarship in digital humanities are done, in the spirit of building off of or extending the shared methods, opening up paths for new collaborations, and acknowledging the labor of everyone on a project team, for example, as well as the types of labor involved. The pedagogical potential inherent in such openness is equally promising. What does it take to apply a similar brand of transparency to the work of open access, particularly the content we are trying to free up for broad discovery and use? How attentive are we to documenting, sharing, and updating our processes for publishing digital collections? From the kernel of the idea, to consulting with the collection curator or other stakeholders, to the mammoth stage that is production, to mounting the realized and reformatted collection online and advocating for its usage?

One of the concrete outcomes from our first digital retreat in February was a prototype digital collections workflow that we have started to implement, expecting to iterate upon it as we apply it. Another outcome was [an “intake” form](#), for documenting information about a collection, such as its physical or digital condition, rights status, and readiness for harvesting by external bodies such as the DPLA. Completion of this form, which we have also begun implementing, kicks off the workflow. It's yet to be decided where this information will live so that it is easily retrievable, but the record-keeping is happening in earnest, and I'm confident our team will arrive at a solution soon. Such project-based efforts can be a boon for emerging instruction areas such as [digital library pedagogy](#). One hope is that, in time, we will also learn how to integrate processes - and share such processes - for representing our digital collections as open humanities data sets, released with a readiness for working with them, in a variety of ways. Given their growing emphases in any number of domains, whether the humanities, the sciences, or the social sciences, open data is becoming the new people's content.

Diversifying what we make open

At the second of the two digital retreats, we received an update on the implementation of our strategic plan. One of the action items is to develop a digital collection policy that will take advantage of collections little known and underused - and thus effectively hidden. The deliverables of creating scope and guidelines for developing digital collections offer our Libraries a chance to determine where the gaps are in representations of the cultural heritage of the Commonwealth. It's an enormous opportunity to diversify what we digitize and could inform, in turn, how our collecting mission in the context of physical materials evolves. With our Special Collections Library under the [new leadership of Athena Jackson](#), I'm eager to see how this unfolds - and to take part as I can and as makes sense.

It's all about the people's content

For colleagues in the University Libraries and in the Department of History at the College of the Liberal Arts at Penn State, the first part of the title of this blog post will sound familiar. It is a play on another title - that of a digital project, "[The People's Contest](#)," which is capturing "the lived experiences of Pennsylvanians" of the Civil War Era through aggregation of archival content drawn from libraries, archives, museums, and historical societies throughout the state. The name of the project is inspired by words from Abraham Lincoln in a July 4, 1861, message to Congress:

This is essentially a people's contest. On the side of the Union, it is a struggle for maintaining in the world, that form, and substance of government, whose leading object is, to elevate the condition of men — to lift artificial weights from all shoulders — to clear the paths of laudable pursuit for all — to afford all, an unfettered start, and a fair chance, in the race of life.

I've long admired how the People's Contest project is clearing paths for scholarly content to be discovered and used, thereby unfettering it from the obscurity often besetting small, under-resourced archives. In processing and describing otherwise hidden primary sources, the project is conveying a more expansive narrative "of the war beyond the battlefield," shedding light on issues surrounding politics, race, ethnicity, and gender. The People's Contest is helping to extend what is taught, researched, and learned about the Civil War Era - no small affair these days, given how accuracy in the representation of history as it's taught continues to be a [troubling issue](#) in U.S. education.

I've clearly riffed the project's name, and the riff itself has resonance for what the People's Contest is trying to accomplish. The content to which efforts like this project are dedicated is the *people's content* - primary source materials deserving of broad public access and without which much scholarly communication, especially in the humanities and in history, could not take place. Digital collections capturing our cultural heritage in all its diversity give voice and representation to people and communities little heard from and known about. These are the people's collections, too, and they should be accorded, if they aren't already, as much attention in OA education and outreach as the content we recruit for our IRs.

Tightening their grip

Fri, 20 May 2016 17:09:13, Kevin L. Smith

[Category: copyright-law, scholarly-publishing]

In the last couple of weeks, there have been several developments in the scholarly communication world that all point in the same direction – the move by the major commercial publishers to tighten their grip on access to and share of academic work, as well as a concern to capture data about how scholarship is shared. Call this last part the commodification of the professoriate.

My attention was first drawn to these developments by a tweet that pointed to [Wiley's "Article Sharing Policy" site](#) — with its handy-dandy sharing guidelines chart — and asked if Wiley really was asserting control over the pre-peer review copy of scholarly manuscripts. Before I proceed, I think it is important to explain why the answer to that question is yes.

When copyright is transferred to a publisher, that copyright is in the content of the work, not in any particular version. Minor changes between versions, and even some changes that are more extensive, do not change the fact; the publisher gains the rights over any versions of the work that are “substantially similar” (which is the standard courts use to determine when one work infringes on another). So, after the transfer of copyright, the publisher can, and most do, tell authors what they can and cannot do even with the “pre-print” version of an article. In that regard, Wiley’s chart is not much different from many other publication contracts, which often parse the rights that are given back to authors in terms of the different versions. They can do this because they control the copyright in the content, and hence in all the different versions of that content.

Even before copyright is transferred, in fact, Wiley still has some level of control, since they could, if they wished, assert that putting an article in a pre-print repository was a prior publication. By long tradition, publishers insist that they will not publish previously published work, and authors warrant that the articles they submit have not previously appeared. So Wiley could, if they chose, use a pre-print version in a repository to decline publication; thus their assertion of control even before submission has, unfortunately, some justification under the present system.

In some ways, Wiley strikes me as the worst actor in this rush to tighten the publishing stranglehold on scholarly collaboration, but they are not alone. Their policy references these STM Publishers Association “[Principles for article sharing on scholarly collaboration networks](#),” which show a strong movement to coordinate publisher policy on how articles can be made available to students, colleagues, and the general public. Call this the co-opting of open access.

These principles are introduced in a blog post on the Scholarly Kitchen site called “[Content Sharing Made Simple](#).” The title is somewhat ironic to me, because scholarly sharing should be simple. It is only complicated by the various restrictions imposed on authors by publishers who are desperate to make ever-greater profits from the free labor of academics. They have created the mishmash of different and often contradictory rules about open access, classroom use, and collaboration that have plagued us for

years. Now that they are beginning to discover “the burgeoning Internet” as a new source of revenue, these so-called “collaborative approach[es]” are really about tightening their grip over every possible purpose an author could have for her work, and making sure that they serve that revenue stream. After years of simply denying the role of the Internet, publishers now desperately want to control it.

The news that [Elsevier has acquired the Social Science Research Network \(SSRN\)](#) is another wrinkle in this ongoing quest for control. The same five or six major publishers who dominate the market for scholarly journals are engaged in a race to capture the terms of and platforms for scholarly sharing. This is a serious threat to academic freedom, which has largely gone unnoticed by the champions of that important value. Where does the AAUP stand on these principles and acquisitions? How can we help our scholarly authors maintain freedom of inquiry in the light of this tightening grip over their rights and venues? It is interesting, I think, that there appears to have been no scholarly authors involved in the development of the STM principles, and certainly none were consulted when Elsevier was buying SSRN. These moves are threats to the foundational values of the academy and should be addressed as such by institutions and academic organizations.

With the purchase of SSRN, about which there will be more commentary on this site shortly, one other trend is noteworthy. This acquisition offers Elsevier access to a commodity even more valuable, perhaps, than scholarly articles – [data about the behavior of scholars](#). There is an old saying about Google that users are not their customers, they are Google’s product. The data that Google gathers about search patterns and interests is the real value of the company. Now Elsevier seems to be planning to cash in on that same type of data about how academics behave. Many of us have been concerned about the commodification of higher education in the so-called neoliberal university. It is also time to raise the alarm about the commodification of our faculty in this potential dystopia where publishing giants control every aspect of research, collaboration, and sharing.

For the 1,000th Time: Who Will Own (and Mine) the Scholarly Record?

Mon, 23 May 2016 08:00:28, Brandon Butler - Ellen C. Ramsey

[Category: all-posts, uncategorized]

Elsevier is a massive, for-profit publisher headquartered in Amsterdam. They make a lot of money aggregating faculty work product for cheap and selling it back to universities at a huge markup. Their mission is to maximize shareholder value and profit.

[Elsevier just bought SSRN](#), a widely used repository of social science research articles, especially preprints. A [lot of smart people](#), including Kevin Smith on this blog, have weighed in on this development. SSRN users aware of Elsevier's profits-first practices are nervous. The excellent Authors Alliance has put together a [list of principles](#) they believe SSRN must adhere to in order to maintain the trust of the authors who post work there. One of our favorite takes, Christopher Kelty's blog post [here](#), explains why Elsevier probably bought SSRN, and why we should be nervous. The acquisition is probably not so much about the individual papers as it is about possession of a trove of research for data mining *about* scholarship. Possession may be 9/10ths of the law, but it's 10/10ths of data mining. If you don't have the data, you can't do the mining. Now Elsevier's got the data, and the academy will get to use it only on Elsevier's terms.

What's the path forward, in the long run, if we take this concern seriously? If you're an author with the ability to post your work freely in places like SSRN, and you're thinking of jumping ship, where should you go?

The first step to recovery, as is so often the case, is to stop hurting ourselves.

Some of SSRN's users are [asking](#), not unreasonably, "What should we build now to replace SSRN?" This is a natural question, but we think it's misconceived if it leads to a bespoke fix that might well repeat the weaknesses and limitations of SSRN.

Thankfully no one has suggested publicly that Academia.edu or ResearchGate are viable alternatives for the SSRN community. This points to the growing awareness by scholarly authors like [Ian Mulvaney](#) that these publicly listed concerns are likely next on the block for consolidation and purchase. He seems to agree with Kelty that the motivation behind this merger-mania is really to commoditize (data about) the researcher.

Many of us in the Library world have looked to discipline-specific repositories as a potential ally in mission-driven openness. When discipline-specific commons are supported by universities and disciplinary communities (like [arXiv](#)), they can be equal or superior to institution-specific commons, especially for early review and collaboration. When they aren't (like SSRN, or [BEPress](#)), ownership and sharing rights to their contents can never be assured. However, the arXiv model only really works for

content outside of the commodification stream. Physicists are quick to point out that no one is lining up to buy their pre-prints, so arXiv continues unhindered. In other disciplines, preprints have not gotten a strong toehold (biology's nascent [bioArXiv](#) and [ASAPBio](#) efforts), or aggregation of scholarship only happens at the citation level (PubMed) or not at all.

If we want dependable access to papers *and* the promise of open access to a huge, aggregate trove of papers that could support powerful research *about* research, the better option is to look to existing, university-owned infrastructure. Institutional repositories are becoming ubiquitous in the US and are already supporting sustainable, mission-driven alternatives that can easily provide one of the core services SSRN provided - easy, open access to research. In time, they will also be able to provide its other core service: good aggregate data about access, re-use, "impact," and much more. And, crucially, the academy, collectively, will have possession of this trove, and we can make it available for scholarly uses beyond one-at-a-time upload or download, including testing, refining, and forking tools to crawl the scholarly record and learn more about research.

We sometimes jokingly refer to our institution's repository as a "repository of last resort" since the only criteria for deposit are 1) you have rights to share your work, and 2) you created the scholarly work as a member of our institutional community. It would be much better, though, if we and our users considered the IR the *first* place they put their papers. Even if you do deposit your work elsewhere, as long as the work is in an academic repository, rather than a proprietary vault like SSRN, we can harness the Internet and open linking to add your paper locally without a separate deposit. Libraries are pretty good at protecting stuff long term, too—the very first content at UVA to go into the [Academic Preservation Trust](#) long-term preservation environment was the entire [Libra](#) institutional repository.

Most importantly, the wide cross-section of institutions collaborating on the Association for Research Libraries' [SHARE](#) initiative understand it is about the Data, Stupid, and not just research data, but data *about* research. Academic institutional and discipline-specific repositories are not competing with each other when they are the building blocks of a "**free, open, data set** about research and scholarly activities." When these players are connected and preserved through research library-driven efforts like SHARE and APTTrust, conflicts of interest about who owns scholarship fade from view.

This isn't a zero-sum game. We agree with Mulvaney that all of the people we've met who work at Elsevier (like, um, Ellen's husband!) are good people with researchers' interests at heart. By all means, Elsevier should develop services that help researchers and institutions meet our missions. But something as crucial as collecting, preserving, and studying the scholarly record cannot be left to private interests alone. Research libraries are building a network of repositories owned by the academy, preserved for the academy, and accessible to the academy on terms consistent with the core values of scholarly inquiry. Depositing your papers with us is your best insurance policy against (another) for-profit monopoly on the scholarly record.

Discussing Race In The Open: LACUNY Institute 2016

Mon, 23 May 2016 10:20:58, April Hathcock

[Category: antiracism, diversity, libraries, race, racism]

On Friday, May 20, a group of librarians from all over the country—and Canada—gathered at Brooklyn College for the annual Library Association of the City University of New York (LACUNY) Institute. The theme for this year’s LACUNY Institute was [“Race Matters: Libraries, Race, and Antiracism,”](#) an important topic that is long overdue for discussion in a profession that is [87% white](#).

I was honored to give the opening talk for the day and focused on how “Race Matters in Our Profession.” I discussed whiteness as an ideology that values the lives, experiences, and values of white people over those of others and the ways that whiteness operates in the library profession to erect barriers to the creation of a more diverse workforce. In particular, I used a combination of personal family anecdotes, social media discussions, and scholarly material to talk about the importance of both diversity *and* inclusion, recruitment *and* retention. These are key issues that must be addressed if we ever hope to have a profession that accurately reflects the populations we serve. We need more than just numerical equity; we need to ensure that our institutions are open and inclusive to allow people from diverse backgrounds to thrive.

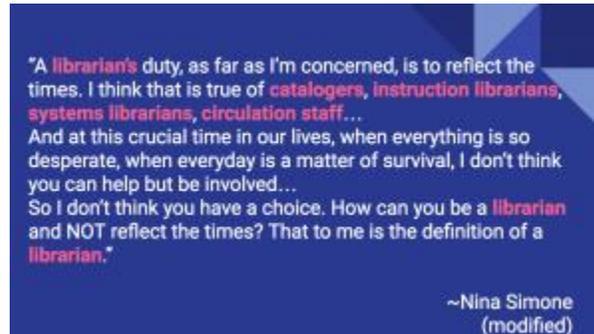
Later in the afternoon, award-winning author and NYU and Columbia professor Mitchell S. Jackson delivered the keynote, detailing the heart-wrenching reality of his child- and young adulthood as a poor, drug-dealing, black kid on the streets of Portland, Oregon. Using captivating storytelling, Jackson highlighted the concept of *revision* as a means of taking the pain of a racialized past and revising it into a life-affirming future. Specifically, he noted that revision is an act of social revolution that breaks beyond the bounds of structural oppression.

Throughout the day, there were a number of breakout sessions dealing with race that allowed attendees to join the conversation. One session focused in particular on the experiences of African-American male librarians in the U.S. and the practice of a Black Feminist Librarianship. Another session later in the day featured chief librarians from throughout the CUNY system discussing the practical ways in which they promote diversity and inclusion in their hiring practices. In the middle of the day, a few of the librarians involved with the [LIS Microaggressions zine project](#)—an informal print publication founded by women librarians of color to discuss instances of racialized and gendered microaggressions in the workplace—led the group in exploring the ways that subtle racist and sexist attitudes and actions affect the work we do.

Overall, it was a great event creating an effective forum for beginning some of these really difficult but vitally important conversations in the library profession. Current events make clear that the myth of “post-racial neutrality” and “colorblindness.” We live in a highly racialized world, and our work is

integrally affected by race and racism. We cannot afford to pretend these issues do not affect our profession and the communities we serve.

As I noted at the end of my talk, using a modified version of a quote by singer and musician Nina Simone:



Let's reflect the times we live and work in and continue to have these important conversations about race in the open.

Beware the Trojan Horse: Elsevier's repository pilot and our vision for IRs & Open Access

Tue, 31 May 2016 08:30:49, Ellen Finnie

[Category: all-posts, institutional-repositories, uncategorized]

By IO blogger Ellen Finnie with Guest co-author Greg Eow, AD for Collections, MIT Libraries

As charged discussion around [Elsevier's purchase of SSRN](#) continued in the past week, [Elsevier](#) and the [University of Florida](#) (UF) announced a pilot that links UF's institutional repository with Elsevier's platform. By employing an automatic deposit of metadata about Elsevier-published UF articles into UF's repository, with pointers to Elsevier's site for access to the articles themselves, users of the UF institutional repository will be able to discover and, if they have authorized access, access final copies of Elsevier journals.

Elsevier describes the pilot as a means of "exploring how publishers and universities can work together to make their platforms and repositories interoperable." And in the words of Judith Russell, Dean of University Libraries at UF, "The project addresses several university needs including showcasing UF's body of works, providing a better user experience for researchers who use its repository and facilitating compliance with US policies on public access to federally funded research." [liveporncams](#)

While proponents of this pilot suggest a number of potential benefits, at MIT Libraries our initial take is that this approach does not align with our vision for scholarly communications and open access. In fact, when an Elsevier/CHORUS team asked us to participate in a similar pilot program, the MIT Libraries declined. Our repository DSpace@MIT, [like many others](#), was designed to be, and has remained, an open access repository, not a de facto discovery layer for commercialized content. The MIT faculty recognized as they developed their [Open Access Policy](#) in 2009 that publishers couldn't be relied on for permanent access, or access at all—indeed, a main motivation of the faculty Policy was that licensing models in the digital era had left universities without assured access to scholarly articles, vulnerable to losing access to even their own research output. In ceding data gathering, reporting, and article access to a for-profit commercial entity legally bound to focus on profit for stockholders, this kind of pilot risks what we hold dear – our ability to access and build upon prior science and scholarship in the service of humanity.

At MIT Libraries, our aim is to create a world where global access to scholarship, both today and in the future, is as frictionless as possible. And this commitment goes beyond current access to research articles, to include a commitment to build, share, and preserve our cultural heritage in support of this aim. We are not convinced that our larger objectives — including digital preservation, long-term access, and access to the fruits of scholarship as democratizing knowledge and promoting social justice – are accomplished through this kind of new partnership. In fact, we are concerned that this pilot represents a

Trojan Horse strategy that, rather than making Elsevier's platform more open, serves to undermine the value and promise of our institutional repositories by turning them into little more than discovery layers for commercialized content.

Our vision for a healthy, global scholarly communications environment is different, and it is this: a community of organizations, including libraries, museums, university presses, and government agencies building a wide-ranging open infrastructure to achieve our goal of democratized access to science and scholarship, including for example the following:

- Shared repository ecosystem
- Unified deposit interface for all campus, government, and nonprofit repositories
- System for aggregated and inexpensive usage data, including research analytics
- Nonprofit campus-supported disciplinary repositories
- Shared print collections
- Shared print storage
- Shared digital collections and discovery systems
- Collaborative digital preservation
- Top quality open access journals
- Less expensive, open source publishing systems and services

Admirable efforts are being made in all these directions. We have arXiv, DPLA, HathiTrust, Internet Archive, ORCID, SHARE, and other important initiatives too numerous to name. But these nonprofit collaborations have taken time to surface, are still limited in scope and execution, and are taking too long to build.

As we see it, the question is no longer how proponents of open access can work together to build a shared infrastructure for the open dissemination of scholarship, but rather how can we move quickly to jump the political, cultural, organizational, and economic hurdles so these open infrastructure initiatives can move swiftly with development and wide adoption.

The two authors of this post and the colleagues we have consulted in its writing (including those listed below) represent more than a century of cumulative experience in campus scholarly communication. Our experience tells us that this pilot is a kind of collaboration that takes us down the wrong path. In potentially offering some shorter term benefits, depending on one's calculus, it cedes too much to a

commercial entity whose values and mission are orthogonal to our own, and sets us on a road that is in opposition to realizing our deeply held values and mission.

While the above post is authored by Ellen Finnie and Greg Eow of MIT, the following members of “In the Open” endorse and support the statements made here.

Amy Buckland

William Cross

Ellen Finnie

April Hathcock

Patricia Hswe

Lisa Macklin

John Sherer

Sarah Shreeves

Kevin Smith

Claire Stewart

Shan Sutton

On Trying Not to Worry About Piracy

Wed, 01 Jun 2016 14:23:50, John Sherer

[Category: all-posts, humanities, monographs, scholarly-publishing, subventions, uncategorized, university-presses]

A few weeks ago, it felt like the threats to the work we do at the University of North Carolina Press were coming from all directions.

At a regional SSP panel discussion, a key local collection development librarian in the audience told the university press panelists that declining purchases of our monographs was not primarily due to a lack of financial resources in libraries. Instead, he argued, their analytics indicated our books were not being used enough to justify their acquisition.

That same week, we were confronted with the now familiar question about how to respond to the SciHub-LibGen theft of scholarly texts. Hundreds of our books were suddenly and completely available for free download, potentially depriving us and our authors of the protections and compensation traditionally afforded by these books.

Which threat should I be more worried about? People don't want our books, or people want them so badly they'll download them from pirated sites.

This contradiction embodies the fracturing of the transactional funding model for humanities monographs. While deeply imperfect and apparently in crisis for many decades, the system of publishers extracting money in return for the delivery of physical copies of our books essentially funded the solution to an interlocking set of scholarly communications challenges. Book publishers added value by surfacing key manuscripts; improving texts through peer review and various levels of editing; moving research forward in many disciplines; aiding promotion and tenure review; marketing and dissemination of findings; and preserving scholarship in durable and accessible formats.

But with digital editions of our books now widely available, our reflexive efforts to apply the transactional model to the world of digital editions have become nonsensical and sometimes riddled with these kinds of contradictions. Almost from the inception of eBooks, publishers tried using analog antecedents to preserve their revenue and consequently viewed the web as the ultimate battleground in the forever war on piracy. We would do well to admit that the efficiency and scale of the SciHub theft is a trending indicator illustrating how it has never been so hard to fight online piracy, and it will also probably never again be as easy.

STEM journal publishers saw this coming a long time ago and, in order to return maximum value to their shareholders, have been weaning themselves away from the transactional model as their primary source of income. This blog is vigilantly tracking such mission creep, (including Ellen Finnie's [post](#) earlier in the week on an Elsevier IR pilot at the University of Florida; and Kevin Smith's [post](#) on the SSRN sale) and calling it out exactly for what it is—an attempt to broaden the control publishers have over all

versions of scholarship in order to better manage access and leverage analytics. It takes a lot of resources (as well as sheer ambition) to spread even further the command and control publishers are trying to exert over the web-based tools being developed to share scholarship.

University presses don't have access to such resources and therefore couldn't dream of waging that battle even if we wanted to. And why would we really want to invest in barriers to access? Rather than dreading it as a facilitator of piracy, wouldn't we be better off if we could use the unique qualities of the web to disseminate our books in ways that were unimaginable even a few short years ago?

In the world of information abundance, limiting access and erecting pay-wall feels like an odd way for publishers to stake their claim for a value proposition. Where humanities publishers need to discernibly add value is in our ability to meaningfully transform manuscripts into more valuable works of scholarship. Frankly, if we could spend less time worrying about formats and piracy and cost-recovery, we could redouble our focus on the invaluable tasks we are singularly positioned to manage (e.g., curation, editing, dissemination, credentialing, discoverability).

The immediate challenge, of course, is the funding question. If presses give away digital, can they afford to keep publishing? There is one encouraging trend indicating this might not be as economically disruptive as it first appears. The annual [Ithaka Faculty Survey](#) indicates that while even humanities scholars want to use digital tools to start research and discover new scholarship, deep engagement with a text still needs to happen with a physical format. If a persistent fractional audience of users will buy print even when digital is free, then our new business model should be trying to create the largest possible pool of potential discoverers.

Which brings us back to Sci-Hub, and a potential new way of seeing all of this. No one should interpret the following rhetorical questions as an apology for these pirated activities. On a campus where [an epic academic scandal](#) was triggered by individuals going rogue to achieve a (arguably) moral aim, I have no sympathy for the steal-first, justify-later model. There's a better way to achieve our collective goals than that. But could one of the outcomes of this theft actually be an increase in sale of print versions of our stolen books? Could we try not worrying about piracy and learn to love the ease of our books circulating freely in the open web?

Waking from the Dream

Mon, 13 Jun 2016 10:59:03, Kevin L. Smith

[Category: diversity-and-inclusion]

A blog called "In the Open," dedicated to issues for scholarship and libraries, is a logical place to engage in the ongoing and vital discussions about diversity and inclusion in our libraries and on our campuses. Following the lead of [April Hathcock's post](#) from last month, I offer this reflection to continue the conversation:

Many years ago, soon after we were married, my wife and I spent a year as house parents for a group of academically-talented teenage boys from disadvantaged backgrounds who, were they not part of the program that put them in better schools, would have had little chance of getting into college. The house was, to say the least, ethnically and racially diverse. One afternoon, one of our seniors came home upset and with his knuckles bleeding. Corry, as I will call him, had been in a fight because another boy in the school had called him the N-word. The details of the fight, as well as his distress at the result, convinced me that Corry had behaved as well as could be expected in the circumstances, but there were complex consequences. For me, the most profound part of the whole episode was when I sat listening to a conversation between Corry and his father. His father asked Corry if he understood why being called that word had upset him so, since it was common enough in music and on the basketball court. When Corry admitted that he did not, his father explained the context and history of that epithet in his own life, which I think opened Corry's eyes. I know that it opened mine.

I thought of this story as I was reading Ta-Nehisi Coates' *Between the World and Me*, which is the common reading book for the coming academic year here at the University of Kansas, [part of our First Year Experience program](#). Coates structures his book as a long letter to his son, partly occasioned, it seems, by the failure of the courts to bring charges against the police officer who killed Michael Brown. At one point, he writes that his son, Samori, "thought that Michael Brown was the injustice," but that the injustice is so much deeper than that, embedded in narrative and myth, in the construction of race and the false dream of "Whiteness." Corry's father began to fill in some of that narrative for his own son, and for me, those 30 years ago.

Coates' book is powerful and complex. It is a provocative choice as a common book for many of our students to read. KU seems very serious about being willing to have difficult and uncomfortable conversations about race, diversity and inclusion, and this book will certainly provoke those kinds of discussion.

One of the things that struck me immediately is how *physical* Coates makes the issue of race. Slavery, and the other, related, forms of capricious violence to which African-Americans are subject, involve the loss of one's body, the inability to control one's physical safety and the security of one's person. The story Coates tells Samori is nothing less than his quest to make his body his own. There is a fear here, an insecurity, that I can never fully understand, because that goal of feeling secure in one's body and at

home in society is something that has been achieved for me, as one of those who “believes himself to be White,” over a long history of violence and oppression.

By talking about his body, and the desire to have his own person within his control, Coates shows powerfully how bone-deep racism is, both in the consciousness of an African-American man and in American society. At the same time, it reminded me, at least, of how shallow the foundation of “racecraft,” to use Coates’ word, really is; all that struggle, violence, oppression and discrimination over a mere pigmentation, something that really means nothing at all, until we invest it with meaning.

For me it is not very hard to feel the injustice of racism on behalf of others, but much more difficult to understand the privilege and the deception at the root of my own self-identification. Whiteness, Coates reminds, is a social construction that has shifted over time; my own Irish ancestors were once not considered white. Whiteness, he says, is “a syndicate arrayed to protect its exclusive power to dominate our bodies.” I read these words while sitting on the leafy deck of my suburban house on the edge of a golf course; how could they not upset me and rattle my view of myself? I have gotten an extensive education, worked hard, and been fairly successful in my chosen profession, so those perks in my life seem natural, don’t they? Coates forces on me the awareness that that sense of naturalness, of entitlement even, is constructed. It is not “natural” to everyone, and my entitlement has been — continues to be — built on the suffering of others.

Coates has shown me, I think, how very deep the reality of White privilege is. It is not just found in the relative security I feel when out in public, or applying for a job, or when stopped by the police. It is embedded in the very myths and narratives that are the foundation of the culture in which I live, and it allows me to be profoundly ignorant of those other narratives that Coates discovered, and even began to challenge, while he was at “The Mecca.” His explorations of himself, his ancestors, and his societies must be so much deeper than mine because for me the narrative is ready-made and inclusive; for him it must be won through struggle, lest he be crushed by the violence of someone else’s story (mine!).

What makes *Between the World and Me* a daring book to ask all incoming students to read is that it challenges the very moral of the American story, the comfortable belief that anyone who works hard and obeys the rules can succeed (by the standards of those on the inside). It destroys the myth of “pulling oneself up by the bootstraps,” and the related blame so often heaped on those perceived to fail at such self-help, by showing how society makes that process difficult and even impossible for some. It even questions the value of our “traditional” forms of education, themselves rooted in a history of violence and oppression.

On the other hand, however, it is significant to me that Coates himself began to find his own connections to the stories that would help him shape his identity in the library at Howard University. As our students arrive on campus, we want to welcome them, to make them feel that we are glad they are here, and to know that we will treat them equally and with respect. But we also have an opportunity, if we can embrace it, to help each student discover him or herself within the unique narratives that will be revelatory and self-defining for them. To do this we must adopt an attitude of cultural humility in the deepest possible sense. Libraries above all are a place for this to happen, if we will make space for it,

physically and emotionally, and also collect with an eye to the great diversity of narratives that can truly support an inclusive campus aware of its role in promoting a more just society.

It is so hard for those of us who identify with the majority culture, those who live and breathe inside “the Dream,” to step back and let others develop as their own selves, rather than as our narrative says they should. The dominant narrative often resorts to violence to prevent that development. But Coates shows us a different path. He writes that his own desire for his son is that he will grow so he does not feel the need to constrict himself in order to make other people comfortable. For those of us who live inside the dream made possible by centuries of oppression, it seems like a simple aspiration. But for many of our students it is very difficult indeed, and we need a personal and an institutional commitment to the attitude of humility and respect for difference — even differences that make us profoundly uncomfortable — that can open the space for it to happen.

The Copyright Office off the rails

Wed, 22 Jun 2016 15:49:14, Kevin L. Smith

[Category: copyright-law, libraries]

When the Copyright Office issued its [Notice of Inquiry \(NOI\) about a “Draft Revision of the Libraries and Archives Exception in U.S. Copyright Law,”](#) I happened to be at a large meeting of librarians. The conversation turned quickly to this new NOI, in regard to which librarians are, of course, a major stakeholder, and I learned two things.

First, the group confirmed my previous intuition that section 108 — the exception in question — still works pretty well for the limited activities it enables — copying for library preservation and for users doing private research and study (which includes interlibrary loans). Second, there is considerable mistrust of the Copyright Office in the library community.

I have channeled some of this mistrust in [previous comments about the CO](#), suggesting that they represent the interests of the legacy content industries too strongly, and give short shrift to the public interest, including the role of libraries, which ought to be central in discussions of copyright. In this new NOI, I and many colleagues see this problem again.

The first problem is the process outlined by the NOI. The Copyright Office has limited its inquiry to some very specific questions, and has decided to accept only private meetings to discuss those questions. Such a process clearly favors the lobbyists for the content industries. This clear preference for hearing industry voices is exacerbated by the fact that this discussion will be essentially secret. Without written comments that are publicly available, the normal procedure in such inquiries, no one will be able to know what any one else told the CO.

This process tends to confirm my suspicion that the CO already knows what it wants to do. The NOI seems to suggest that a draft revision already has been written, although it is not yet public. The process thus seems designed to give the CO cover when they release that draft, because they will be able to say that it conforms to what they heard from those who commented, and no one will be able to challenge that claim.

Such suspicion may seem paranoid, but it is confirmed by the attitude that the CO has taken toward library opinions whenever this topic of section 108 reform is raised. Over and over the [library community has told the CO that such reform is not needed and would likely harm library functions more than it would help them](#). The fear is that we would end up with an exception as complex and unusable as the TEACH Act (section 110(2)), or laden with industry-demanded fees and burdensome requirements. Yet these concerns are routinely ignored. I made these points in person to a CO representative who had given a presentation at a libraries conference in March, and received a bland answer that simply reasserted that section 108 is “obsolete,” which is absurd. It was very clear that I, like so many of my colleagues, was being entirely ignored.

Apparently the CO often says that it wants to hear the opinions of “working librarians” as a justification for ignoring what they are told by the library organizations. But I am a working librarian, and my opinion was dismissed just a summarily, apparently because it did not coincide with the preconceived, lobbyist-driven vision of the CO. “Working librarian” seems to be a code for listening only to those who tell the CO what it wants to hear, and their double-secret inquiry process appears designed to protect that bias.

In a court decision issued last week, we had an additional illustration of this bias the Copyright Office displays toward the legacy content industries, even to the extent of misrepresenting the plain meaning of the copyright law and earning them a (gentle) rebuke from the federal courts.

The decision came from the Second Circuit Court of Appeals in the case of [Capital Record v. Vimeo](#), and involved the issue of whether or not the DMCA “safe harbor,” which exempts internet service providers from potential infringement for content uploaded by users if the ISP follows specific procedures for notice and take down, was available when the uploaded content was pre-1972 sound recordings that are not, of course, subject to federal copyright law. The lower court had held that the safe harbor was not available to Vimeo, so that it could be liable for videos uploaded by users that contain music from some of these pre-1972 recordings. The Court of Appeals, however, felt otherwise, ruling that if the intent of the DMCA provision was to protect the ISPs when they did not know about or control the activity, that provision should apply even if the content was not subject to federal copyright.

The content industries originally negotiated and accepted the notice and take down provision back in 1998. But in recent years they have come to dislike it intensely and to try multiple ways to undermine it in the courts. If they are able to do this, it would make the ISPs essentially enforcement arms of these rights holders, relieving the latter of the expense of protecting their own copyrights.

The *Vimeo* case, then, is another instance of a content company suing to try to chip away at the safe harbor provision (section 512(c) of Title 17). Specifically, the plaintiff, Capitol Records, asked the courts to find that the safe harbor did not apply if the content in question was a pre-'72 sound recording, so that the ISP (Vimeo) could be held liable for the presence of such material on its site. Their position was supported by a report on such sound recordings written by the Copyright Office in 2011, which seems to have been written and timed, in part, for that purpose. The CO offered a specific opinion, which it was not asked to provide, that the safe harbor did not apply to pre-1972 sound recordings. The Office is certainly entitled to its opinion, and the District Court relied heavily on that opinion when it ruled in favor of Capitol Records in 2013. But the Second Circuit was not impressed by the CO's efforts on behalf of Big Content.

In the opinion issued last Thursday, Judge Pierre Leval, perhaps the most noted copyright authority on the federal bench, politely demolished the arguments offered by the Copyright Office in its report. Judge Leval noted, first, that the CO had implied that there was a definition of “copyright infringement” in section 501(a) that dictates the outcome of the case. But as the Judge points out, the claimed definition simply is not there; to make that claim involves a forcible misreading of the language of the section. Opinions from executive agencies are entitled to some degree of deference in the courts, as Judge Leval notes, but they do not get deference when they misrepresent the actual wording of a

statute. Later, the CO tries to rely on “canons of statutory interpretation” to foist its opinion on the Court. After noting that, since this is not an area of expertise for the CO, they are not entitled to any degree of deference, Judge Leval carefully picks apart the claims made to try and bolster Capitol Records’ position. The canons are misapplied, the Judge tells us, and the cases cited are misunderstood.

Overall, Judge Leval finds that the Copyright Office has “misread,” “misunderstood,” and “misapplied” the evidence it cites in its report on section 512 and pre-1972 sound recordings. This should be a pretty comprehensive embarrassment for the CO. Unfortunately, as it continues to embrace a role more akin to a lobbying organization than a federal agency, there is little sign that the Copyright Office is embarrassed. For the rest of us, however, the ruling is further evidence of a Copyright Office that has gone off the rails; they have aggressively chosen sides in the alleged conflict between tech giants and content corporations and are simply no longer a reliable authority on copyright in the U.S.

Are Some Fair Use Factors “More Equal” Than Others?

Fri, 24 Jun 2016 14:42:39, Will Cross

[Category: all-posts]



“Cute Little Tiny Baby Pig” by Michael Kappel CC-BY-NC

Last week, a district court judge [upheld a jury’s decision](#) that Google’s use of Java declaring code in the Android operating system was protected by fair use. If terms like “declaring code” and “application programming interface” aren’t common parlance for you, don’t worry, you’re in very good company (and may be eligible for a seat on the Federal Circuit). No matter how familiar you are with the technical details of the case, however, it offers a fascinating example of how fair use has evolved in recent years. It also suggests we take a closer look at one generally-overlooked aspect of the law: the second fair use factor.

The Google case goes back to a [2014 decision in the Federal Circuit](#) finding that APIs, - described in detail [in this article](#), but basically specifications that allow programs to communicate with each other - were protected by copyright despite the fact that [most experts believe](#) that they are functional and thus should not be eligible for copyright protection. Confronted with the [specter of a \\$9.3 billion verdict](#), Google raised a fair use defense for use of the APIs and, at trial, went to great lengths to better-explain the technical issues, comparing APIs to a QWERTY keyboard, a library, a restaurant menu, and,

amazingly, to a “literal actual physical filing cabinet labeled ‘java.lang’ that [Google dragged into the courtroom for the benefit of the jury.](#)”

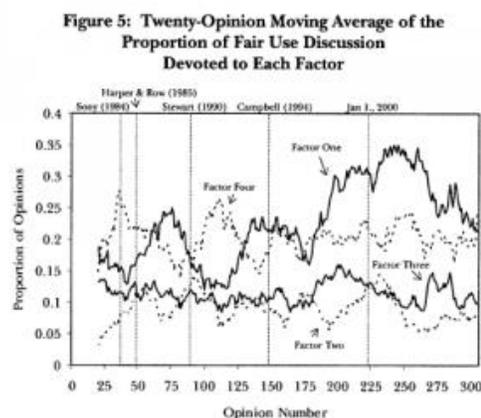
In May, the jury sided with Google and found that the use of Oracle (which owns Java)’s code was fair. The jury’s decision supporting Google’s fair use of the APIs is an [important win for open source](#), but also shines a light on the way that fair use has evolved over time. As [chronicled from the courtroom](#) by livetweeters like Sarah Jeong and Parker Higgins, much of the non-file-cabinet discussion centered on the four [statutory fair use factors](#). Grounded in common law and enumerated in the 1976 Copyright Act, these are:

1. the purpose and character of your use
2. the nature of the copyrighted work
3. the amount and substantiality of the portion taken, and
4. the effect of the use upon the potential market.

Oracle, arguing that the use was not fair, focused primarily on the first factor (the purpose and character of the use) and asserted that Google’s copying was commercial, not transformative, and was done in bad faith - all strikes against first factor support of fair use. This emphasis on the first factor was no surprise, since it is often cited as the “[key to the fair use inquiry](#),” but disagreement about the purpose of Google’s use may not have been what ultimately persuaded the jury.

As noted above, the Copyright Act lists [four factors “to be considered”](#) with no indication that any factor be given special weight. In the years immediately following the passage of the Act, however, courts looked primarily to the fourth factor (market harm), as in [Harper v. Row](#), where Justice O’Connor wrote that this factor was “undoubtedly the single most important element of fair use.”

Beginning with the seminal 1994 [Campbell case](#), however, the Supreme Court [adopted a new test](#) that placed the first factor front and center. In an [influential early study on the use of the four factors](#), Barton Beebe (whose chart is included here) notes that, before *Campbell*, 59% of opinions gave primacy to the fourth factor. A more recent article by [Neil Weinstock Netanel](#) notes that since 2000 better than 70% of cases looked to the first factor’s “transformation” test. Since then, scholars have argued [back](#) and [forth](#) about the importance of those factors, with a general consensus today that the first factor’s transformation test is the guiding star.



As these approaches have risen and fallen - often with the third factor (amount) implicitly tied to the analysis of the first or fourth - one factor has been neglected: the second. The second factor (nature of the original work) has been mostly overlooked by scholars, who have asked “[is that all there is?](#)” and by courts, as in the [Georgia State](#) case where Judge Tojflat found that the second factor was “of relatively little importance.”

In this case however, something unusual happened: the nature of the copyrighted work became *really* important.



Considering the use of APIs, which [probably shouldn't be protected in the first place](#), the functional character of the declaring code brought the second factor to the fore. Google's use is clearly commercial and Oracle would argue that market harm exists, but a jury nevertheless found that the use was fair.

Because the case was decided by a jury, there was no written opinion, just a simple “yes, the use was fair” so we can only speculate about the jury's motivations. But the court's [subsequent order](#) upholding the decision as reasonable does explicitly point to the “functional character” at issue. Whether the jury was ultimately swayed by the functional character of APIs, by the norms of the open source community, or just by the giant file cabinet Google dragged into the courtroom, fair use saved the day by patching up the damage done by a misguided decision.

It was able to do this by relying on the full scope of the statute, referencing all four factors. Even as the first factor's transformation analysis empowers us in so many ways, we would be wise not to overlook the rest of the text. Copyright experts often remind us that [loving fair use sometimes means giving it the day off once in a while](#). The same is true for transformation. In modern copyright, the first factor may be first among equals, but the law of fair use is more robust and more versatile than we often give it credit for.

Momentum

Thu, 07 Jul 2016 11:30:55, John Sherer

[Category: all-posts, digital-collections, humanities, monographs, scholarly-publishing, university-presses]

Last month university presses came together for their annual convention in Philadelphia. This was only my fifth meeting so I lack the deep perspective that many of my colleagues in the UP world have, but I perceived signs of a shift in the center of gravity around conversations of open access. It's a somewhat wobbly, but directionally clear migration toward engaging deeply with how OA might apply toward monographs.

We can point to a number of causes for this shift.

- More and more presses are becoming structurally affiliated with their libraries. In most of these cases, that concurrently brings a very high level of appreciation (or at least curiosity) for OA.
- As with any group this size, there has been churn in some of the leaders at presses. Many of these new leaders see OA as an issue that simply must be addressed—whether it is to endorse, criticize, optimize, or investigate. These leaders frequently possess a growing awareness that within much of scholarly publishing, funding models are shifting from ones of selling content to selling services.
- The maturation of analytical usage data for electronic editions held in institutional library collections is giving new insight into how our books are being discovered and used by scholars. Some of this data suggest that the discoverability afforded by OA may be leading to increased usage.
- Very much related to that, we are hearing about case studies where titles that are published in digital OA still have significant print revenue potential.
- Finally, while the sales pattern for print monographs continues its asymptotic decline approaching unsustainability, digital revenue has hit the hockey stick and essentially flattened. When we experienced triple digit growth in electronic formats just a few years ago, we had to be cautious about shifting to a model that would jeopardize that revenue. What it looks like we're seeing now is a stabilizing of sales patterns, which allows us to consider new long-term revenue models. For me, now that digital sales have stagnated, I'm beginning to wonder whether it's still worth protecting these digital revenue streams. The expenses for creating DRM, limiting distribution, and managing cost recovery might be close to equaling the revenue we're seeing from digital formats. The next question becomes, what does long-term print revenue look like when digital is free?

While the conversation is shifting slowly from defensiveness, to curiosity and even inquisitiveness about how OA could and should look (and especially how within an OA environment university presses must retain value for we're uniquely good at—identifying, enhancing, and disseminating high quality humanities texts) there's still a wide range of opinions within the university press world about OA. That might stop us from being able to present a unified perspective, but I believe the diversity is a positive thing. We've seen what happened in the OA marketplace for journals when a few monolithic publishers wrote most of the rules. It may take the UP world more time to embrace OA, but you can rest assured that if we're given the space and institutional support to work it out, the outcome should be one that our partners (authors, librarians, scholars, and students) will vigorously embrace.

Revolutionizing Scholarly Publishing

Thu, 14 Jul 2016 11:53:24, April Hathcock

[Category: all-posts, copyright-law, institutional-repositories, license-agreements, open-access-outreach, open-access-policies, scholarly-publishing]

I recently went out on a limb to help a group of scholars who were trying to do a good thing but going about it in a not-so-good manner.

They wanted to curate a list of articles on a topic relating to current events and social justice. Unfortunately, they were determined to post the materials to the open web using full-text PDFs from licensed, published content.

Yes, cue the collective copyright librarian shudder.

Their arguments for doing so were typical. Partly a misunderstanding of fair use: *But it's for an educational purpose!* And partly a misguided sense of “revolutionizing academic publishing.”

I shared with them some information (information, mind you, *not* legal advice) about fair use and the necessity of considering all four factors. I told them a bit about current best practices in academia, how small changes in their strategy—such as posting links to OA versions of the articles if they exist or curating a bibliography of citations—may be more effective. I talked a bit about licenses and how even with fair use, posting these materials could violate institutional contracts with publishers. I also mentioned that, from a discovery perspective, their long list of PDFs was a bit of a burden for researchers looking for these materials and suggested they work with a metadata and discovery librarian to better organize the work. I'm pretty sure I mentioned [Georgia State](#) and [Sci-Hub](#) a few times (for different reasons, of course).

As is often the case with doling out unsolicited information (*not* advice), there was a bit of pushback. And complaints. All of which made me reflect on this new trend that seems to have arisen in which scholars randomly decide they will “revolutionize” academic publishing unilaterally by flouting copyright law and contractual agreements to distribute others' work Robin Hood-style.

The key here, at least for me in my frustration, is that this revolution almost always involves someone else's work. These so-called revolutionary scholars are ever interested in liberating scholarship to which they want access while still signing away rights to their own work and rarely, if ever, deigning to post green open versions of their work in institutional repositories.



“revolution” by daniel zimmel via Flickr, CC BY-SA 2.0

Don't get me wrong. Our current system of academic publishing needs revolutionizing. But that isn't going to happen with individual scholars breaking the law and exercising rights that more appropriately belong to others.

And, to be quite frank, it's not like the revolution hasn't already long begun. All kinds of work is already being done in this space:

- Funders in the [U.S.](#) and [abroad](#) have started requiring public access to the research they fund.
- Collaborative, cost-sharing initiatives like [Open Access Network](#) to help transform the way scholarly publishing is funded.
- Interoperability and discovery efforts, like that of [Share](#), to facilitate the sharing of metadata across repositories.
- The creation of new discipline repositories, like [SocArXiv](#), and the improvement of existing repositories, like [ArXiv](#), to better ensure access to knowledge.

These efforts have been difficult and they take time, yet slowly and surely we're gaining ground.

For scholars truly interested in revolutionizing scholarly publishing, get involved with these efforts. Touch base with your scholarly communications experts and share your experience and expertise. Rather than attempting to “break down the master's house” by stealing the master's tools and giving them out for free, let's work together to build our own tools.

And finally, speaking of houses, make certain that you begin the revolution in your own house. Publish your work in an open access journal or ensure that you post your manuscripts in an institutional or discipline repository. Negotiate your publishing agreements and fight for your rights as author so that you are able to do just that.

Engage in legal practices to liberate your own work. Then, join already-existing efforts to liberate scholarly publishing for everyone.

Copyright small claims: an update on legislation

Mon, 18 Jul 2016 16:19:53, Kevin L. Smith

[Category: copyright-law, legislation]

In theory, the idea of a small claims board that could adjudicate copyrights claims where the monetary value is not too high seems sensible. Federal litigation is very expensive and intimidating, so a small claims mechanism could make it easier for independent artists and small businesses to defend their rights.

Nevertheless, I have never been very enthusiastic about the idea, in large part because the devil is definitely in the details of any proposed scheme. The fear is that a small claims board could become, in the words of [this 2012 article about the topic from Techdirt](#), just “a new venue for porn companies to coerce settlements out of internet subscribers.” If such a board appeared to be nothing other than a mechanism to make it easier not just for trolls but for Big Content in general to bully individual users and avoid the high costs of litigation, it would ultimately be harmful to the copyright balance that is already so out of whack in the U.S.

Unfortunately, when I look at the [CASE Act](#) (H.R. 5757) (it stands for “Copyright Alternative in Small Claims Enforcement Act) introduced last week to the House of Representatives, many of these fears seem realized. Based on the actual text of the proposed legislation, I am afraid this specific bill would have two negative impacts. First, I fear it would greatly increase the power of the Copyright Office in shaping copyright enforcement, which is not something I can contemplate with anything other than foreboding. Second, I think that the proposed legislation would make it easier for Big Content, and especially for the copyright trolls who are often their vanguard, to bully ordinary individuals and increase the phenomena of copyright enforcement by fear, rather than through the law.

The proposal is not without its good points, however, and perhaps it is a good idea to start with those:

- One thing that may seem obvious, but needs to be said in the legislation, is that all parties to an action before the board would have the right to legal representation. The CASE Act does include such a provision.
- There is also a specific allowance for actions that assert copyright misuse in regard to DMCA takedown notices. Section 512(f) of the copyright law calls out knowing misrepresentations in a DMCA notice as a cause of action, but our courts have done little to penalize such false claims. The CASE Act would allow an aggrieved party to bring such a claim, although it is not clear that the damages available would justify even the reduced costs of bringing such an action.
- Most importantly, the bill would ensure that the parties to an action before the Copyright Claims Board would be able to assert all the defenses that are now available in the law or that

courts recognize “in equity.” So it would still be possible to raise a fair use defense; the question is whether it would be heard or analyzed in the same way as we have seen evolving over time in the federal courts.

Two other provisions of the CASE Act leave me with a good deal of uncertainty and disquiet. One cause for this is the potential to bring an action before the small claims board claiming infringement even on an unregistered work. Copyright registration is required prior to bringing a lawsuit in federal court, but this bill would allow such a claim before the small claims board, with a greatly reduced potential for recovery of damages. So such a claim would cost less to bring, but also offer less reward for success. It is not clear to me if an author, acting on her own, would be well served by such an option, or if registration, which does not cost much and would allow greater damages even in a small claims action and also provide access to the federal courts, would still be more sensible. Also, since it seems likely that copyright misuse claims under 512(f) would fall into this unregistered category, the reduced damages provision is also the reason why to allowance of such claims, while a positive step, probably would actually do little good. Content companies would likely still feel free to send out massive numbers of automatically generated take down notices without much fear of these kinds of small claims.

Indeed, the whole area of damages in small claims is rather problematic. On the one hand, statutory damages for copyright infringement are ridiculously high, and often are used to chill legitimate uses because the risk of making a mistake is so great. So lowering damages in the small claims arena makes sense, and the CASE Act caps such damages at \$15,000 for any one act of infringement and \$30,000 in a single action. Certainly small claims without reduced damages would be intolerable. But these damages still strongly favor plaintiffs over defendants, since the costs of suing would be much lower, while the risk of being held liable would still be potentially devastating for individuals. Add to this the fact that it would be impossible, before the small claims board, to be awarded attorney’s fees and court costs even if one won, and the odds are still strongly tipped in favor of the big content companies with in-house lawyers and against individual users — artists, authors and students, for example — who might find themselves on the wrong end of one of these claims.

Overall, I have to conclude that this bill is a power grab by the Copyright Office and would be a boon to the lobbyists for Big Content. The makeup of the proposed small claims board would be recommended by the CO from the ranks of lawyers with substantial experience in copyright infringement actions, which means that those very lobbyists would probably become the judges (called “Copyright Claims Officers”). And the work of the board would, according to section 1402(c) of the bill, “be generally directed... by the Registrar of Copyright.” The provisions would give the Copyright Office tremendous influence on copyright enforcement, which would please the content companies a great deal, but would undoubtedly further detract from a balanced law that genuinely encourages new creativity, rather than merely protecting profits for legacy works.

Because the bill would make enforcement cheaper and easier, but still carries a large threat for smaller entities caught up in it (especially since they could not recover costs), I think that ultimately the bill would further empower the copyright trolls who have begun to plague our courts. A mere threat to sue

would still be amply frightening to coerce settlements from many people who might still be found innocent if they could risk the issue, and it would be less costly for the trolls in those rare instances where they did.

Finally, there is a provision (1404(f)1(c)) which seems to assume that the small claims procedure would be used against ISPs that did not respond adequately, in the judgment of plaintiffs, to content take down notices. Big Content has been trying to chip away at the notice and take down safe harbor for ISP for a long time, because they want ISPs to act as enforcement agents for their rights. Here, as in other ways, the small claims board would further advance that agenda, potentially further undermining free speech on the Internet by increasing the pressure for rapid take downs without providing enough protection against abuse.

At first glance, this bill looks like it is a move in favor of the little guy. But, in fact, it offers a laundry list of goodies to trolls and to the large content companies. It would, I am afraid, simply be one more tool to be used to intimidate legitimate users of content and tighten the grip of the legacy industries over innovation and creativity.

Open Access Infrastructure: Help on the Way?

Mon, 25 Jul 2016 14:55:31, Shan Sutton

[Category: all-posts]

Readers of “In the Open” are familiar with the ongoing machinations of Elsevier and other major commercial publishers as they seek to [tighten their grip](#) on elements of the scholarly communication system. As Mike Taylor points out, these developments bring to mind the underlying issue of [who controls OA infrastructure](#), and the notion that resistance to commercial domination should be largely based on the academy establishing its own dissemination infrastructure, ideally with substantial investments from funding agencies. Recently, a new funder-supported open dissemination platform, [Wellcome Open Research](#), has emerged as an alternative to vehicles controlled by commercial publishers, and in a separate development, the [SocArXiv](#) repository has been released as an alternative to Elsevier’s newly acquired Social Science Research Network. Wellcome Open Research in particular offers an intriguing model that raises the question of how funder and university-supported elements of OA infrastructure can coalesce into a more integrated system in the future.

Wellcome Open Research will be launched by the Wellcome Trust in the fall as a platform for its grantees to make their research outputs (articles, data sets, etc.) openly available at no charge to the author. The article component of this platform will utilize post-publication, open peer review by “carefully selected peer reviewers.” In the initial coverage I was struck by a quote from Robert Kiley, Wellcome’s Head of Digital Services, “We hope that other funders will follow our lead. We also hope that, over time, funder-specific platforms will merge into a single international platform that’s open to all researchers.”

It will be interesting to see the level of author uptake achieved by Wellcome Open Research. To what degree will authors buy into the Wellcome brand and open peer review as indicators of quality compared to the impact factors and blind review process of traditional journals? Could this platform’s success inspire other funding agencies to eventually follow suit and coordinate their efforts, leaving behind funder models based on paying APCs or requiring manuscript deposits of articles published elsewhere?

However quixotic it may sound at this point in time, the development of integrated dissemination platforms among research funding agencies could be a major turning point in establishing OA infrastructure that is not beholden to commercial interests. University-supported disciplinary and institutional repositories could supplement and integrate with these platforms by developing comparable services to disseminate the considerable amount of scholarship that does not fall under the auspices of research funders. In order for this scenario to unfold, authors (and their institutional reward and recognition systems) would need to sufficiently embrace article-level publishing and metrics as viable alternatives to traditional notions of journal prestige and impact factor.

Assuming traction with authors could be realized, a serious level of coordination among funders and academic institutions would obviously be critical, but the technological and economic elements of the system could probably be sorted out **if** there was a collective political will to make it happen. Thus far, universities have largely distributed their OA eggs into baskets that are directly (funding APCs) or indirectly (hosting article manuscripts) tied to commercial publishing. Some have viewed this as a necessary transition phase as new models emerge. Hopefully, the emergence of new platforms such as Wellcome Open Research will lead to more active engagement among funders and universities to envision how a scholarly communication system encompassing funder platforms and university-managed disciplinary and institutional repositories could provide a sustainable path to universal OA for research outputs.

Building Open: SocArXiv

Mon, 08 Aug 2016 08:00:34, Amy Buckland

[Category: all-posts, building-open, digital-collections, institutional-repositories]

Note to readers: This is the first post in our new series “Building Open” where we interview those who are building tools and services to support scholarship in the open. For our first installment, we talk to Philip Cohen of SocArXiv.

Ultimately, I do think we need to leave the old system behind, but it can work incrementally. For example, we need people to donate fewer free hours of labor (reviewing, editing, moderation, publishing) to for-profit, paywall publishers and more to open access institutions. But they can do that without completely boycotting all for-profit journals, if we build our institutions in an open and inclusive way.

Who are you?

Philip Cohen, professor of sociology at U. of Maryland, College Park. I tweet [@familyunequal](#). Info about SocArXiv can be found on the [blog](#) and [@socarxiv](#).

What is SocArXiv?

It is a free, open access, open source archive for social science research.

Please note that we are using the name SocArXiv under (a friendly and generous) license from Cornell, which has a trademark on the name [arXiv](#), and which assumes no responsibility for what we do with it.

Why did you create SocArXiv?

The initiative responds to growing recognition of the need for faster, open sharing of research on a truly open access platform for the social sciences. I have personally grown increasingly frustrated with the slow, expensive, and inefficient system of journal publishing in my field, sociology. I have been looking for a way to bring more research out into the open faster.

Who is involved with SocArXiv?

The University of Maryland is the administrative host for SocArXiv, and the [Center for Open Science](#) is our technology partner. Other than that, there are individuals involved from a variety of institutions but no formal affiliations as yet.

How does the launch of SocArXiv relate to the [Elsevier purchase of SSRN](#), if at all?

It is a coincidence, sort of. That is, I registered the SocArXiv domains and Twitter account before I knew anything about Elsevier buying SSRN, and we were just starting the planning a few weeks later when the news broke. But it's also not a coincidence, because both SocArXiv and Elsevier are responding to the demand for better, faster, more open scholarship. It's just that our approaches are completely different: we are committed to an open source, open access system, with links to code, data, and other research

materials – and they are trying to increase their vertical control of the academic publishing industry by buying up possibly competing systems.

Why did you decide to partner with Center for Open Science?

COS already had a preprint server in development when we started our planning. And they already are working with [SHARE](#), the “free, open, data set about research and scholarly activities across their life cycle” (from their website), which provides a key link between SocArXiv and other open scholarship resources through metadata. Judy Ruttenberg, who is the leader of SHARE at the [Association of Research Libraries](#), already had a long working relationship with COS; she is now on the SocArXiv steering committee.

What are your short term plans for SocArXiv?

We want to make it a free, easy, accessible, working paper and preprint archive as soon as possible. COS has implemented an email deposit system so we can start accepting papers right away (it’s at [socarxiv.org](#)), and we already have more than 250 papers. This is a great start for us, and allows us to start working on key development questions with some real cases before us. The system currently provides free registration open to all, regardless of academic affiliation; permanent identifiers for papers, access and discoverability through Google and other search engines (not yet Google Scholar, but we hope that will be working soon); the option to use any Creative Commons license; the ability to facilitate comment and discussion on papers among registered users; grouping of papers together for conferences or working groups; analytics data on how often papers have been accessed; and easy sharing on social media sites – without requiring readers to register.

Long term plans?

As the archive grows, SocArXiv will engage the community of scholars, members of the research library community, and publishers to develop a fuller publishing platform, with post-publication peer review and evaluation, and open access electronic journals. To build that we will enlist a wider advisory board and a series of working groups to develop norms and standards, and engage in an outreach campaign to reach more social scientists about the benefits of open scholarship.

Where would you place SocArXiv in the scholarly publishing system? What about the scholarly infrastructure system?

We want to be an alternative venue for dissemination and development of social science research. For many people, all they need is a way to archive and share papers – whether working papers or pre-publication versions of papers published elsewhere. But for others we hope to become a genuine alternative, providing a platform for peer review in a truly open environment.

What rights must depositors transfer to SocArXiv?

Depositors are subject to the COS [Terms of Use](#).

What services will be integrated with SocArXiv?

The integration with SHARE means that SocArXiv materials will be discoverable and linked through a much broader data set about research and scholarly activities. This means anyone can develop tools for

discovering and disseminating any of the materials we host. The possibilities for this system are virtually endless, but they include, for example, the possibility of open access overlay journals, target subscriptions through email or RSS feeds, and links to institutional repositories and faculty productivity systems. In addition, the integration with COS's [Open Science Framework](#) means that SocArXiv papers can be linked to other research materials – such as data and code – on a powerful collaboration platform (with easy plugin access to other sharing and storage systems, such as Dropbox and Google Drive).

How do you plan to sustain SocArXiv? How will it be funded?

We are tremendously fortunate to come along at the time that COS has funding to develop and maintain a preprint server. So for the basic system of archiving and disseminating papers we do not need to raise money for SocArXiv directly. However, for additional services, such as administering peer review, or facilitating and moderating discussions, we will need to provide funding and/or staffing. We are talking to foundations and universities to raise initial support for planning and development, and hope to work with other initiatives, such as the [Open Access Network](#), to develop long-term support.

What do you think about the state of openness in social science research? What kind of future would you like to see?

Our [steering committee](#) is sociologists and library community leaders. In sociology, from our experience, openness is very slow in coming. The [American Sociological Association](#), for example, is deeply dependent on its group of paywalled journals (although they have now added [one open-access journal](#)). And many sociologists do not work in communities with an expectation of working paper or preprint sharing. In part, this may be because many sociologists work with qualitative data (such as ethnographies) or proprietary data (such as small surveys), where the norms and practices for sharing are less well established.

One of our first strategic challenges is reaching more sociologists – and other social scientists – on the benefits (for themselves and their communities) to a more open approach to scholarship. We are tremendously encouraged by the enthusiastic response we have received so far, which increases our confidence that we will be able to provide skeptics and newcomers with concrete examples and real-life success stories coming from open scholarship, with best practices guidance and training.

What's your day job?

I'm a professor of sociology. I do research on family demography and inequality, I write the [Family Inequality blog](#), I have a textbook ([The Family: Diversity, Inequality, and Social Change](#)), and a forthcoming compilation of essays entitled *Enduring Bonds: Essays on Modern Families and Inequality*. I hope SocArXiv will become a bigger part of my job in the coming months and years.

Is there anything you wish I had asked?

One of the things I greatly admire about COS is that they are doing something with very deep potential to change the entire research ecosystem, but they also are committed to making it practical and approachable for scholars now. This is a difficult balance to strike, and I think they do it better than anyone I've seen. Penny Andrews [tweeted](#), "I'm as bored of utopian visions as the next pragmatist but SA [SocArXiv] is working." I think we need the utopian vision because it helps motivate and mobilize

people to be the change (as they say). But I see sociologists, especially junior scholars, who are understandably worried about making it through the last big hurdle – tenure – and don't want to throw it all away on a utopian publishing model. I have to respect that completely. So the challenge is to make it feasible and accessible for them to enter a transition into open scholarship without cutting the cord of the established system. It has to have a very low barrier to entry and tangible reward or they will simply turn away, and we don't move the system forward. Ultimately, I do think we need to leave the old system behind, but it can work incrementally. For example, we need people to donate fewer free hours of labor (reviewing, editing, moderation, publishing) to for-profit, paywall publishers and more to open access institutions. But they can do that without completely boycotting all for-profit journals, if we build our institutions in an open and inclusive way.”

The Corporate Capture of Copyright

Wed, 17 Aug 2016 07:55:57, Kevin L. Smith

[Category: copyright-law, faculty-works]

Catherine Fisk's [Working Knowledge: Employee Knowledge and the Rise of Corporate Intellectual Property, 1800 - 1930](#) (University of North Carolina Press, 2009) has been around for a few years, but I only became aware of it recently, after a colleague mentioned it in conversation. So my recommendation — it is a fascinating read — is belated, but I hope these reflections based on the book are still useful.

Fisk's book makes two overarching points that particularly interested me.

First, for over a century in the U.S., there really was no concept of “work made for hire” in regard to the creative and useful works of employees; it was generally assumed that ideas, expressions, and inventions created by workers belonged to those individuals. When a worker changed jobs, they could take those ideas and know-how with them, unless there was some kind of explicit “non-compete” contract between employee and employer.

Fisk's other point that struck me as especially significant is that the idea of copyright protection as a property right itself developed over time; copyright has not always been thought of this way. And even as thinking about copyright evolved into the idea of a property right — i.e., a right to exclude others (even employers) from using a work — the notion that an employee's work naturally belonged to the creator, rather than the employer, still survived for a while. So even when our perception of copyright as a monopoly developed, it was still not taken for granted that that right to exclude must always belong to the corporate entity for whom the creator worked.

To take just one of the many 19th century cases that Fisk discusses, consider *Pierpoint v. Fowle*, from 1846, a case in the federal district court in Massachusetts that involved the renewal right in a work after the copyright had been assigned to the author's employer. The case is interesting because it involved a commissioned textbook, the copyright in which was assigned to the party that commissioned it by contract; there was no assumption then, or now, that merely commissioning a work made it work made for hire. When it came time to renew the initial copyright for its second term — the law at that time provided for an initial 28 year term that could be renewed for 14 more years — the author and the assignee disagreed about who had the right to renew and hold the copyright for those 14 additional years. The court held that the renewal right belong to the author and that the assignment applied only to the initial term. The second part of the term was held to be a “new interest, which that court believed to be “made to benefit authors.” Indeed, the court felt that renewal was intended to reward “the genius which conceived and the toil which compiled the book.”

This emphasis on authors and creators, even to the exclusion of employers and others who pay for works of the intellect, seems very different from our experience of copyright today. Expansive work made for hire rules are just one example of how our copyright law has changed, in both substance and

through practice, from a strong focus on the author and encouragement of individual creativity to an emphasis on maximizing profitability. With the ever-increasing emphasis in the mid to late 20th century on the goal of squeezing all possible profits out of a work came the corporatization of copyright. Companies now own monopoly rights in most creative works, work for hire is the rule rather than the exception, and often contracts are written in ways that diminish the role and the rights of creators in favor of long-term corporate exploitation of their works.

Scholarly publishing is both an example of this corporate focus and an object lesson in how poorly such a trajectory serves the original, author-focused purpose of copyright. Consider the debate going on in many quarters over Sci-Hub and Elsevier, which has sued and won a [default judgment](#) (in the shape of a pretty much unenforceable injunction) against the article sharing site. In many ways these two entities are opposite extremes in the academic world, one focused on making a profit by excluding readers from academic work unless a fee is paid, the other seeking maximum distribution without charge. But each is serving a single-focus vision of what it deems is best for scholars and scholarship; neither actually takes into account what individual authors need and want for their academic works.

Needless to say, academic authors often have very different ideas about how their works should be disseminated and used than are the norm for the commercial markets in which Elsevier, Wiley, et al. operate. Even the language used often indicates a particular attitude towards an author; Wiley consistently uses the language of “contributor” in its publication contracts, which shows, I think, an attitude that the author is just a worker bee, striving to fill the pages of a Wiley publication. And, of course, a few publishers are beginning to require a stipulation, in some contracts, that the article or essay is a work made for hire. In such agreements a direct contradiction of both the facts of scholarly production and its ethos is attempted, by making the author nothing more than a contractor for the press. Whereas authors write to express themselves and share their unique scholarly perspectives in a fairly free environment, these contracts usurp that labor and deny the academic freedom that is so central to it. They fundamentally devalue the academic author.

Open access is an important part of the solution to this corporatization of copyright, and the commodification of faculty authors. Gold open access allows authors to retain their copyrights, and the financing of such openness comes in a variety of forms. Despite corporate efforts to capture Gold open access and portray it as always requiring the payment of ever-increasing article processing fees, a variety of business models support this type of openness. And Green open access relies entirely on author choice, whether that is an individual choice to self-archive a work or a decision by an entire faculty to make openness the norm for that campus’ scholarly work. In all cases, open access is at least somewhat more responsive to the actual needs and wishes of the creators. It hearkens back to the days before copyright was captured by corporate entities, when a court could still assert that copyright was intended to benefit authors.

Is VHS an obsolete format under Section 108?

Mon, 29 Aug 2016 10:15:50, Lisa Macklin

[Category: all-posts, post-format-image]

Libraries routinely rely on [Section 108](#), the limitations on exclusive rights specifically for libraries and archives in US Copyright Law, even if librarians don't always realize that the services they provide, such as ILL, are encompassed in Section 108. Also included in Section 108 are provisions for libraries and archives to make replacement copies of published works in their collections if the work is 'damaged, deteriorating, lost or stolen, or if the existing format in which the work is stored has become obsolete'. What is obsolete? Well, 108 (c) defines a format as obsolete 'if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.' For convenience, the text of 108 (c) is below.

For libraries with extensive VHS collections, managing those collections continues to be a challenge as some tapes are deteriorating, fewer (if any) VCRs exist in classrooms, and many faculty and students prefer digital formats. While one answer, if funding is available, is to purchase these VHS titles as DVDs, many VHS titles in library collections aren't available in any format, which libraries discover when trying to find an unused replacement copy at a fair price. The challenges of managing these collections is very well documented in the New York University publication [Video at Risk: Strategies for Preserving Commercial Video Collections in Libraries](#), including addressing the question of whether VHS is an obsolete format.



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Therefore, when [Fortune Magazine](#) announced that Funai Electric will cease producing VCRs at the end of July 2016, librarians naturally wondered if this means that VHS is now an obsolete format. Since DVD/VCR players are still readily available in the marketplace, from a variety of manufacturers, the declaration that VHS is obsolete is a bit premature, but all indications are that VCRs will cease to be profitable to produce in the near future. However, obsolescence isn't the only reason under Section 108 to create a replacement copy of a VHS tape. Works which are damaged or deteriorating also qualify. Unlike obsolescence, determining whether a VHS tape is damaged or deteriorating is not defined in this section of US Copyright Law, and relies on the expertise of librarians to determine if a VHS tape is damaged or deteriorating.

While we may not yet be able to declare VHS tapes obsolete under the definition in Section 108 of US Copyright Law, there are many other ways for libraries to effectively manage their unique and aging VHS

collections. If you have not yet read it, I highly recommend the NYU publication [Video at Risk](#) as a guide to understanding and effectively implementing Section 108 (c) for video collections. In addition, depending on the use of the content on the VHS tape, a good fair use argument could be made. As one example, in the dismissal on the grounds of standing of the alleged infringement case *AIME v. UCLA*, the judge gave an overview of how UCLA's streaming of video to students in a class for educational purposes could be a fair use. Since the case was dismissed, the judge's analysis is informative but does not set precedent. For an overview of the case, see fellow blogger Kevin Smith's post '[Another fair use victory for libraries](#)' from 2012. Of course, any fair use analysis needs to take into account multiple factors, including any licenses for the content. Librarians should take advantage of all of the tools at their disposal, analyzing both Section 108, Section 107 and scope of licenses, if any, to best serve the needs of users and preserve these VHS collections.

§ 108. Limitations on exclusive rights: Reproduction by libraries and archives

(c) The right of reproduction under this section applies to three copies or phonorecords of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if—

(1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and

(2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.

For purposes of this subsection, a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

Library as Safe Haven

Thu, 08 Sep 2016 07:44:16, Kevin L. Smith

[Category: all-posts]

This is a guest post written by Jennifer Chan of UCLA

On June 1, 2016, UCLA's Westwood campus was suddenly thrust into the media spotlight across the world when a shooter entered a campus building and fatally shot one of our engineering faculty. I was just days shy of my one-month anniversary as UCLA Library's Scholarly Communication Librarian. What I knew, and what most of us on campus knew that June morning, was that "police activity" had been reported at the other end of campus. Far, but not far enough. Soon, the details began trickling in.

You may have viewed footage of our students seeking refuge and safety in campus buildings by barricading doors with furniture or securing them with belts. What you did not see were those banging on the doors of the law library for entry, or images of the students here on our floor of the Charles E. Young Research Library. Some were hiding in bathrooms where doors were weighted down with their backpacks, others were hiding behind boxes. Despite the varied backgrounds of these students, many ventured to their respective libraries, expecting us to be open to them for shelter.

Because of the uncertainty surrounding the events of that morning, we at the library did not yet know if the threat we were facing was active or had been neutralized. What we did know was that we had a group of frightened students to reassure. My supervisor unlocked her office to offer sanctuary to the nearby students. In that moment, "library as safe haven" transformed from rhetoric to reality. While we connected to news from the local media and our campus Bruin Alert system, we hoped to reinforce in the minds of these students a reality of the library as a safe place, despite the uncertainty in our own minds about the events occurring around us. We all handle difficult situations differently. While a couple of the students were glued to every new tweet that came through, another student focused on asking questions about his research. Huddled together, a research interview doubled as a chance to provide both information and a sense of calm.

June was a difficult month. In the days and weeks since the shooting, we all worked hard to move beyond this tragic event. Commencement ceremonies were held to celebrate the achievement of our students, and retirement ceremonies to commemorate years of dedicated service. Our hearts have been filled with emotion. Yet sadly, violence has not left our lives. We were met with the tragedy of Orlando, and the month of July brought us more violence.

I cannot adequately describe the importance of your chosen vocation, but allow me to share a bit about what has led me down my personal path. In 2007, I worked in one of the "Katrina trailer" library facilities funded by the Gates Foundation to serve areas along the Gulf Coast that had lost a library due to the damage caused by Hurricanes Katrina and Rita. It was there that I had an experience that has become one of my most salient library memories: A man walked through our doors and declared that he was so glad to see us because he had driven over two hours just to find an open library, with power, working

computers, and access to the internet. The importance of access was no longer an abstract ideal, but a concrete reality: in providing access to others, both giver and receiver reap the benefits.

As librarians, we provide welcoming, open, and inclusive spaces, and constantly work toward achieving open access to knowledge, in hopes that our efforts at disseminating and preserving the scholarly record will allow all to advance. Whether stated or not, there is an expectation from others for us to be open: to keep our doors open, to provide open access to materials, to support the educational pursuits of those we serve. We are a profession with a giving heart and a long memory. We have taken naturally to the Open movements of recent years: Open Access, Open Education, Open Data, and so on. The Library, regardless of type, serves as sanctuary; we embody the spirit of The New Colossus. We live and work in a world that is constantly confronted with challenge and uncertainty. Let your library be a safe and open place for the mind to blossom, unfettered.

About the author — Jennifer Chan is the Scholarly Communication Librarian at UCLA Library and is part of the Scholarly Communication and Licensing Unit. She is the current Vice Chair of the ALCTS-STIS Scholarly Communications Interest Group, and current Co-Chair of the LITA Altmetrics and Digital Analytics Interest Group. Her twitter handle is @jtcmlis

Copy shops, economics, and educational use in India

Mon, 19 Sep 2016 08:36:22, Kevin L. Smith

[Category: all-posts]

A few years ago, I was asked by the U.S. State Department to give a presentation on copyright for librarians in India. I spoke via web conferencing to a group of Indian librarians gathered in an auditorium at the U.S. Embassy, and the session was moderated by an IP professor from Delhi University. This moderator began the session by asking me a very challenging question; pointing out that the standard textbook that he would like to use for his class in trademark law cost more than a month's salary for the average Indian, he asked me how the copyright balance between rights holders and the public could be calibrated in such economic conditions. I don't think I provided a very good answer at the time, but last week the High Court in Delhi took on that question and [offered an amazing response](#).

The case involves a lawsuit brought by three publishers — Oxford University Press, Cambridge University Press and Taylor & Francis — against a kiosk on the Delhi University campus that was providing copying services for students, often providing so-called “course packs” consisting of photocopies of all the supplementary readings for a particular course. This service apparently sometimes included copying of entire chapters from textbooks.

If this all sounds rather familiar, it should. Two of the plaintiffs, of course, are also plaintiffs in the long-running case against Georgia State University, over scanning, for class use, of excerpts from books (after losing another trial court decision in that case, on remand, the plaintiffs recently announced their intent to appeal to the 11th Circuit, again). OUP and CUP are, ironically, becoming the go-to publishers for attacks on higher education; their greed and poor judgment are actually serving the global higher ed community quite well because their losses help clarify the broad scope of fair use / fair dealing. But the Delhi University case probably seemed easier picking to those publishers, since the copying was commercial, in that the copy kiosk was paid for the course packs, and some textbooks, works intended directly for the university market, were at issue. But the decision was not easy for them; it was [a disaster for the publishers](#).

The legal basis for Justice Rajiv Sahai Endlaw's holding that the challenged copying is permitted was section 52 of the [Indian Copyright Act](#), which enumerates instances of copying that are not infringement. There is a broad exception for copying of literary works by teachers and students, and the Justice held that this “course pack” service from a commercial copyright service was allowed under that exception. There are three aspects of this decision that I think make it quite remarkable.

First, Justice Endlaw took the step that courts in the U.S. were unwilling to take when hearing course pack cases; he held that if the copying would be permitted for the students themselves, it was permissible for them to employ an agent to do it for them. These seems like a logical application of the

law, and it is one that is really quite common. Rights holders, for example, often employ agents to exercise their rights, particularly in sending take down notices about alleged infringement to internet services providers. Why then, should users not be allowed to employ agents to exercise their rights? Since the exceptions are based on the socially-desirable use that is being supported by the law, why should it matter who actually presses the “copy” button?

The second remarkable thing about this verdict is the Justice’s [explicit statement that copyright is neither a divine nor a natural right](#). It is amazing, first, that a court even has to say this, since it is settled law, at least in countries with British-influenced copyright laws. But publisher rhetoric often sounds like they believe that they are entitled to be paid for every single use, and that every exception to their monopoly is an unjustified taking of their property (rights holders in the U.S. are making exactly this claim about compulsory licenses). So the Justice reminds us that copyright does not emanate from on high, but is rather a practical policy designed to address a specific economic situation. When the grant of exclusive rights does not work to solve the economic dilemma for which it is intended, those rights must give way.

The economic analysis that follows on this conclusion is the third remarkable thing about this verdict; that analysis is [discussed in this article from Forbes](#). Basically, the Justice tells us that the students for whom the copies at issue were being made would never be customers of the publishers because those publishers had priced their books too high for the market. The students would not, could not, buy all of the books in question; were it not for the copy shop kiosk, they would need to laboriously take notes by hand, as Justice Endlaw tells us he did as a law student. So the copy kiosk is not substituting for a legitimate market, it is just providing a labor-saving service. What this seems to say, then, is that when the publishers get so greedy that they price themselves out of a specific and socially important market, they will not be allowed to use copyright to shut down market alternatives. As prices for academic books rise throughout the world, this situation is becoming quite real even in more developed countries, so Justice Endlaw has provided us with a path forward that might well be important even in the U.S. and Europe. Basically, we need to return to the economic roots of copyright and analyze alleged infringements through the lens of its original incentive purpose for authors, not the rent-seeking of publishers. In fact, the fair use analysis in the U.S., especially in its [second factor about the nature of the work](#), invites us to do just this.

With this ruling, Justice Endlaw indicates a possible solution for the damage that the copyright monopoly is doing to education and innovation around the world by looking at the economic incentives, and using exceptions to the exclusive rights to keep copyright within the bounds of the balance demanded by those incentives. Personally, I am grateful to the Justice for pointing out how to answer that difficult question from Indian librarians that stumped me years ago.

Toward a Digital First OA Monograph

Tue, 27 Sep 2016 08:02:27, John Sherer

[Category: all-posts, digital-collections, humanities, monographs, scholarly-publishing, university-presses]

Project MUSE [announced](#) over the summer a \$938,000 grant from the Andrew W. Mellon Foundation to integrate OA university press (UP) monographs into their platform. *

Digital aggregations of UP books are becoming a key discoverability mechanism. The possibility of using linked data tools to discover content within a much larger body of humanities and social science scholarship is one of the few very clear and bright developments for UPs. After years of our printed books being relegated to the ever-dustier library stacks, our digital content is now feeding a significant corpus of highly usable humanities research and being made available in a growing number of library collections. With this grant, MUSE wants to ensure that OA content is seamlessly discoverable within these collections, rather than isolated in some segregated position.

MUSE may also be hoping to (or at least I'm hoping they will) create a low friction ingestion tool so that peer-reviewed, copyedited and ready-for-composition manuscripts can be ingested into their collections. If they, or any other OA platform achieves this, it means that a publisher who also wants print editions will need to continue with their traditional workflow of preparing those formats for the marketplace. But I'm imagining there may be some publishers who declare that for some segments of their publishing lists, simply getting a high quality digital edition into wide dissemination is a legitimate and perhaps even superior method of publication. Since it's debate season, I would very much enjoy a debate about which dissemination method yields higher accessibility and use: digital-only OA versus traditional pay-walled print.

This notion of print-as-optional raises a provocative question. Is a print copy a definitional requirement of publication? I share the common belief that even in digital OA environments, there is almost certainly a market for print. But any publisher will tell you that the steps required to go from a copyedited manuscript to successfully manufacturing, marketing, and selling print versions of it are a significant portion of what presses do and require significant costs. A further twist is that while publishers directly oversee acquisitions and peer review, much of the work required to create print is actually done by freelancers. Printing (always) and warehousing (usually) are outsourced to common vendors. In other words, a lot of these later stage (post-editing) activities aren't even done by employees of the Press

As print sales for monographs continue their asymptotic decline (and I'm not aware of anyone who is predicting a rebound in these trends) what is the point at which sales are so small, that the unit costs of creating print are prohibitive? We've probably already arrived at that number in some disciplines. Many worthy books simply don't get published because the print economics don't work. The arrival of a program like MUSE Open offers an open path out of this spiral. It wouldn't be one-size-fits-all, but I can imagine a segment of a university press's list being published more effectively in digital-only editions. It's an easy argument to make that a press may be making a more valuable contribution to the world of

scholarly communications if it is allocating more and more of its limited resources on developing, editing, and disseminating digital content rather than participating in the charade of a market-based cost recovery system.

**Disclosure: I am a member of the Project MUSE advisory board and wrote a letter of support for the grant, although I was not involved in its crafting. Nor am I privy to the details of its implementation.*

Building Open: OJS 3.0

Tue, 04 Oct 2016 09:52:40, Amy Buckland

[Category: all-posts, building-open, scholarly-publishing, workflows]

Note to readers: This is the second post in our new series “Building Open” where we interview those who are building tools and services to support scholarship in the open.

In terms of the future, I think we still have a long way to go in determining sustainable models. APCs aren't it, especially outside of big science and North America and Europe. Our research into open access publishing cooperatives, which brings together the major stakeholders — researchers, societies, journals, libraries, funders — is showing that this can be an important alternative model.

Who are you?

Kevin Stranack, Community Engagement & Learning Coordinator for the [Public Knowledge Project](#) at Simon Fraser University Library. I tweet [@pkp](#).

What is OJS?

[Open Journal Systems](#) (OJS) is a free, open source journal publication management system that deals with every step of the workflow from submission and review through to online publication. It is kind of like Wordpress or Drupal for peer-reviewed journals. It is free to download and set up independently on your own server, or to work with us for fee-based hosting and support.

Why did you create OJS?

Back in 2000, when we first started developing OJS, we believed that the move from print to online publishing was going to provide the opportunity to significantly lower the costs of publishing, and therefore reduce the costs of subscriptions — to the point of eliminating them altogether. To help facilitate this transformation, we created OJS to increase workflow efficiencies and reduce the costs of online publishing, which, we hoped, would increase the ability of publishers to move to an OA model. Since then, we've seen many journals make this “flip” from subscriptions to OA using OJS, and many more be born-digital and OA. Today, there are [close to 10,000 journals using OJS](#), with the vast majority publishing under a fully OA model.

Who is involved with OJS?

OJS got its start as part of a research project, the [Public Knowledge Project](#) (PKP), of [Dr. John Willinsky](#), at that time at the University of British Columbia. John remains the Director of PKP to this day, although he has since moved to Stanford University. Although perhaps best known for our software development, PKP continues to do research, such as the MacArthur funded [Open Access Publishing Cooperative Study](#). The operational and software development home for PKP, under the leadership of Managing Director Brian Owen, is at the [Simon Fraser University Library](#). SFU Library has a long tradition of developing open source software for research libraries and was a logical choice for taking on this role as PKP grew.

Since 2005, Alec Smecher has been the lead developer of OJS, as well as the overall technical architect for all PKP software projects, including Open Monograph Press (OMP).

PKP also enjoys the support of major [development partners](#) and has community-based [Advisory, Members, and Technical Committees](#), with representatives from the hundreds of libraries and other organizations that use our software.

Our community also includes developers, translators, documentation writers, testers, and hundreds of others who use, modify, and help to improve the software, for the benefit of everyone, in the best tradition of open source.

What are the improvements in 3.0 that we are going to love?

[There are so many](#), but perhaps the greatest is flexibility. OJS 3 makes it easier to customize your reader interface, your workflow, and the various roles and responsibilities. We've also put a lot of effort into simplifying the configuration of OJS, how the workflow operates, and the registration, submission, and review procedures. The first thing you'll notice is a much improved and more contemporary look and feel; OJS 2 out of the box was starting to look so 2005.

How long has OJS been around? What are your short term plans? Long term plans?

OJS 1.0 was released in 2001, so it has been around a long time.

In the short-term, we're listening to the feedback we're getting on the OJS 3.0 release and preparing a list of required refinements and additions for an upcoming 3.0.1 release later this year.

Medium-term (over the next 12- 18 months), we're looking forward to integrating new features and services that are emerging out of some of our research projects, including [article-level metrics](#) and automated Word to XML typesetting, as well as from new external projects, such as

[Hypothes.is](#), [Substance](#), [Fidus Writer](#), and others. We're also working on increasing the number of OJS journals in the [PKP Private LOCKSS Network](#) and the [PKP Index](#) as well as expanding the courses in [PKP School](#) (all of these are free services to the community).

Long-term, we're investigating a more article-based editorial option, eliminating the need for uploading multiple revisions of a word processor document and working directly on the text within OJS. And of course, we continue to do usability testing and our own research into ensuring OJS remains highly usable and useful for the rapidly changing world of scholarly publishing.

Where would you place OJS in the scholarly publishing system? What about the scholarly infrastructure system?

We're a small team, but we punch above our weight. With nearly 10,000 OJS journals, we are the largest open access publishing platform in the world. As an open source, decentralized platform, we need to have a different approach to our users than that of a centralized, proprietary enterprise. We can't, for example, control how each OJS journal customizes its user interface or what they choose to publish. However, we strongly believe that providing an open publishing platform and helping new publishers develop their skills will continue to be an important part of a more sustainable, academia-owned and operated alternative for scholarly publishing.

What services will or do you integrate with?

As an open project, we are always happy to integrate with other open projects. Some of those services include LOCKSS, Substance, Dataverse, Hypothes.is, and Fidus Writer.

How is OJS funded?

PKP has developed a diversified strategy to fund the ongoing support and development of OJS. The three main funding sources are: community support from our sponsors and development partners; research grants and awards especially for new development; and revenue raised through our commercial [PKP Publishing Services](#) division, which provides fee-based hosting, support, training, and customization services. All of the income generated the PKP Publishing Services is invested directly back into OJS development for everyone. SFU also provides invaluable in-kind support by providing a home that allows us to draw on all of the administrative services and support essential for PKP's daily operations.

What do you think about the state of openness in scholarly publishing? What kind of future would you like to see?

I'm pleased to see the growing recognition of the value and viability of openness. When I started working in this area, there was still a lot of skepticism about OA, but that seems to be much less. The community has done a great job of raising awareness. It is especially gratifying to see the increased role that libraries have assumed during the past decade to support scholarly publishing and OA in a very direct and proactive way.

There is still work to do in supporting publishing and publishing expertise outside of the North America and Europe, and we're pleased that OJS has played a small part in this, with over half of OJS journals, and PKP School students, being in the global south. Developing local infrastructure and local skills are key components in ensuring less dominant voices can be heard.

In terms of the future, I think we still have a long way to go in determining sustainable models. APCs aren't it, especially outside of big science and North America and Europe. Our research into open access publishing cooperatives, which brings together the major stakeholders — researchers, societies, journals, libraries, funders — is showing that this can be an important alternative model.

Any thoughts on the recent Elsevier patent for a peer review system (which cited OJS as prior art)?

Surprised and yet not surprised at the same time. The general title of the patent was initially quite disturbing, but reading through it, it was more specific and less alarming. Nonetheless, software patents like this are the opposite of openness and the traditions of scholarship, only serving to impede innovation and knowledge development for short-term, commercial goals. They said mean things about OJS, too. But hey, it's also a backhanded compliment of sorts if Elsevier felt it was necessary to single out OJS as one of their competitors.

Is there anything you wish I had asked?

What can we do to help support all of the work that PKP does?

Well, I'm glad you asked. There are a few things we'd love to see:

1. Add your OJS journal to the [PKP Index](#)
2. Sign up for the [PKP LOCKSS Network](#) to preserve your content
3. Read our [blog](#), follow us on [Twitter](#), like our [Facebook](#) page, subscribe to our [Youtube](#) channel, and sign up for our free [newsletter](#)
4. Share your stories on the [PKP Community Forum](#) - let us know what is working for you, and what we could be doing better
5. If you have made some useful customizations to the software, or have done a translation, [share them back with us on Github](#), for the benefit of everyone
6. Participate in a [usability testing](#) session of OJS
7. Join one of our [committees or interest groups](#)
8. Come to one of our regular [sprints](#) or [biennial conferences](#)
9. Consider becoming a [sponsor](#) or [development partner](#)

At the edges of academic copyright

Tue, 11 Oct 2016 13:39:10, Kevin L. Smith

[Category: all-posts]

Anytime that academic authors sue each other over a journal article, it is worth attention in this space. A couple of weeks ago, the U.S. District Court in Massachusetts [ruled in such a case](#), and the ruling raises some interesting points to consider for those of us involved in working with scholarly publications.

Note first that this is a very fact-specific case and a decision by a district court, so it is not a control precedent for anyone other than the parties. A decision would have more weight if this ruling were appealed, but, because the motive behind the lawsuit seems to have been more wrath than reason, I think that is unlikely.

The facts of the case are pretty common, even though the end result, a lawsuit, is not. A postdoc named Mallon was hired by a scientist at Brown University and together these two, with a third Brown faculty member, wrote an article in 2011 that was submitted to, and rejected by, the journal *Neuron*. The article was later sent to *PLoS Biology*, which required extensive revisions as a condition of publication. During this drawn out process, the relationship between Mallon and the faculty authors “deteriorated,” according to the court. Also, the article was revised extensively, with new experiments, new data and new text. Dr. Mallon disagreed with the inclusion of some of this new material and told the court that he did not have confidence in the integrity of the later versions of the manuscript. Mallon and the faculty authors had no communication for 15 months prior to the ultimate publication of the heavily revised article. The article was finally published in early 2013; Mallon’s contribution to the early draft was mentioned in the acknowledgements, but he was not listed as an author on the published version.

Mallon sued seeking a declaration that he was a joint author, and also asking the court to order that the article, which he claims in its published version is a product of scientific misconduct, be retracted by the journal. The court correctly notes that these two demands are irreconcilable. In order to meet the standard for joint authorship, which is to have created original expression with the intention that it be merged into a unitary or inseparable whole, Dr. Mallon undermines his own claim that the article in its final form should never have been published. Clearly his intentions in regard to the article changed over time. Ultimately, the court ruled that Mallon was not a joint author of the final version, because of this lack of intent, and also, I am glad to say, that court-order retraction would not be appropriate.

For me, the most interesting issue in this case is a controversy that the court did not resolve, because it did not have to. What is the legal relationship, under copyright, between that first draft, on which Mallon was listed as first author, and the final, published article, on which, according to the court, he was not an author at all? I have written before that the copyright in an academic article extends to all versions of that article; this is why publishers who receive a copyright transfer are able to dictate, as they usually do, how the authors of the article are allowed to use earlier versions - so-called pre-prints

and post-prints. This case raises a situation that tests the limits of that assertion, where the first version and the published version may differ so much that they would be considered separate works (or, perhaps, the later article could be a derivative work from the first draft), where distinct copyrights would exist. This certainly seems to be implied in a situation where someone is an author of one version and not an author of the other.

The possibility of distinct copyrights really turns on the degree of dissimilarity between the first draft and the final article. The court notes how different the final publication is, with all the new additions and revisions, from the first draft. There is, of course, a point at which a revision becomes a new work. That point will be different in each situation, and in many cases — perhaps most cases — there will be no such point. In other words, most final articles are not substantially dissimilar from the first draft; not different enough to be a separate and distinct work. This case exists at the edges, where the differences are much more substantial, apparently, than is usual.

As I have said, the court does not resolve the issue of where, or if, a separate copyright exists. It notes the concern expressed in *Garcia v. Google* that if every iteration of a work had a separate copyright, this would “make Swiss cheese of copyrights,” but notes that in *Mallon v. Marshall*, the case it is deciding, there is a logical division between the paper Mallon intended to contribute to and the one he disavowed so strongly. This is enough to decide the issue of joint authorship, so the question of distinct copyrights does not arise. The court specifically says that it will not rule on whether or not Mallon holds a copyright in the first draft (the defendants suggested that it was work made for hire) or whether the final version is a derivative work based on that first draft. These questions would help us define the boundaries of copyright in a work that goes through multiple versions. From this case, however, all we can conclude is that there are extreme cases where an early draft might be so different from the final published article that the copyright transferred to the publisher would not encompass some earlier iterations. Even in those rare cases, however, scholars would need to consider the value of what they have retained, since control over an early draft that is so different from the final article might have very little scholarly utility, precisely because those authors decided to make radical changes.

Publishing Art History Digitally

Fri, 21 Oct 2016 14:41:08, April Hathcock

[Category: all-posts]

Last week, I attended a symposium on [“Publishing Art History Digitally: The Present and Future”](#) that was sponsored in part by the NYU Institute of Fine Arts. One of the symposium organizers is a Ph.D. student with whom I’ve worked to navigate some sticky intellectual property issues related to an international collaborative digital art history project. She asked me to attend the symposium and come back the next day for an invitation-only workshop with several other symposium participants. The main focus of both the symposium and the workshop was to look at the ways art history journals are going digital and stepping into new modes of publishing and scholarship.

One of the main themes that seemed to run through the symposium panels and the workshop was the tension these scholars were experiencing in wanting to engage in and make available new forms of scholarship while still remaining respectful of traditional modes of scholarly creation and dissemination that in many places continues to dominate their field. As a scholarly communication librarian who works with scholars across multiple disciplines, this conversation was fascinating to me. Across disciplines, scholars are teasing out the implications of this tension between remaining faithful to the past and present while looking toward and planning for the future. It’s always interesting to hear how scholars in different disciplines navigate these questions based on their unique needs and priorities. But it’s also interesting to see the ways in which these various navigational paths overlap—realizing that the lessons learned in one space could easily be modified and applied in another.

I see great potential for libraries in helping to bridge that gap between devising unique discipline-specific strategies and learning not to reinvent the wheel, so much of my contribution to the workshop portion of the program involved sharing stories with the scholars and publishers about the ways their libraries can and should help with their work. Some of the scholars in the room had already made initial contact with librarians to discuss certain narrow issues and were eager to engage in fuller collaborative relationships. But for the majority of the scholars, the idea of working with librarians and archivists on their publications was a fairly new one. There was a lot of surprise in the room when I mentioned that [libraries have been doing a lot of forward-thinking work in the publishing space](#) and that we are eager to work with scholars on whatever projects they have going regardless of discipline. Certainly, the future of digital art history publishing could benefit from increased library involvement.

The workshop group plans to continue its work in the form of a best practices document or white paper outlining some of the issues discussed during our time together. And there is certainly a lot of eagerness to get more librarians and other information professionals involved. It was clear to me from the workshop and symposium that there is a lot of room for library outreach and collaboration with art historians who are publishing digitally.

Sci-Hub and the curious case of author attitudes

Fri, 02 Dec 2016 10:04:07, Shan Sutton

[Category: all-posts]

Sci-Hub has received a lot of attention in 2016. From multiple articles in *Science* and *The Chronicle of Higher Education* to Sci-Hub focused sessions at professional meetings, lots of folks have weighed in on the pros and cons of Sci-Hub and its undeniable impact on scholarly communication. Over the past six months I've attended programs on Sci-Hub at the ALA annual conference, the fall ARL membership meeting, and one here at the University of Arizona during Open Access Week. In reflecting on these experiences I'm struck by how Sci-Hub illustrates the apparent disconnect between authors' permissive attitudes toward sharing copyrighted materials and their willingness to sign publishing agreements that often make that sharing illegal.

In asking "Do you think it is wrong to download pirated papers?" a *Science* [survey](#) of over 11,000 respondents found that 88 percent answered "No." The accompanying story explains, "A closer look at the survey data indicated that respondents in almost every category embrace the rebellion, even those who have never used Sci-Hub or are 51 and older—84% and 79%, respectively, had no qualms." It seems fair to assume that a number of these respondents are also authors of works that are illegally posted on Sci-Hub, though that question was not posed in the survey.

Similarly, [interviews](#) conducted by *The Chronicle of Higher Education* with highly downloaded Sci-Hub authors reveal a shared comfort level with "pirated" articles being freely available. Professor Jordan Pober of Yale, "says he doesn't mind that many people download his paper free since he didn't make money from its publication." He goes on to clarify, "I'm torn in the sense I think it would be better for the science community if findings were made freely available. But I'm not sure how to sustain functions of society journals." His co-author Parwiz Abrahimi describes their article's popularity on Sci-Hub as "an honor." He further comments that "I never felt people were pirating my work," acknowledging colleagues in Iran and Afghanistan who rely on Sci-Hub for access.

The scenario of authors who are supportive of illicit access to their work that is owned by publishers has some precedent. Harken back to the flurry of takedown notices issued by Elsevier in 2013 in response to authors posting versions of their own articles that were prohibited by the publishing agreements they had signed. Authors who condone Sci-Hub's distribution of publisher-owned articles can have it both ways without personal culpability: they publish in the journals (which are often pay-walled) that are most important to them for recognition and advancement while Sci-Hub provides the unauthorized open access that expands their readership. Ironically, typical publishing agreements and their copyright implications are ignored by Sci-Hub but can have a chilling effect on institutional open access options like depositing in a repository.

I am admittedly painting with broad strokes on author attitudes in this arena. Some authors certainly object to Sci-Hub and its suspect methods of content acquisition, but I wonder how we might leverage many authors' comfort with illegal open access to increase their interest in utilizing legal open access methods. Sci-Hub may offer a conversation starter with faculty authors on the tension between their positive attitudes toward open dissemination of their work and their publishing behaviors that help create the context of illegal openness in which Sci-Hub operates.

Open Access policies: Protecting authors' rights

Sun, 04 Dec 2016 21:52:48, Shan Sutton

[Category: all-posts]

This is a guest post written by Devin Soper, Paolo Mangiafico, and Kevin Smith. The letter was originally submitted to Science, which declined to publish it.

In a recent [letter to the editor](#) of *Science*, Ilya Kapovich states that “unsustainable ethical and legal burdens are placed on faculty in schools with Harvard-style open-access policies.” While it is true that the terms of open access (OA) policies are sometimes inconsistent with those of standard publishing contracts, this legal complexity is the result of the unnecessarily restrictive and complicated language used in such contracts, which typically require authors to assign their copyright to a publisher, and which thereby work against the interests of authors, other researchers, and the public. In contrast, Harvard-style OA policies simplify this situation for authors, making it clear that they and their home institutions retain rights in the works they create, and thereby providing a means of redressing the systemic problems caused by restrictive copyright transfer practices. In this sense, and in addition to making thousands of articles available to those who otherwise would not have access, OA policies are designed to give faculty choices, allowing them to retain more rights in their work than they would under standard publishing contracts, giving them access to a range of tools and services to help them make their work OA — and yet also giving them the option to waive application of the policy with no questions asked.

It is worth noting that these policies are faculty-driven initiatives: rather than being imposed from without, they are devised, developed, and adopted by faculty governance bodies that are dissatisfied with overly complex, restrictive publishing agreements and the problems they cause. Further, there is no evidence to suggest that Harvard-model OA policies present significant legal risk to authors. Since 2008, these policies have been adopted by [over 60 schools](#), which have collectively made openly available tens of thousands of journal articles — and to date no evidence has emerged to indicate that any authors or institutions have had to defend legal claims from publishers after exercising the rights granted to them under their institutional policies.

We agree with Dr. Kapovich that the current landscape of publishing contracts is too complex. Academic authors can and should push against this complexity by challenging scholarly publishers to explain why such complexity, including full transfer of copyrights and a long list of legalistic restrictions, is still needed. A simpler approach, and one that leaves the authors in control of their own works, would be for authors to keep their rights, and only grant to publishers the non-exclusive rights they need to publish the work. This is what institutional open access policies aim to do.

Submitted on behalf of the Steering Committee of the Coalition of Open Access Policy Institutions (COAPI).

Devin Soper, Florida State University

Paolo Mangiafico, Duke University

Kevin L. Smith, J.D., University of Kansas

The fox guarding the henhouse? Or, why we don't need another citation-based journal quality index

Tue, 13 Dec 2016 11:01:46, Ellen Finnie

[Category: all-posts]

[Nature announced on December 8](#) that Elsevier has launched a new journal quality index, called [CiteScore](#), which will be based on Elsevier's Scopus citation database and will compete with the longstanding and influential Journal Impact Factor (IF).

Conflict of Interest

One can hardly fault Elsevier for producing this metric, which is well positioned to compete with the Impact Factor. But for researchers and librarians, there are serious concerns about CiteScore. Having a for-profit entity that is also a journal publisher in charge of a journal publication metric creates a conflict of interest, and is inherently problematic. The eigenfactor team Carl T. Bergstrom and Jevin West have done [some early analysis](#) of how Elsevier journals tend to rank via CiteScore versus the Impact Factor, and conclude that "Elsevier journals are getting just over a 25% boost relative to what we would expect given their Impact Factor scores." Looking at journals other than *Nature* journals – which take quite a hit under the CiteScore because of what Phil Davis refers to as Citescore's "[overt biases](#) against journals that publish a lot of front-matter" — Elsevier journals still get a boost (15%) in comparison with Impact Factor.

Perpetuating problems of journal prestige in promotion and tenure

But more broadly, the appearance of another measure of journal impact reinforces existing problems with the scholarly publishing market, where journal brand as a proxy for research quality drives promotion and tenure decisions. This tying of professional advancement, including grant awards, to publication in a small number of high prestige publications contributes to monopoly power and resulting hyperinflation in the scholarly publishing market. Indeed, I was recently informed by a large commercial journal publisher that a journal's Impact Factor is a key consideration in setting the price increase for that title—and was the first reason mentioned to justify increases.

Let's support an alternative

In an age when we can measure impact at the article level, journal quality measures should play a secondary role, behind article-level quality measures. As [Martin Fenner of PLoS](#) notes, journal measures create "perverse incentives," and "journal-based metrics are now considered a poor performance measure for individual articles." While traditional tools perpetuate journal prestige, article-level metrics and alternative metrics look at the full impact of an article, including for example

downloads; views; inclusion in reference managers and collaboration tools; recommendations (e.g. in Faculty of 1000); and social media sharing. As Fenner also reports, citation based metrics take years to accumulate, and don't necessarily capture impact in fields with more pragmatic applications of research, such as clinical medicine. Alternative metrics engage with more recent technologies: tweets have been shown in a [2011 study](#) to correlate well with – indeed to predict— citation rates. These metrics can be applied to data sets and other scholarly outputs well beyond the article. Such alternative metrics provide something new: an ability to “measure the distinct concept of social impact,” which, in our era of climate change and global health and social problems, is arguably as important as measuring more purely scholarly impact, by citations alone.

Scholars and librarians have choices about what measures they use when deciding where to publish and which journals to buy. [Altmetrics](#), EBSCO's [PlumAnalytics](#), and the nonprofit [Impactstory](#) provide citation and impact analytics at the article level, and expand the notion of how to measure the impact of research. The team behind Impactstory, funded by NSF and the Alfred P Sloan Foundation, describes their aim this way: they are “helping to build a new scholarly reward system.” While there is convenience — and inertia — in the long-standing practice of using journal citation measures as the key journal quality assessment vehicle, article-level and alternative metrics provide a needed complement to traditional citation analytics, and support flexible, relevant, real-time approaches to evaluating the impact of research. Our dollars and our time would seem to be well spent focusing on these innovations, and moving beyond journal citation-based quality measures as a proxy for article quality and impact.

Tracking the Magnificent Seven: Who do scholars want to read their Open Access books? And how do we know if they do?

Mon, 16 Jan 2017 12:14:23, Charles Watkinson

[Category: all-posts, humanities, monographs, open-access-outreach, scholarly-publishing, university-presses]

This post is co-written by Michael Elliott (Interim Dean, College of Arts and Sciences, Emory University), Christopher Long (Dean, College of Arts and Letters, Michigan State University), Mark Saunders (Director, University of Virginia Press), and Charles Watkinson (Director, University of Michigan Press).

As part of an initiative to explore the potential benefits of open access modes for disseminating academic monographs, we have found ourselves returning to basic questions about how we want to measure and understand what it is we do when we send a monograph out into the world. Every book is created from our basic scholarly impulse to enrich some aspect of the complex world we share. Yet when we seek to tell the story of its impact, we too often rely on narrow, dull, and/or inadequate measures — citation counts; print runs; downloads.

One way to shift this tendency to narrow and flatten the scope of scholarly impact is to give it more texture by identifying a wider range of possible audiences capable of creating transformative public communities. To that end, we have proposed a taxonomy of reading publics for the academic monograph who would particularly benefit from an open access approach. We believe that indicators of engagement with these seven types of readers could be used to tell a much richer story about a book's influence that could be persuasive to authors and funders. And we think the data sources to tell this story already exist.

Group 1: **Public policymakers** (local, national, international), and those that inform them (e.g., think-tank researchers, journalists). This would also include public and private funders.

Group 2: **International users** from areas with limited resources, especially in the Global South, including scholars working in universities and NGOs and potential overseas students.

Group 3: **Independent and loosely-affiliated scholars** in North America (e.g., faculty affiliated with less well-funded institutions, contract academic employees).

Group 4: **Teachers and students** interested in using a book for pedagogical purposes who might not be able to afford to do so (e.g., students, K-12 educators).

Group 5: **Technology-supported scholars** who benefit from greater ease of reuse/interaction, including scholars using machine interfaces to “read” a work.

Group 6: **Traditional scholarly users** who benefit from barrier-free access and may introduce these works into the undergraduate / graduate classroom more readily.

Group 7: **Practitioners and other specialist publics** of interest to the university. Especially those of strategic interest to a university (e.g., citizens of the state in which a public university is housed)

A variety of sources of information are now available to publishers wishing to track their success in reaching these audiences, even if the work of aggregating and communicating such information is still in progress. Altmetric providers (such as [Altmetric.com for Books](https://www.altmetric.com)) are able to provide information about mentions of books in policy documents, specialist blogs, open syllabi, social media, and conventional news sources. Web logs and Google Analytics can reveal the geographical spread of usage down to the city level as well as the source of referrals. Use by institutions of different types is tracked by aggregators that share data with publishers such as [JSTOR’s Open Access eBooks program](https://www.jstor.org/open-access). Finally, tools are becoming available to create user surveys that can be imbedded in ebooks, through initiatives such as the [“Mapping the Free Ebook Supply Chain”](https://www.umich.edu/freeebook) project being conducted by University of Michigan Press, Open Book Publishers, and the Free Ebook Foundation with support from the Andrew W. Mellon Foundation.

In our enthusiasm to tell the story of open access impact, we must always remember it is important to encourage the ethical and transparent use of indicators in order to protect the rights of the reader and to acknowledge the many aspects of humanistic scholarship that cannot be measured quantitatively. We must be clear that we are not interested in tracking the identity of users beyond an aggregate level that does not reveal private information such as gender, race, or religion. Luckily, library privacy policies provide good guidance as to ways to protecting the rights of the user while still learning how to improve and sustain our open access publishing projects.

Our taxonomy is a work in progress. As we think through the issues around measuring the impact of open access scholarship, we’re interested in your comments. Do the seven groups resonate? What potential audiences have we missed? What other indicators of engagement might deepen our attempts to tell a richer story about impact?

It's the Internet, stupid!

Tue, 31 Jan 2017 10:48:53, Kevin L. Smith

[Category: all-posts]

This quote is from a 1996 letter written by then-Register of Copyright Marybeth Peters to Senator Orrin Hatch of the Senate Judiciary Committee about why the Copyright Office belongs in the Library of Congress:

Put simply, copyright differs from industrial property in fundamental respects. Most other countries, like the United States, have recognized this difference, handling copyright issues in their ministries of culture or education, and patent and trademark issues in their ministries of commerce or trade. While copyright, like industrial property, has important commercial value, it also has a unique influence on culture, education, and the dissemination of knowledge. It is this influence that logically connects copyright to the Library of Congress in contributing to the development of our nation's culture.

In my opinion, Register Peters was exactly right in what she wrote, so it is interesting that 20 years later she seems to take the opposite side in this long-standing debate, writing in a letter to a new group of senators and representatives, which was [made public by the advocacy group Artist Rights Watch](#), that:

The placement of the Copyright Office in the Library owed more to an accident of 19th century history than to a carefully considered plan for effective management. Since that time, the role of the Register and the importance of copyright has grown, and the competing missions and differing priorities of the Library and the Copyright Office have increasingly emerged as a source of tension.

Register Peters is entitled to change her mind, of course, especially as the social and political landscape changes. But the earlier letter suggests that the change has not been a matter of centuries; it only took two decades. So what has changed in that time that could lead to such a radical turnabout?

I think the obvious answer is that the explosive growth of the Internet over the past 20 years that has caused changed. More specifically, it is the impact that the Internet has had on competition in the content/communication industries.

Twenty years ago, the Copyright Office's perception of itself as a champion of the content industries, specifically big publishers, music companies and movies producers, made a good deal of sense. Now, as the digital environment has lowered the barrier for entry in to the realm of content creation and distribution, what once seemed natural now looks anti-competitive. The CO, and its former leaders, are in a position of taking sides in favor of the legacy industries — that they thought of themselves as

serving for so long — and in opposition to new (and often more popular) forms of consumer entertainment.

That this is still the case is evidenced by the [rapid move of former Register Marie Pallante from the CO to a position as CEO of the Association of American Publishers](#). The revolving door between the CO and those legacy industries, which hardly raised an eyebrow in past decades, now is disturbing in what it says about the lack of impartiality in the administration of our nation’s copyright system.

No industry genuinely welcomes competition, of course, so there is a constant jockeying for position in hopes of getting the thumb of government influence to weigh the scales against those who would offer “my” customers a choice.

If the Copyright Office has long been a mouthpiece for the legacy content industries, it is this new fear of competition from new technologies that has propelled its change of direction. It is no longer about shared national culture, it is about who gets a bigger piece of the pie.

These industries could, of course, listen to their customers and work to produce new products that compete better and meet the needs and desires of consumers. But it is easier, unfortunately, for these companies to fight against the innovators and to ask the government to shield them from competition, while muttering [dark and absurd suspicions about a Google-financed cabal](#).

Marybeth Peters was correct when she wrote to Senator Hatch about why the Copyright Office belonged in the Library of Congress. It is unfortunate that fear of legitimate competition from the industries that the CO regulates has led to this change of heart and, in my opinion, specious argument. The idea of a shared commitment to promoting and preserving our national culture is still the foundation for the [powerful argument supporting a continuing link between the Copyright Office and our national library](#).

Crisis, What Crisis? Why OA Might Work for Historians

Thu, 02 Feb 2017 12:43:46, John Sherer

[Category: all-posts, monographs, scholarly-publishing, university-presses]

Last month I was invited to participate in a panel on Open Access at the annual American Historical Association meeting in Denver. One of my colleagues led their presentation with the astute comment that the way most historians react to OA is with apathy. After all, the economics of traditional monograph publishing work pretty well in history and the book is still the coin of the realm in this field. If OA is a solution to an economic crisis, then history should be the last place we need it, right?

More broadly, the discipline of history is wrestling with all things digital. To their credit, the AHA recently launched a new set of [guidelines for the professional evaluation of digital scholarship](#). On the other hand, they've had what I would label a [less progressive stance](#) on the posting of dissertations on IR's. They regrettably (although perhaps accurately) pointed to university presses as one of the key reasons for recommending embargoes, on the assumption that a press won't publish a manuscript if an early version is freely available. I've tended to call bullshit on this notion, since that stance would beg the question, why are presses spending tens of thousands of dollars to transform and improve these works while publishing them if the first draft is all that most scholars need? I welcome scholars comparing dissertations to the finished books published by my press any day of the week. There's no better way to see the value we add than going through this exercise.

But back to Denver, the panel drew a nice crowd although there was the occasional odd notion in the questions from the audience ("If you publish openly on the web where annotation can occur, how do you control the quality"?) revealing some confusion about the difference between content and formats. But overall, I was impressed with the dialog among scholars, publishers, and librarians.

I even presented a hypothetical model for how university presses might bring OA history monographs into the world (more on that in a future post). While I was neither pelted with tomatoes nor carried out as a conquering hero, it was clear that even within a relatively conservative field like history, the benefits associated with unfettered access to new scholarship is beginning to emerge.

To me this is an important step. When OA is described as a silver bullet for the broken business of monograph publishing (and it is broken, just less broken in history), then the debate gets muddled around issues of money, prestige, and resources. But when we frame it another way—*there's an alternative model that maximizes dissemination, discoverability, and reuse*—then it doesn't matter what we call it. Such a model isn't a solution to any crisis as much it is a new and in many ways superior strategy for publishing the valuable work done by authors in partnership with scholarly presses.

OA beyond APCs: a conference report

Mon, 20 Feb 2017 14:23:57, Kevin L. Smith

[Category: all-posts]

This is the Conference Report from the Symposium on Open Access : Envisioning a World Beyond APCs/BPCs that was held at the University of Kansas last fall. The symposium generated international attention and some great conversations. This report was written by Robert Kieft, Ada Emmett, Josh Bolick, and Rebecca Kennison.

On November 17-18, 2016, the [University of Kansas Libraries](#) (KU), [Open Access Network](#) (OAN), [Allen Press](#), [Scholarly Publishing and Academic Resources Coalition](#) (SPARC), and [Association of Research Libraries](#) (ARL) sponsored an international symposium, *Envisioning a World Beyond APCs/BPCs*, at the University of Kansas in Lawrence, Kansas, USA. The symposium [brought together a group of 18 panelists and 9 respondents](#) and offered a first session [livestreamed](#) for a worldwide audience. The remainder of the meeting was structured as an “unconference” focused on key ideas raised by participants’ statements and the ensuing discussion during the opening event. The symposium asked the participants to consider current models available for achieving an expansive, inclusive, and balanced global open publishing ecosystem, one that does not depend on the payment of article- or book- processing charges (APCs or BPCs) for publication.

The symposium was organized in part as a response to the December 2015 [Berlin 12 Open Access invitational](#) conference, which focused on “flipping” the current subscription model of scholarly publishing to one that provides free access to readers. While the goal of that conference was to begin to develop a global consensus to redirect subscription expenditures toward sustainable OA business models, some raised concerns that the mechanisms proposed in Berlin would favor a model based on APCs paid for by authors or their institutions that may be unaffordable in some regions of the world. The Kansas symposium sought to include in its discussions voices from the global south, including Latin America and Africa, where traditions of scholar- and institution-supported OA publishing exist but budgets for APCs do not. The organizers’ goal was to foster a space where voices from around the world could preliminarily examine and exchange methods for designing and financing the scholarly publication system so that it is both open and free to authors as well as readers, so that it redirects subscription expenditures toward sustainable OA business models.

The 1.5 day symposium opened with a 2-hour session that was livestreamed and viewed at over 350 sites around the world. ([Transcripts, the livestream and project outcomes](#) are also archived now in KU’s repository, KU ScholarWorks.) During the first half of the session, which was introduced by KU Libraries’ Ada Emmett and Kevin Smith, the 18 participants offered 2-minute lightning remarks in which they were asked to identify gaps in the scholarly, funding, and publishing communities’ knowledge about OA publishing models. The second half of the livestreamed session shifted to a conversation (moderated by Smith) among both panelists and on-site respondents that included reactions and questions posed through Twitter and a public Google document by viewers around the world.

The session closed with commentary by symposium respondent April Hathcock, who noted from the panelists' gap analysis and the Twitter feeds that the symposium could have been titled "Envisioning the Global North Beyond APCs," given that APCs seem to be both a fixation and quick fix by the global north that only harms the already successful OA global south. It was proposed that the problems of APCs and an APC-future were the global north's to solve.

Building on the opening 2-hour livestream session and Hathcock's observations, participants met in plenary in the afternoon. The group decided to have three afternoon sessions—the plenary, a breakout session, and a closing plenary. The first plenary was used to provide the participants from and/or working intensively in the global south with the opportunity to highlight the significant advances in and challenges for non-APC OA in their local contexts and to share the traditions of and arrangements for institution-based publishing already in place. Small groups then met to brainstorm four topics that emerged during the morning sessions as barriers to an open access future: effecting the transition from a market approach to an open approach, ensuring scalability of current OA projects, enabling OA publishing ventures to become competitive with commercial ventures, and establishing broad collaboration among OA publishing ventures.

Friday morning's discussions considered the extent to which a global academic community might create a more equitable OA publishing system, that is, one without costs to readers or authors. Taking up themes that emerged in the Thursday sessions, the group broke into four teams to develop scenarios for a publishing system that would meet a number of requirements and serve as the basis for agenda setting:

- present a solution that is free for readers and for authors — in this case APC-free;
- work in the local context and create partnerships that incorporate a variety of global situations, including those marginalized by historical, political, and economic power structures;
- acknowledge and suggest paths for addressing perceived barriers and challenges to the proposed scenario;
- present an agenda for action;
- envision a 5- to 10-year transition that includes universities as a major stakeholder in a knowledge production and sharing environment that will benefit all readers and authors;
- be scalable — something that interacts with the local but could be scaled up to the global.

The symposium generated a significant amount of online activity as well as vigorous and thoughtful discussion in Lawrence. During the course of the event, symposium participants who have deep investments in or diverse vantage points on programs for OA were challenged to step back from their agendas and work from the several perspectives brought from many parts of the world and other

disciplines and professional arenas. That challenge remains in play for this group as well as the OA community in general as experiments with models and tactics continue to emerge or evolve.

Participants reported feeling energized by the symposium and its challenges and are hopeful about further collaboration as work continues. Organizers and participants are currently sifting through notes and recordings, documenting and making available the proceedings, and setting an action agenda. Notably, one group from the Friday morning session is already pursuing further discussion and a possible letter of intent to a funding agency for the scenario they developed. Participants foresee continuing this work by expanding participation in the group — especially to those invited but unable to attend, including foundations, and those from scholarly communities and organizations not represented in-person at the symposium, notably people from Asia, Australasia, and Eastern Europe as well as other parts of Africa and South America — submitting grant proposals, designing future conferences, and continuing to develop models for a world beyond APCs/BPCs.

Free the Science: One Scholarly Society's bold vision for open access and why it matters now more than ever

Tue, 21 Feb 2017 08:36:33, Ellen Finnie

[Category: building-open, hybrid-open-access, post_tag: preprint-servers, scholarly-publishing, scholarly-society-publishers]

[The Electrochemical Society](#), a small nonprofit scholarly society founded in 1902, has an important message for all of us who are concerned about access to science. Mary Yess, Deputy Executive Director and Chief Content Officer and Publisher, could not be clearer about the increased urgency of ECS' path: "We have got to move towards an open science environment. It has never been more important — especially in light of the recently announced '[gag orders](#)' on several US government agencies— to actively promote the principles of open science." What they committed to in 2013 as an important open access initiative has become, against the current political backdrop, truly a quest to "free the science."

ECS's "[Free the Science](#)" program is designed to accelerate the ability of the research ECS publishes — for example, in sustainable clean energy, clean water, climate science, food safety, and medical care — to generate solutions to our planet's biggest problems. It is a simple and yet powerful proposition, as ECS frames it:

"We believe that if this research were openly available to anyone who wished to read it, anywhere in the world, it would contribute to faster problem solving and technology development, accelerate the pace of scientific discovery, encourage innovation, enrich education, and even stimulate the economy."

How this small society — which currently publishes just 2 journals — came to this conclusion, and how they plan to move to an entirely open access future, is, I believe, broadly instructive at a time when our political environment has only one solid state: uncertainty.

ECS's awakening to OA was jump-started by the 2013 [OSTP memorandum on public access to research](#). It became clear to the ECS that while their technical audience had perhaps not at that time fully embraced open access, the OSTP memo represented a sea change. By spring of 2013, the board had resolved that ECS was heading towards OA, and they launched a hybrid open access option for their key journals in 2014.

And here's where the story gets even more interesting. If you look only at their first offering in 2014 or even their current offerings, you won't immediately see their deeper plan, which goes well beyond

hybrid OA. For ECS, as Yess clearly indicates, “Gold open access is not the way to go.” In fact, ECS “doesn’t believe in gold open access,” seeing it as “just a shell game.”

As Yess explains it, “If we hit tipping point to all gold OA, the big commercial players will simply flip all their journals to OA, and the subscription money from library budgets will come out of author budgets, costs will spiral up and we’ll be in the same escalating price environment we’ve been suffering from for years.” So Yess is “skeptical about gold working. Given the size and market share of the large STM publishers, they will make Gold OA work to their stakeholders’ benefit, and it will not benefit researchers and their communities.”

There is broad (though hopefully not divisive or overly distracting) debate about whether the [APC market will function well for research libraries](#), and what [adjustments to this APC market](#) might make it work. But meanwhile, what’s a society – the sole nonprofit society to still be publishing their own journals in the relevant disciplines – to do? ECS’s multi-pronged and contingency-based path is one we could all benefit from watching. What they envision is “a community of people supporting the content.” Their insight is to work in the same framework they have had since 1902 – community support— but to evolve what that community support looks like.

Under their subscription-based publishing model, they had relied on a combination of library subscriptions, the Society’s own coffers, and authors’ page charges. Competition from commercial publishers forced ECS to eliminate page charges and to rely on subscriptions and other revenue to support the publications program. This model has already shown signs of falling apart, with ECS, like many smaller societies, increasingly edged out by big deals from major publishers which preclude cancellations of their journals.

So ECS felt they needed to think differently. Starting with offering hybrid OA in their flagship journals (rather than launching new OA-specific titles) has allowed the ECS to “test the waters” and has introduced OA to their community of scholars, generating interest around all of the issues. They started with a two-year program offering generous numbers of APC waivers to members, meeting attendees, and all library subscribers. This has resulted, as they hoped, in raised awareness, good uptake, and recognition for their OA program.

Then in 2016 they introduced [ECS Plus](#), through which libraries can opt to pay a bit more than the cost of single ECS APC (which is \$800) to upgrade their subscription to the package of ECS journals, and as a result have all APCs waived for authors on their campuses who choose the OA option. Since its launch, ECS has seen a small but encouraging growth in this program. They now have about 800 subscribers, and “there is some evidence the library community feels this is a valuable program,” Yess says.

ECS aims to become “platinum OA” by 2024 – entirely open access, with no APCs, operating fully in what Yess calls an “open science environment.” They expect to take many roads to achieve this goal. One is reducing publication costs. Toward that end, they have entered an agreement with the [Center for Open Science](#) to build, at no cost to ECS, a new digital library platform which, once adopted, will reduce ECS’s publication costs.

In addition, this platform will allow ECS to fulfill the “need to move beyond the original concept of open access in standard journals, and beyond the idea of being a publisher in the old sense of journals, articles, issues – to get beyond containerized thinking,” Yess says.

Moving beyond those ‘containers’ will be more possible given their work with the Center for Open Science to offer a preprint server. The preprint server will be built on the same [platform and framework](#) as the preprint servers SocArXiv and PsyArXiv, and will integrate with preprint servers outside of the Open Science Framework such as bioRxiv and arXiv. ECS hopes to launch this preprint server in beta next month.

While reducing costs and breaking out of old containers, ECS will also need to generate non-subscription revenue if they want to balance the books. They want to work with the library community to obtain a commitment to pay some kind of cost, possibly looking at a model inspired by SCOAP3. They also plan to seek donations and endowments from organizations and research funders. And if the cost reductions and new revenue streams don’t provide a sufficient financial foundation, Yess says that APCs are “a contingency plan” for ECS.

Regardless of which of these roads the ECS takes, for Yess, the overall direction is clear: “Scholarly publishing has to change. Period.” Their solutions to the need for change are generated from their own context, and are certainly not one-size-fits-all. But regardless of whether the specific mechanisms work for other societies, what is instructive from the ECS approach is that they are embracing new realities, envisioning a new, open, scholarly sharing environment, and are building their future from their original base in a community of science and technology. They are finding a way to maximize the potential of the digital age to support their mission to “free the science” for the betterment of humanity.

In this time of tumult and doubt on our national stage, when the merits of science – and even the existence of facts — are questioned at the highest levels, ECS’s doubling down on OA and open science can help those of us committed to leveraging science and scholarship for all of humanity, everywhere, see a hopeful way forward, a way that keeps us moving toward our aim of democratized access to science.

Disclosure statement: I am a member of the ECS Group of Advisory Librarians (EGALs). ECS did not, however, suggest that I write about their program in this blog, and had no role in framing the questions I asked Mary. The MIT Libraries adopted the ECS Plus program in the first year it was available.

Moral Rights and Fair Use

Fri, 24 Feb 2017 12:57:58, Kevin L. Smith

[Category: all-posts]

I have a conflicted relationship with the idea of moral rights in copyrighted works. Because I saw my work as a scholarly communications librarian as focused on helping academic authors understand their rights and use them to further their own goals and the goals of scholarship writ large, I have often been sensitive to the lack of a real attribution right in U.S. law. I even [wrote an article](#) in 2010, in which I suggested such a right as a potential improvement of our law. Nevertheless, the difficulties associated with incorporating moral rights into U.S. copyright are substantial, so this topic has remained unresolved in my own mind. newrambler.net/ramblings/wp-content/uploads/essay

Late last month, the Copyright Office forced my hand, as it were, by publishing a Notice of Inquiry (NoI) that requests comments on the possibility of amending U.S. copyright law to include the moral rights of integrity and attribution. To be more accurate, they have initiated a review of the current state of protections for those rights — all signers of the Berne Convention agree to protect these moral rights, as well as the economic rights that are the core of U.S. law — and to consider if additional protections should be enacted. I recommend [reading the Notice of Inquiry](#) because it provides a clear overview of what moral rights are, what Berne requires, and how the U.S. has traditionally viewed our own response to those obligations. The ten questions posed as the specific subjects of the NoI do an excellent job of focusing the issues.

Moral rights, of course, refer to the “non-economic” rights over creative products that are afforded to authors and other creators in many countries of the world. Traditionally, these are a right of attribution and a right of “integrity,” meaning the right not to have a work distorted in a way that damages the reputation of the creator. These rights are considered personal to creators in a way the economic rights are not; some countries do not permit them to be transferred to others, for example. Most significantly, the Berne Convention, which the U.S. joined in 1988, requires member states to provide protection over moral rights. The U.S. determined, at the time it joined Berne, that our existing laws were sufficient to protect these rights, and no additional legislation was introduced, with one exception. Now the Copyright Office wants to review that situation.

On what basis has the U.S. argued that moral rights are already adequately protected under our current law? First, we have asserted that the [Lanham](#) Act, which provides for trademark protection and prohibits “false designation of origin,” provides some protection against misattribution. This claim was tested in a 2002 Supreme Court decision in the case of [Dastar Corp. v. Twentieth-Century Fox Film Corp.](#), which held, at least, that the Lanham Act does not prevent the unattributed copying and use of a work that is no longer protected by copyright. The late Justice Scalia was clear in his opinion for the Court, that trademark law cannot be used to “create a species of mutant copyright law that limits the public’s “federal right to ‘copy and use’ expired copyrights.” But whether false designation of origin could be used to enforce attribution for a work still in copyright remains an open and debatable question.

The one exception to the U.S. refusal to enact specific moral rights into copyright is the “[Visual Artists Rights Act](#),” enacted in 1990 to give attribution and integrity rights to a certain group of visual artists. VARA is narrow in its application and subject to a number of exceptions that have been the cause of a lot of disputes, so it is hard to argue that it, by itself, provides sufficient protection for moral rights. Indeed, an academic author might well wonder why her colleague who teaches painting or photography is entitled to protection (possibly) that her own scholarly works do not get.

A few additional ways to ensure attribution and integrity that are often mentioned are, first, the right that is included in U.S. copyright law over derivative works, which presumably provides some opportunity to protect the integrity of a work, and, second, the ability of copyright holders to use licensing (i.e. contract law) to require attribution and preserve the integrity of a work. This latter point is an important acknowledgement of the role that Creative Commons licenses have, especially for academics and artists; those licenses are often the best mechanism creators have to protect their moral rights, which is why CC-BY is so vital for scholarship (this point is raised in the Notice of Inquiry, especially in question 7).

Recourse to the right over derivatives as a way to protect integrity really raises, for me, the key issue about moral rights – how do they comport with the strong protection of free speech in the U.S.? This is, in fact, the fourth of the specific questions posed in the Notice of Inquiry. A strict right over derivatives might be an effective weapon for rights holders to use to prevent criticism, comment, parody, and other acts of free expression that both benefit society and embody the purpose of copyright in the U.S. Fair use developed largely to prevent copyright from being abused to suppress protected speech; the role of fair use in parody is one key example of that role. So, if fair use is necessary to prevent the economic rights—especially the right over derivatives—from becoming an anti-free expression weapon, how could we ensure that separate moral rights do not pose the same risk? Would fair use apply to moral as well as economic rights?

The fear that moral rights could be used to chill free speech, especially as a way to enforce a stricter rule against defamation than the U.S. currently does because of the First Amendment, was expressed nicely by Allan Adler of the Association of American Publishers during a [symposium on moral rights in 2016](#). Adler correctly notes that moral rights might eliminate the need, under libel and slander laws, to prove that a statement was false in order for it to be found defamatory. A standard of “damaging to reputation” (under a moral right of integrity) would be quite different, and could significantly compromise the right of free expression.

Overall, the philosophy behind moral rights is rooted in European ideas of copyright as a natural right, a fundamental aspect of a creator’s personality. American law has consistently rejected that philosophy in favor of a utilitarian approach, where copyright is an economic tool to incentivize creation, with limitations to prevent it from growing beyond that role. As much as I struggle with the idea that attribution is the right thing to do, especially in scholarly works, I remain unconvinced about moral rights. I fear that adopting such rights would compromise the fundamental nature of American copyright law, and that what we lost would be far greater than what we would gain. At the very least, fair use would have to extend as a limitation over moral rights, and it is not clear how that would work, or that

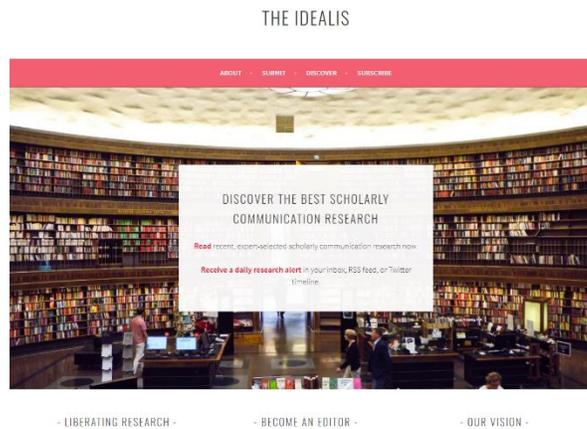
such limited moral rights would actually position the U.S. better vis-a-vis Berne. Overall, I come down on the side that says what we already have to protect attribution and integrity is adequate, and any efforts to increase those protections would be more risky than beneficial.

Perhaps for a different post, it would be interesting to consider whether judges could improve the situation for scholarly authors by including attribution as a consideration for fair use in some situations. Other countries often do make attribution a requirement for various educational uses under the umbrella of “fair dealing,” so it is not a far-fetched idea. Still, like the rest of fair use, treating attribution as an additional factor in the analysis would have to be handled carefully and could only be applied when the totality of circumstances surrounding the use were considered and it was found that attribution improved the fairness of the use without diminishing the communicative force of the new work. In other words, we would come back to free speech concerns.

Coming Soon: The Idealis - A Portal for Finding Curated OA LIS Research

Mon, 06 Mar 2017 12:08:08, April Hathcock

[Category: all-posts, libraries, scholarly-publishing]



On March 15, founding editors Stacy Konkiel and Lily Troia, both of Altmetric, and Nicky Agate of the Modern Language Association, will officially launch [The Idealis](#), a portal for connecting to curated open access library and information science scholarship. Operating on the WordPress plugin Press Forward, The Idealis will include annotated lists of open access scholarship written by, for, or of interest to information professionals. Curation will be done by volunteer editors with expertise in the field. Each editor will serve on two-week rotations during which they will nominate pieces for inclusion in The Idealis platform using the Press Forward plugin. Initially, the collection will consist entirely of works focused on scholarly communication, but the hope is that The Idealis will soon grow to include scholarly work from a wide-range of library interests, including critical librarianship, public librarianship, school librarianship, and more.

The aims of The Idealis are simple: to help connect library and information science scholars to high-quality, open access work in and connected to their field. To this end, the founding editors take a broad view of “scholarship” and encourage the inclusion of works that may not otherwise receive a lot of attention but are nevertheless important to the advancement of the field. These could include blog posts, presentation notes, infographics, and other forms of alternative or “grey” literature.

Keep a look-out for the official launch of The Idealis on March 15 and spread the word. Also, if you are interested in serving a two-week term as a general editor, feel free to fill out the [information form](#).

In the words of founding editors, Stacy, Lily, and Nicky, “You don’t have to be an idealis(t) to imagine a better future for library-related research. Let’s start building that future today.”

What friends are for

Thu, 09 Mar 2017 11:54:44, Kevin L. Smith

[Category: all-posts]

It might be necessary to remind readers that the copyright lawsuit brought by Oxford University Press, Cambridge University Press and Sage Publishing against Georgia State University is still going on. It began in 2008, and after losing all of their major points at every level of the litigation, it would be easy and sensible to conclude that the publishers had walked away, as most sensible plaintiffs would have done. But these are not sensible plaintiffs; they, or the folks who call the shots and pay the bills for them, are fanatically determined to push their alternate view of copyright law ever up the hill, no matter how often it rolls back on them.

Thus we have another appeal to the Eleventh Circuit Court of Appeals, following the second trial court judgment, rendered after the 11th Circuit sent the case back on a remand order. Since the 11th Circuit had undermined all of the major principles the publishers were trying to establish, it is not very surprising that that second trial court ruling also went against them. What is a little surprising is that they are going back to the 11th circuit to complain, yet again.

This second appeal is at the stage where amici curiae (friends of the court) are filing briefs in support of one side or the other. In [a recent blog post](#), David Hansen of Duke covered some of the points raised in the brief by the Authors Alliance on behalf of GSU. I would like to review some of the arguments made by [the Library Copyright Alliance \(LCA\) in its brief, which also supports GSU](#).

The LCA brief begins by noting the foolish persistence of the publisher plaintiffs. The brief suggests that the publishers actually got the best probable outcome way back in 2009, when the Georgia Regents adopted a new copyright policy. That changed the case, and it made it much harder for the publishers to “knock out” fair use for e-reserves in through litigation. But they kept going, making ever more unlikely arguments over excerpts that were used over three semesters eight years ago. One possible explanation, if a reasonable explanation for these unreasonable actions can be found, is that the plaintiffs are essentially trying to re-litigate issues that the Court of Appeals already decided three years ago, something that U.S. law tries hard to prevent.

But the brief discerns a deeper, more sinister motive for the publishers’ behavior: “Having failed to strike a knockout blow, Publishers now seek death by a thousand cuts.” The LCA suggests to the Court that publishers are using their deep pockets to keep alive futile litigation in order to create a chilling effect on other universities. This is probably correct, although it indicates just how out-of-touch these plaintiffs really are. My impression is that this case has become something of a joke to many in the academic community, and that policies and practices for providing digital resources to students have moved well past most of the issues that publishers are fighting over with such comical determination.

One issue raised by the brief, however, is important and timely. The LCA suggests that the trial court failed to analyze the second fair use factor as fully as it should have. This is a problem not just with this

trial court but with many, indeed most, applications of fair use. Courts tend to look at the second factor, the nature of the work used, only in terms of information versus fiction, highly creative works versus those that are more factual. As the brief points out, however, the second factor is the place to consider “whether the work is the kind of expression that requires copyright incentives for its creation.” In other words, why is this particular type of work written, and what are the expectations of the authors of this kind of work? Distinguishing between highly creative works and those that attempt to convey information is really just a surrogate for this deeper inquiry. Courts should be asking, as the brief points out quoting an article by Robert Kasunic, “whether copyright might have reasonably encouraged or provided an incentive for an author to create the work.”

In the case of academic works, the LCA argues, it is recognition and prestige, not profit, that academic authors are seeking. Since the rewards that copyright offers are not a significant incentive for creation, the purpose and nature of copyright itself argues that these works should be more accessible for fair use than a commercial movie or a best-selling novel. Thus, according to the brief, a proper second-factor analysis would find that the second factor favors fair use for all of the excerpts at issue in the litigation.

The publishers, of course, do not like an analysis based on incentive, since they want to be able to substitute their own profit motive for the authors’ reasons for creating the work in the first place. But profits for intermediaries, if they are to be relevant to a fair use analysis, must serve some role in incentivizing creation. Since, for most academic works, any share in those profits is withheld from authors, the market that copyright is intended to create fundamentally fails in this area, so these works should be subject to a much wider field for fair use.

In its final section, the *amicus* brief from the LCA tries to return the Court of Appeals to the fundamental situation that is at issue. What impact would it have on higher education and academic publishing if institutions were compelled to license each provision of even a small portion of a work to students in digital form? Those licenses are very costly, so it is quite clear that some other priority would suffer if this extra money were paid to publishers, and the most likely source of those funds would be library collection budgets. Thus, paying to license materials that have already been published and purchased would reduce universities’ ability to purchase or license new materials. Publishers might create a new income stream, but it would be offset by lost revenue from sales. Education and the production of new knowledge would be harmed, and academic publishing would begin to look a lot more like copyright trolling, rather than the dissemination of learning.

The LCA is asking the Eleventh Circuit Court of Appeal not to let this happen. We can only hope that they listen.

A Restart on the eBook License Agreement

Mon, 03 Apr 2017 14:44:49, John Sherer

[Category: all-posts, digital-collections, humanities, license-agreements, monographs, scholarly-publishing, university-presses]

Last month, I attended the [Charlotte Initiative Open Conference](#). This Mellon-funded project brought together publishers, librarians, and technology providers to explore a reconsideration of the transactional models between publishers and libraries for eBooks. To quote the [initiative](#), “Our starting premise is that permanent acquisitions of eBooks requires these licensing terms:

- Provision of irrevocable perpetual access and archival rights.
- Allowance for unlimited simultaneous users.
- Freedom from any Digital Rights Management (DRM), including (but not limited to) use of proprietary formats, restricted access to content, or time-limited access terms.”

I was invited to be on the project’s advisory board two years ago and I’ll admit the premise seemed like quite a stretch at that time. In a climate where the rhetoric of accountability is paired with market-optimizing tools like DDA and EBA, the idea that libraries will only buy our most successful books and then insist on broad usage terms like the Charlotte Principles just felt like a non-starter. As John Unsworth mentioned in his conference keynote, publishers operate in the world of risk and libraries have historically helped academic publishers mitigate risk by building deep monograph collections. Predatory publishers figured out how to game this system, forcing libraries to use “accountability” as a reason to reduce monograph purchases despite the arrival of digital platforms making them less expensive and more accessible than ever. As a director at a public university press, I can attest to the acute pain that strategy has had on mission-driven non-profit publishers and on the humanities and social science disciplines we support. More on that in a moment.

Let’s first step back to the world we thought we lived in six to eight years ago in monograph publishing. At that moment, the business appeared to be migrating swiftly to digital. We were going to be the music business with content being downloaded and stored in clouds, bookstores (and libraries?) going away, publishers being disintermediated and the few remaining ones would consolidate. So to protect our businesses, publishers sought new digital rules to duplicate our familiar analog models. Instead of selling a physical book, we’d sell an eBook. Using the prism of the old order to imagine the new one is a classic trap during a paradigm shift. In the case of monograph publishing, this approach ignored the reality that digital versions of our books want to be “of the web” and need to be discoverable, shareable, and reused in ways that previous generations would have marveled. Instead, publishers insisted on clumsy barriers aiming to create artificial scarcity and delimit access.

The good news is that the marketplace has stabilized significantly since then. Print has shown a surprising durability while digital formats are becoming the key to discoverability. To be clear, print sales

for monographs are still inexorably declining, but that is a persisting trend that goes back decades and to pin it on the arrival of digital formats ignores that historical reality. At the same time we're getting a glimpse into the future as there are a number of OA experiments underway now that will provide data on the long-term impact on print revenue when digital editions are widely available.

So now back to the Charlotte Initiative Principles and trying to find a better way. What I like about the principles is they empower librarians to be excellent dissemination and preservation partners. But for publishers to be able to offer terms like this, we need librarians to get back in the game of sharing risk. I will never forget one of my first bosses in publishing naively asking, "Why don't we just publish the big books?" Small books make big books possible and if you strive for a marketplace of *only* big books you'll get no books. The new purchasing models embraced by libraries are resulting in the strategy of trying to only buy the big books. This will end badly for publishers, authors, and librarians.

In his discussion of risk, Unsworth thoughtfully offered the distinction between university presses and commercial presses (I've worked in both). Commercial publishers look to offload risk to increase potential profits. University presses need insurance against risk to succeed in their mission of publishing valuable scholarship. AAUP president Darrin Pratt has recently offered several thoughtful [blog posts](#) quantifying the value and efficiency UPs exhibit in doing this. We like accountability too. But frequently lost in the mix is how UPs add value in filtering, clarifying, and amplifying scholarship. Librarians and academic institutions should be supporting that activity as a service and not as an output of products. In doing so, these libraries and institutions would receive the vast output of university press scholarship. They would strengthen the non-profit presses who can help address other defects in scholarly publishing. They would support the advancement of humanities and social science fields. And they would demonstrate the value of long form writing, reading, and learning in an ungraceful age of fake news, 140-character-distillations, and incipient anti-intellectualism.

What are the next steps for open access?

Fri, 07 Apr 2017 15:24:04, Kevin L. Smith

[Category: all-posts]

Recently there has been a spate of comment expressing frustration about the allegedly slow progress of open access, and especially Green open access. It is hard to disagree with some of this sentiment, but it is important that frustration not lead us into trying to solve a problem with a worse solution. The key, I believe, to making real advances in open access is to walk away from the commercial publishers who have dominated the market for scholarship. Only if we do that can libraries free up money from our collection budgets to do truly new things. A new business model with the same old players, even if it were possible, would be a mistake.

The most articulate call for an open access future for scholarship – the Budapest Open Access Initiative – was issued fifteen years ago, in February 2002. There is no one better qualified to speak about the meaning of that declaration today than Professor Jean-Claude Guédon, who signed the original Budapest statement and last month published [a brilliant and compelling article about where we are and where we need to go next in the movement toward open access scholarship](#).

Guédon covers a lot of ground in his article “Open Access: Toward the Internet of the Mind.” I want to focus on two points, one I think of as a warning and the other a signpost.

As part of recounting the development of open access from the BOAI to where we stand today, Guédon talks about the development of the APC funding model, where authors, institutions, or funders pay per article charges to make journal articles OA. He notes, and although it is an obvious point it still struck me when I read it clearly articulated, that APCs developed as a way for commercial publishers to exploit the movement toward OA for their own profit. That is, this business model is only a sensible way to finance open access if one accepts that the traditional commercial players must remain part of the equation in an open access world. Not only is that assumption not obvious, it also has some unfortunate consequences.

As Guédon points out, so-called “predatory” journals (Guédon calls them “pseudo-journals”) can only exist because of the APC business model:

Such journals have exploited the APC-Gold business model. One could add that without APCs, the “predatory” journals could not exist. Part of the attraction of the APC model is that it provides a risk-free way to publish, since all costs are covered upfront... The first consequence of this illegitimate business strategy is a pollution of the scientific archive. The second result is more indirect: the presence of “predatory” journals makes all lesser-known titles more questionable (p.12).

This last point is especially important, I think. The APC business model does more than just provide a way for traditional commercial publishers to make money from open access, it also helps to delegitimize perfectly respectable forms of OA publishing because of the taint of “predatoriness.” There are, of course, predatory practices throughout the publishing industry, and they take a lot of different forms. But the attention given to “predatory OA,” which is the bastard child of the efforts by Springer and Elsevier to profit from OA, causes suspicion to fall on any journal that does not have the right branding.

In this context, it is easier to see why the proposal that came out of the Max Plank Institute to “flip” all subscription journals to APC-Gold open access is such a bad idea. It is the fruit, in my opinion, of frustration rather than careful reflection. Major commercial publishers like Elsevier and the [STM Publishing association](#) have already rejected the idea, and since their cooperation is key, that in itself should kill the plan.^[1] But there is a deeper harm that would result from an all-APC approach to OA.

At the recent ACRL Conference in Baltimore, I attended a session about predatory publishing, which unfortunately focused exclusively on predatory OA practices, but did acknowledge that the root problem, APCs, was a creation of the commercial publishing sector. The interesting data for me, however, were expressed in a map showing that the “victims” of predatory OA journals were overwhelmingly from the Global South. That is, the high cost of “real” APCs is driving scholars from the developing world into the arms of those offering low APCs and little or no actual publishing support.

In a “flipped” OA world, APCs would have to rise further; this is a point made clearly by Elsevier and the STM publishers in their response to the Max Plank proposal. And that would make this problem for the developing world even worse. The “acceptable” outlets for scholarship would be even more closed to those scholars than they are now, and the lure of predatory publishing would be much greater. A proposal to flip scholarly publishing is actually a form of scholarly colonialism, shutting out the Global South, forcing scholars from half the world to choose between predatory publishing or the charitable whims of large Western conglomerates.

If a flipped model that depends on APCs is not the way forward, what is? Here Guédon gives us some clear signposts pointing forward. He calls on libraries to reimagine themselves “as interconnected nodes that help a knowledge infrastructure emerge (p14).” He directs our attention to the OpenAIRE project in Europe, which, as he says:

While starting from a large set of repositories... has decisively moved to the level of a full network. This leads to the creation of a distributed server system making possible the recovery of any document deposited anywhere in the network. The network is built on top of national systems and it is woven together through a set of protocols and standards to ensure interoperability (p. 16).

Guédon goes on to outline some of the opportunities that such a network built on top of repositories make possible, including linking publications and their underlying datasets, open peer review, and text and data mining.

In the U.S. we do not have the advantage of national networks, of course, nor the investment of centralized funding, for the most part. But we do have a resource that might offer a starting point for this next step in making open access a more robust and sustainable approach to knowledge creation and sharing – the consortia to which many of our libraries belong.

Our consortia often function as primarily as “buying clubs” that negotiate to reduce the cost of purchasing commercial products. The future of that role, however, is doubtful; more and more libraries are backing away from “big deals,” either because they have to for financial reasons or because they realize that these deals, while good for commercial publishers, and not in the best interest of our universities. Consortia need to redefine their roles every bit as much as libraries do, as the movement away from commercial publishers accelerates.

I want to suggest three ways that library consortia can help universities begin to wean themselves from the unsustainable system of scholarly communication that developed in the era of printing and begin to usher in the next stage of open access scholarship:

- Consortia are well placed to develop the infrastructure to connect our institutional repositories and to develop services on top of them. This step would increase the effectiveness of Green OA exponentially, and open up opportunities, such as text and data mining, that we currently seem to rely (wrongly, imo) on permission from commercial interests to exploit.
- Consortia could help broker a coordinated approach to library publishing, where specific groups of universities take on particular disciplines in which to publish. Thus strong nodes of disciplinary expertise and a critical mass of materials could be created. Such coordinated publishing, undertaken in collaboration with university presses and scholarly societies, could be a key to breaking the grip that legacy publishers have over scholarship.
- Consortia could organize conversations amongst provosts and presidents about how scholars and scholarship are evaluated. Libraries often think of this as an intractable problem, and political forces, as well as inertia beset our conversations on our own campuses. One way to break this logjam is to gather together a critical mass of campus leaders and guide them in a conversation with each other. For the most part they know that the current system is absurd, using surrogates for quality that were never intended for that purpose. In fact, we spend millions – billions, collectively – to purchase social capital from commercial entities, even while the work that builds that capital is done *pro bono* by our own faculty. More than anything else, this system cries out to be reclaimed by our universities. Consortial conversations, where our campus leaders have a chance to talk and bargain with each other, might be the way forward.

[1] I have read Elsevier’s “Thoughts on the Max Plank White Paper” and have a copy in my possession. I have been told, however, that it is a private document, and I was asked not to share it widely. The arguments it makes, about why publishers are unwilling to give up the subscription model and how APCs would have to rise in any “flipping,” are essentially the same as those expressed in the STM statement.

When is enough enough?

Mon, 08 May 2017 16:25:24, Kevin L. Smith

[Category: all-posts]

The lawsuit is really a rather local affair; an action brought by Louisiana State University against Elsevier alleging breach of contract. But the facts raise significant questions for all Elsevier customers, and especially for public universities that do business with the publishing giant (which is to say, all of us). Even more significant, I think, is what the specific circumstances, and some of the comments made about the lawsuit, tell us about the future of scholarly communications. In my mind, we have reached the “enough is enough” point with Elsevier.

By now many will have already seen news reports about the lawsuit; there are stories and comments [here](#), [here](#) and [here](#). So I don't need to go deep into the details of the case. Suffice it to say that the dispute centers on whether or not LSU's campus subscription agreement with Elsevier includes the School of Veterinary Medicine (SVM). For some while the SVM did have a separate, duplicate contract with Elsevier. Elsevier, of course, loves such double-dipping and appears to actively encourage it. In this instance, new leadership at LSU officials determined that they could let the duplicative contract lapse, because the campus contract so clearly includes the SVM. Recent tweets from Elsevier have denied this, but the [agreement is an attachment to the public complaint that LSU has filed](#), so anyone can read it and discover that the SVM is included in three distinct ways. First, the SVM is included in the geographic identification of the “sites” covered by the agreement, since the SVM is located on the main LSU campus in Baton Rouge. Second, the students and faculty of the SVM are included in the count of users which forms the basis for the pricing in the agreement. Finally, the designated IP ranges in the campus agreement include the IP ranges for the Vet School. Frankly, this is an easy call, and Elsevier's breach when they shut down access for some of those designated IP addresses seems quite clear.

The approach that Elsevier is taking seems to be based on the fact that the SVM library at LSU has a separate budget. The company appears to believe that each and every library budget on an academic campus must include a substantial slice for Elsevier, and even their own contracts should not be allowed to stand in the way of their fundamental rapaciousness. This is precisely why I believe we must go the other way, by extricating ourselves as academic institutions from any financial involvement with Elsevier. Elsevier simply does not care about scholarship, content or access; they only care about revenue; this makes them an unacceptable partner in the academic enterprise.

During the course of the negotiations that led up to this lawsuit, LSU officials heard what many of us have heard, explicitly or implicitly — “you will never pay Elsevier less.” This is reflected in the “commercial solution” that Elsevier has proposed, which would require LSU to subscribe to \$170,000 worth of journals they do not need or want, and to pay nearly as much as the separate SVM contract cost (comically, Elsevier uses that “nearly” as a way to call this proposal, which would needlessly cost LSU \$200,000, a “savings”). None of this is surprising; all librarians know that Elsevier will negotiate about anything but price, and that their view of their entitlement is the unmovable foundation of all negotiations with them. The LSU situation, however, really puts into sharp focus Elsevier's insistence

that it, not the institution, must control spending and access decisions. Ultimately, if Elsevier's financial and subscription demands are permitted, they — a foreign corporation with no values other than profit — will shape what scholarships we can give, what research we can do, and which faculty get tenure. This is not acceptable.

Even more unacceptable are the implications of Elsevier's decision not to accept the service of process in this lawsuit at their New York offices. The LSU agreement, like all contracts with public institutions in the U.S., has a clause that designates the law of Louisiana as the governing law for the agreement. But Elsevier is now saying that, as a Dutch company, they must be served in the Netherlands using the complex processes dictated by the Hague Convention. This is NOT a normal procedure in this kind of lawsuit, and it is probably just a bullying tactic intended to draw out the lawsuit and raise its cost for LSU, in hopes that the University will back down. Nevertheless, it ought to make all U.S. universities ask ourselves if these clauses actually have any meaning. If Elsevier reserves to itself the right to interpret everything in its agreements unilaterally in its own best interests, the legal requirement that state institutions only submit to the law of their own state may not be met, even when Elsevier agrees to insert such clauses. We simply may not be able, as a matter of our own state laws, to enter into an agreement with a company that behaves this way.

In the last few weeks, I have had the opportunity to interact with two lawyers from outside of academia who have each studied the situation we all find ourselves in when we try to do business with Elsevier. From very different perspectives and based on different legal situations, both lawyers arrived at the same conclusion — you cannot do business with this company. Both recommended that American universities need to find ways to extricate themselves from relationships with Elsevier; that we develop strategies to do so as quickly as possible, and that our freedom from Elsevier should be a long-term commitment.

I began to [propose the outlines of a long-term strategy](#) in this blog post from last month. I was interested to see that a short-term strategy was [suggested by the the Association of Universities in the Netherlands in a press release](#) that describes their inability to negotiate a subscription agreement with Oxford University Press. They point out five options for faculty researchers in a post-OUP (and, by extension, a post-Elsevier) world: requesting articles through ResearchGate, Academia.edu and other international networks, making direct requests from authors, finding Green OA versions of articles in repositories, using interlibrary loan, and finding OA versions using Unpaywall and the Open Access button.

In recent years, librarians have become very concerned about so-called predatory practices associated with some open access publishers. These practices, while concerning, are nowhere near as harmful to the academic mission as are the practices at Elsevier. We are like that metaphorical frog being slowly boiled. We have become dependent, or at least we believe we are dependent, on Elsevier, and cannot make the decision that it is time for us to jump out of the pot. But the water is way too hot right now, and we must, for the sake of our institutional missions, jump soon.

Singing Out Loud: Fair Use in an Opera MOOC

Thu, 08 Jun 2017 08:48:56, Kevin L. Smith

[Category: all-posts]

This is a guest post by **Barbara DeFelice**, Program Director for Scholarly Communication, Copyright and Publishing at the Dartmouth College Library.



Dartmouth offers a small number of MOOCs, selected from faculty proposals, through the [DartmouthX](#) infrastructure. This includes a cross-unit team of librarians, educational designers, students and faculty. Dartmouth is providing this level of support for faculty to develop MOOCs in order to influence long-standing teaching practices through experiments in the MOOCs that are evaluated and brought into the on-campus learning experience.

Among the changes we see is a deeper understanding of transformative fair use in the teaching context, most notably through the development of the DartmouthX course [Introduction to Italian Opera](#). The instructor, Professor Steve Swayne, needed to allow the students to view clips from different performances in order to illustrate his points and to engage the students with the material. That is allowed in the classroom under [U.S. Copyright Law section 110](#), described as “performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction”.

The Opera MOOC provided a case that demanded different approaches and methods. The DartmouthX Opera course team felt strongly that all the content needed to be made available to all students even after the course was over, so neither classroom use of performances nor the TEACH Act applied. The instruction needed to be developed and filmed ahead of time, and so it was important to have a high degree of confidence that all the content in a video could be used for the MOOC audience. From on-going work providing education and outreach to the Dartmouth community about copyright, fair use, and permissions for using works in teaching and scholarship, the librarians had materials to guide the Dartmouth faculty in making a transformative fair use determination. However, this is not exercised very often, because it takes time and work on the part of the instructor.

When faced with the need to incorporate high quality video and audio, the team decided to make a transformative fair use case. The course team used guidelines developed by Dartmouth librarians in consultation with Dartmouth’s General Counsel for using copyrighted materials in DartmouthX courses. The amount used had to be only what was needed to make the teaching point, and the video and audio clips needed to be embedded into the lecture where the instructor commented on just those portions. This allowed the Introduction to Italian Opera MOOC to include clips of the most relevant and compelling video and audio performances into the instructional video lectures. This approach required in-depth deliberations and detailed work on the part of the course team, but all involved felt it was worth the effort. An example of this transformative fair use of copyrighted video is in the [Introduction to](#)

[Italian Opera](#) Act 1, Scene 2, “Examples of Opera before Mozart”. Here, a video clip of Monteverdi’s *Orfeo* plays while Professor Swayne asks the viewer to consider how the music carries the message, which is a major theme of the course. Building on this work, the same team has developed a new MOOC, [Introduction to German Opera](#), which launched in spring 2017.

Having worked through the copyright questions posed in the Italian Opera course with such good results, we now have more ways to incorporate copyrighted video and audio into the DartmouthX courses as Dartmouth continues to develop MOOCs in selected topic areas.

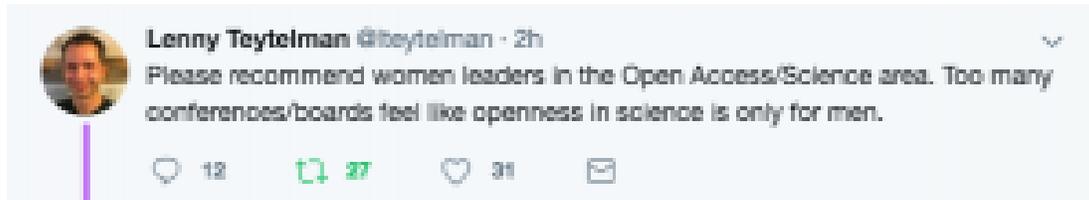


Women Working In the Open

Tue, 20 Jun 2017 14:27:03, April Hathcock

[Category: all-posts, diversity-and-inclusion, hybrid-open-access, oer, open-access-outreach, open-access-policies]

I came across this question on Twitter recently, and it got me thinking about something that I think about quite a bit:



Screenshot of tweet by @lteytelman

I do a lot of work around diversity, inclusion, and representation in librarianship, publishing, and higher education. And I get a lot of questions like this from people looking to diversify their lists of potential collaborators, speakers, etc. I've even [written a bit about ways to incorporate diversity into our programming and work](#).

As my friend and colleague [Tara Robertson](#) pointed out in this Twitter exchange, not having these names is not really the problem. The work we do in scholarly communication is still very much beset by racism and sexism. White male voices are very often overrepresented in the conversations; other voices are severely underrepresented. A [recent study of the Association of College and Research Libraries ScholComm listserv](#) bears some of this out, albeit on a limited scale in terms of data collection and analysis. The fact is, simply having a list of names isn't enough if there's no accompanying commitment to dismantling the structural inequities and meaningfully incorporating more of these voices into our conversations.

Nevertheless, in the hopes of helping well-meaning people like Lenny Teytelman to spread the word about women doing work "in the open," I offer up this [starter list](#). This list is by no means meant to be comprehensive, but should hopefully be a starting point for diversifying the conversations and collaborations in scholarly communications. It's also open for editing so feel free to add more names.

Is the copyright world tired of exhaustion?

Wed, 19 Jul 2017 13:38:19, Kevin L. Smith

[Category: all-posts]

Over the last two weeks, I have been putting together a syllabus to teach a course in copyright law at the University of Kansas law school. Although I have taught copyright a lot, I have never done so in a formal law school class, so this is both an exciting and intimidating process for me.

As part of planning a class session about the doctrine of first sale, I was doing a little bit of research about the *Capitol Records v. ReDigi* case, which squarely confronts the issue of whether or not first sale can survive in a digital age. The case has been going on for a while, so I will claim the process of creating a syllabus as my justification for writing about it now.

As many readers will know, in the past few years the Supreme Court has significantly clarified and strengthened the doctrine of first sale, or “exhaustion,” as it is known in many countries, by ruling that the doctrine applies, in both copyright and patents, even to items manufactured and sold abroad. The idea, of course, is that after the “first sale” of any copyrighted work, the exclusive right to control further distribution of that particular copy of the work is “exhausted.” Hence both first sale and exhaustion as names for this doctrine, which clearly allows lending and resale of physical copies. But the question is, can the doctrine move from the realm of physical objects to the digital environment? Can you, in short, resell your music files or eBooks? If not, in what sense do you own those items?

ReDigi developed a platform to allow people to do just that; it facilitated resale of iTunes music files. The company worked pretty hard to design a system on the “one in, one out” principle, where, at each stage of a transaction, the system would verify that a file had been deleted on the source computer once a copy had been delivered to a new machine. Thus a seller could upload the file to ReDigi and the system would verify that the original had been deleted, and the same process would repeat when the file was sold to a new “owner” and transferred to them. If any digital re-sale system could make a case for the application of first sale, ReDigi seemed like the one.

Unfortunately, the district court in the Southern District of New York didn’t see it this way. In the lawsuit brought against ReDigi by Capitol Records, Judge Sullivan of the SDNY court [ruled back in 2013](#) that ReDigi operated “a clearinghouse for infringement” and essentially shut the company down. In its decision the court insisted that the doctrine of first sale applied only to material objects. Because digital resale always involves making a copy, first sale could not apply, the court felt. The copy the buyer would have would be different from the copy the seller had “owned,” so there could be no first sale defense, even in a “one in, one out” situation. Essentially, this ruling suggests that ownership of digital content is radically different from ownership in the analog world. The district court also rejected ReDigi’s proffered fair use defense.

Now there is an appeal of the decision, [which has come with a twist](#). ReDigi has filed for bankruptcy, and Capitol Records has asked the bankruptcy court to force a liquidation of the company (Chapter 7) to

pay the judgment against it. ReDigi is seeking a reorganization (Chapter 11), contingent on the outcome of its appeal. As the linked article says, the debate is about whether ReDigi faces a contingent judgment, which might be reversed on appeal, or a fixed debt. Obviously, Capitol Records is extremely confident.

Nevertheless, the appeal, in the Second Circuit Court of Appeals, raises some interesting issues, and [the amicus briefs make for interesting reading](#). The [brief from the American Library Association](#) focuses primarily on the fair use argument; it is particularly interesting in the way it looks at specific exceptions in the copyright law, such as first sale, as policy decisions that Congress has made which can inform a court's think about fair use. In a sense, this brief makes the argument, surely correct, that a fair use analysis is not done in a vacuum, but should take account of the overall scheme that the law has created, and make judgments within that context.

Two other briefs, as reported in the story linked above, make especially interesting arguments. The group of law professors who wrote in support of ReDigi make precisely the point I have emphasized, that this is a whole new definition of ownership in the digital environment:

“By eliminating all practical methods of transferring digital purchases, the District Court completely foreclosed the sorts of secondary markets – used book and record stores, libraries, garage sales, even gifts and bequests – in the digital marketplace that have played a crucial role in promoting access and preserving culture in the analogue market”.

Of course, this is precisely the point. Just as in the *Kirtsaeng* litigation and several other lawsuits, the content industry is trying to use copyright to give it a kind of market power that no other industry has. For at least a century, various content producers or intermediaries have wanted to leverage copyright to set prices, reduce competition, and, especially, eliminate secondary markets. From their point of view, this is not a bug in the district court's ruling, it is its most important feature.

Two aspects of the [brief filed by the Association of American Publishers \(AAP\)](#) are noteworthy, I think. First is the cataclysmic language that it uses; it describes the consequences of a reversal in the ReDigi case as “catastrophic” for the publishing industry and claim it would “swamp” their ability to sell ebooks. We often see this kind over-the-top language about the consequences of specific court cases from the industry; they were sure that *Kirtsaeng* would put them out of business as well, and are equally hyperbolic in their claims in the Georgia State case. I am confident that the same kind of language was used when the Supreme Court created the doctrine of first sale in the U.S. with its decision in *Merrill v. Strauss*, back in 1908.

The other point is that the AAP brief essentially argues throughout that the courts must protect their business model. The AAP often seems to forget that they are arguing about the law, and simply tells the court that it is obligated to keep them, the publishing industry, as hugely profitable tomorrow as it is today. But copyright is not about any specific business method or industry; it is to “promote the progress of science and the useful arts,” and the needs of no specific industry should be allowed to

derail a court from pursuing that purpose. What is more, the <http://blog.jipel.law.nyu.edu/2017/03/capitol-records-llc-v-redigi-inc-and-the-future-of-digital-resale/> doctrine of first sale is unique among the limitations in copyright; section 109 of the copyright law says very clearly that [first sale is an entitlement](#): “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, *is entitled*, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord”(my emphasis). If this right to resell is an entitlement that is attendant on owning a copy, then an alteration of first sale really is a redefinition of ownership. This is a radical position for a court to take; it might be far less presumptuous for a court to either readjust its conception of a “copy” or to use fair use in this case, as in so many others, to create a more equitable situation.

Foibles and follies, part one

Wed, 13 Sep 2017 12:18:15, Kevin L. Smith

[Category: all-posts]

It has been a while since we have posted to this site, and I want to catch up by sharing some thoughts about a few odd or disturbing developments from the past month or so.

Let's start with a recent folly, the "settlement" in the infamous "Monkey Selfie" case. The [New York Times proclaims the settlement proposed on Monday as "a victory of sorts"](#) for the monkey and his friends. The "friends," of course are PETA, the People for the Ethical Treatment of Animals, who brought the case as Naruto's "next friend," trying to establish that the monkey, who they named Naruto, owned the copyright in the picture he apparently snapped. It is [not at all clear that PETA even knows which monkey it is representing](#), since in court papers they identify Naruto as a six-year old male, but the original photographer whose copyright claim PETA is disputing, David Slater himself identified the photogenic macaque as a female.

In any case, [this settlement](#) is no victory; to me, it looks like PETA is frantically trying to stop digging a hole they have gotten themselves into.

In the settlement, PETA agrees to drop its appeal of the decision from the District Court, which held that a monkey can not hold a copyright, and Slater agrees to give 25% of the licensing royalties he might collect for the photo to a charity to benefit Indonesian macaques. It is unclear how much money that could be, since the pictures have always been freely available all over the internet, and Slater has complained that he is nearly bankrupt from litigation costs. But the real point of the settlement, in my opinion, is its request that the Court of Appeals vacate the decision in the lower court. Here it is PETA's own face that they are trying to save, not Naruto's. The lower court not only said that a monkey cannot hold rights, which would be a damaging precedent for PETA's on-going publicity-oriented litigation campaign, but also cast doubt on PETA's standing to act as next friend for a group of animals. If that decision, as clearly correct as it is, is allowed to stand, it would be a serious obstacle to PETA's fundamental strategy. So PETA is asking the Ninth Circuit to heal their own self-inflicted wound.

The tragedy here is that PETA will accomplish little to benefit macaque monkeys with this motion and will do real damage to sensible copyright law, all to save themselves from the consequences of their own self-serving effort to generate attention. The lower court was exactly right; copyright is a creation of human law designed to have a specific effect within the context of human economic systems. It is silly and arrogant to assert that an animal can hold a copyright. Even more worrying, however, is that by approving the settlement and vacating the lower court's decision, the Ninth Circuit will perpetuate the myth that every thing must be owned by someone. The loser here is the public domain, which means all of us, especially because recognizing Slater's licensing income further clouds the status of the photos, which ought to be clearly held to be PD. All because PETA brought a foolish lawsuit and now is trying to avoid the predictable outcome of their own folly.

Early Career Researchers as key partners for dislodging legacy publishing models

Fri, 15 Sep 2017 12:06:08, Shan Sutton

[Category: all-posts]

It's been a busy summer for OA in Europe. On one hand, nationally coordinated efforts in places like Finland and Germany have sought (unsuccessfully so far) to pressure Elsevier into better subscription pricing and OA options. On the other hand, a group of early career researchers (ECRs) at the University of Cambridge are looking to mobilize fellow ECRs to embrace open models that are not controlled by commercial entities. In my view, these divergent approaches illustrate why we should focus our collective energies away from strategies in which commercial interests retain control under new economic conditions (see also, proposals to flip subscription payments to APCs), and towards working with ECRs and others who envision a return of scholarly dissemination responsibility to the academy.

One aspect of the Finnish [No Deal, No Review](#) boycott that seems especially telling is that signees refuse to serve as reviewers or editors for Elsevier journals, but make no such commitment in terms of ceasing to submit articles to those same journals for publication. That is probably a bridge too far for many who feel compelled to meet traditional promotion and tenure expectations of publishing in prestigious journals that are often controlled by publishers such as Elsevier. While the Finnish position is admirable in a general sense, even if the demands for better economic terms are met, Elsevier would remain a profit-driven conduit through which dissemination occurs, though with slightly less robust profit margins.

Conversely, the ECRs involved with the [Bullied into Bad Science](#) statement urge their colleagues to "Positively value a commitment to open research and **publishing practices that keep profits inside academia** when considering candidates for positions and promotions (in alignment with DORA)." (**Bold** added.) In a related [article](#), Corina J. Logan describes this as the "ethical route to publication," which she contrasts with the "exploitive route to publication" that typically involves subscription, OA, or hybrid journals from commercial publishers who extract from the academy the funds, labor, and content required to maintain a journal. Of course, a root problem is so many scholars willingly give up their intellectual property and labor in support of commercial publishers who are logically driven to maximize profits via funding from the academy through either subscriptions or APCs.

It's encouraging to see some ECRs challenge these publishing models, even while they must navigate promotion and tenure criteria that may temper their OA practices. My interactions with junior faculty repeatedly reveal that many naturally gravitate to open models, an observation that is confirmed by ECR initiatives such as Bullied into Bad Science and [OpenCon](#). I suspect the "ethical" vs. "exploitive" dichotomy presented by Logan will find increasing traction among ECRs. I hope it will also galvanize their support for OA models that are owned and managed by the academy to dislodge commercial control of scholarly dissemination. Proactive outreach to ECRs through local means like new faculty orientations and graduate student/post doc organizations, as well as through ECR-focused OA initiatives, should be

an important element of shaping an OA future in which they will thrive. This includes soliciting ECR input and buy-in while designing OA publishing platforms to fully enable their interest in “ethical” options.

Foibles and Follies, part two

Thu, 21 Sep 2017 08:20:28, Kevin L. Smith

[Category: all-posts]

The second folly I want to talk about is somewhat embarrassing, since it is my own. Publication contracts are always an adventure for academic authors, of course; we are routinely taken advantage of by publishers who know that publication is a job requirement and believe they have us in a stranglehold. I once read a comment by a lawyer who works with authors that signing an agreement with one of the major publishers was akin to getting into a car with a clearly intoxicated driver – no sensible person should do it. So in this story I have no one but myself to blame. Nevertheless, I want to tell folks about it because it was not one of the big publishers that treated me badly; it was my own professional organization, the American Library Association.

The publishing arm of the ALA asked me last spring if I was interested in writing or editing a book on a particular topic that they identified. I was interested and, after talking with some colleagues and devising a plan that would combine some long essays with shorter case studies, enjoying, I hope, the best of both monographs and edited volumes, I agreed.

Once our proposal was accepted by ALA, we got to the point of negotiating a publication agreement. Our editor was quite accommodating about most of the issues we raised, but on one point he was inflexible — the indemnification clause. As most authors know, these clauses are used by publishers to shift most of the risk of running their business to the authors, the people who have the least control over the process and are least able to actually defend any lawsuit. Sometimes, of course, these clauses are moderate and really try to balance the risks. But not the ALA's. Here is the clause I agreed to:

“The Author shall indemnify and hold the Publisher harmless from any claim, demand, suit, action, proceeding, or prosecution (and any liability, loss, expense, or demand in consequence thereof) asserted or instituted by reason of publication or sale of the Work or the Publisher's exercise or enjoyment of any of its rights under this agreement, or by reason of any warranty or indemnity made, assumed or incurred by the Publisher in connection with any of its rights under this agreement.”

The clause goes on to say that “The Publisher shall have the right... to defend such claim, demand suit, action, proceeding or prosecution by counsel of its own selection and at Author's expense....”

As I say, I am embarrassed to have signed this; were it not that, at that point in the planning, there were a dozen other people involved who are writing case studies, I would have walked away. I consider this clause shocking for a couple of reasons.

First, I am indemnifying ALA for anything that might go wrong, even if I have nothing to do with it and no control over it. This is notably worse than many indemnification clause, which often are limited to actions that the party making the indemnification has some control over. But here, even if ALA publishes the book with artwork on the cover that they fail to license properly, I could still be held liable for their mistake, even though it was unrelated to my authorship of the text. This is not just my interpretation, by the way; the editor admitted to me that he understood the contract the same way.

Second, I cannot even decide for myself how the action will be managed. ALA has absolute control over who the lawyer would be who dealt with whatever problem arose and what the legal strategy would be. My role is just to pay the bill. In a later sentence, the ALA does acknowledge that I might take control of some legal action, but only “with prior written approval of the Publisher.” They have all the control, I am responsible for all the costs. Nice work if you can get it.

I did try to change this, of course. I was told that ALA’s position was that this clause, unlike the rest of the agreement, could not be altered in any way. I asked to talk with the lawyer who wrote it and was told I was not allowed to, because it was non-negotiable. Even more than the actual provision, this inflexible and patronizing attitude was deeply offensive. To add insult to injury, the editor tried to make me feel better by telling me that this was just legal language and would never actually be enforced. This “don’t worry, we will never actually do the terrible things this agreement allow us to do” attitude is endemic in academic publishing, and it is obnoxious; if you don’t mean it, don’t include it, and if you insist on it, you obviously DO mean it.

It is not really news that publishers abuse authors. But the ALA preaches values that are contrary to these practices. As librarians, we support authors and encourage creativity, yet this exploitative agreement patronizes authors who write for the ALA and puts them at unconscionable risk. I have regretted signing this contract since the moment I did it. I will write/edit the book because I believe it will be valuable. But I think that I will not renew my ALA membership when it comes due; I no longer believe that the organization represents the values that matter to me as a librarian.

Foibles and Follies, part three

Wed, 27 Sep 2017 08:41:17, Kevin L. Smith

[Category: all-posts]

The final foible I wanted to write about in this series of posts involves a distressingly common situation – a copyright holder who does not understand what the rights they hold actually are.

This is not the first blog post to point out that Human Synergistics International is pretty clueless about copyright. Almost five years ago, the TechDirt blog [made an effort to school Human Synergistics about fair use](#). Apparently it did not work; they seem to continue to misunderstand the copyright law.

Human Synergistics is a leadership and organizational development company that offers, among other things, simulations to help people experience real management situations. At some point, at least, it was possible to purchase materials from Human Synergistics, and there are libraries out there that own materials they marketed. One such library got in touch with me recently because they were having a contentious exchange with Human Synergistics and wanted to inquire what I thought.

According to the librarian I spoke to, a representative of Human Synergistics was contending that the library could not lend, nor even display on public shelving, a DVD that they held rights to. The representative of the company repeatedly cited section 113 of the copyright law. The librarian later sent me a copy of an “Agreement to Comply with Copyright Regulations” that she had been given by Human Synergistics and that confirmed to me their fundamental misunderstanding of copyright law. As she had told me, it would have bound the library not to do anything “in violation of section 113 of the U.S. Copyright Act, Title 17 of the United States Code.”

I told the librarian that this agreement was fundamentally meaningless. But the library decided that they would not sign it and would, instead, withdraw the DVD from their collection, not because they have to, but in order to avoid a conflict.

The problems with this exchange are numerous, so let me try to enumerate them.

First, section 113 is about the “scope of exclusive rights in pictorial, graphic or sculptural works.” A quick look at the definitions in section 101 of Title 17 will tell one that a film falls into the category of motion picture, so section 113 actually has nothing to do with the DVD that the library owns. That is why I told the librarian that the agreement was meaningless. And if one reads section 113, it is very obvious that it is unrelated to motion pictures, since it deals with copyrighted works incorporated into useful articles and buildings. It is almost unbelievable that an organization claiming authority over copyright would so badly misread the law.

Second, section 113 does not actually confer any rights on a copyright holder, although it does make mention of some of the rights conferred in section 106. In fact, section 113 is a limitation; it prescribes

limits on the scope of exclusive rights in a particular category of copyrighted subject matter. So the demand in that copyright compliance agreement not to “violate” section 113 is gobbledygook.

Finally, and most obviously, nothing in section 113 could possibly prevent a lawful owner of a DVD from displaying it or lending it. Those rights are conferred on owners of particular copies of copyrighted material by section 109, the doctrine of first sale. The company representative who demanded that the DVD be removed from the shelves, and who believed that the presented agreement would enforce that prohibition, was seriously misinformed.

I profoundly hope that Human Synergistics is not getting these interpretations from a lawyer; as unfortunate as it would be, I have to assume that some company official with no training, but who thinks he or she understands the law, is behind their policies. It is true that many lawyers graduate from law school without knowing much about copyright. This issue, however, is more fundamental. Someone is reading the law both selectively and flat-out wrongly. Words do have specific meanings, and while there is lots of room for varying interpretations of the law, there is also outright ignorance.

This foible could be comic, since its major impact is to defeat the company’s own desire to have their materials used. But it is indicative of a very unfortunate situation, since Human Synergistics is not the only rights holder who does not understand what they own and makes absurd demands in the name of copyright.

Join the Movement: The 2.5% Commitment

Fri, 29 Sep 2017 13:51:04, Kevin L. Smith

[Category: all-posts]

NB: This is a guest post from David Lewis, Dean of the IUPUI University Library. David and the regular IO authors hope that this post will generate discussion, and we invite you to comment.

The 2.5% Commitment: Every academic library should commit to contribute 2.5% of its total budget to support the common infrastructure needed to create the open scholarly commons.

A number of things came at me at in late summer.

- In July, Kalev Leetaru concluded an [article on Sci-Hub in Forbes](#) (who would have thought?) by saying in reference to academic research, “In the Internet era information will be free, the only question remaining is who pays for that freedom.” I started using the quote as the tag line on my e-mail signature.
- Elsevier bought Bepress for \$115 million.
- I am a member of the DSpace Steering Group and we were trying to raise the last 15% of our \$250K membership goal. We were doing OK, but it was a tough slog.
- A colleague gave me [a College & Research Libraries article by John Wenzler](#) that argues that academic libraries face the dilemma of collective action. This Wenzler claim is why journal prices are so high and by extension it will make creating the open scholarly commons difficult at best, and maybe impossible.

I was depressed. I thought there has to be a better way. Raising money to support common infrastructure like DSpace was like pulling teeth. Elsevier has more money than God, much of which it gets from academic libraries, and buys control of our infrastructure whenever it pleases. The obvious answer to Leetaru’s question, at least for me, was that academic libraries are going to pay to make academic research free, because that is what we do. Unfortunately, there is a good scholarly argument that we don’t have it within ourselves to do what needs to be done.

So, I wrote a short paper, [“The 2.5% Commitment,”](#) which included a plan. It was therapeutic. The plan was to establish a norm for academic library contributions to common infrastructure. I set the norm as a contribution of 2.5% of the total library budget. I did so because I figured the academic library community needed to raise at least what Elsevier paid for Bepress annually to do what needs to be done. Since U.S. academic libraries spend about \$7 billion annually, and if we can get 60% of what we propose as the goal, then what we need is 2.5%. In other words, I pulled the 2.5% out of the air. I sent the paper to a dozen or so colleagues. One wrote back and said he was thinking along similar lines and proposed we do something about it. So began the movement.

A version of the paper was posted as part of the SPARC list discussion of the Elsevier Bepress purchase and it got a strong response. Further discussion was proposed and there will be discussions of the proposal at several upcoming meetings — the Lyris Membership Summit, CNI, and ALA Midwinter. A small group is working to advance the idea. The first step is to hash out what should count as a contribution, which unsurprisingly is not straight forward. Lots of people have different opinions. We are developing an [initial version of an instrument](#) and will test it in the coming month or two. We hope to get some idea of how much academic libraries now contribute to support open infrastructure and content, which we don't now know. This will tell us whether 2.5% is a realistic goal or is aspirational or whether it can be raised. You can keep track of how this project is going at our [website](#).

In the future, we would hope to have a defined way of measuring contribution to open infrastructure and content, and an easy to use tool to do so. We would hope that the percentage contribution would be reported as a standard academic library statistic to ACRL, ARL and others. We would hope that there would be a norm established around contribution and that this in turn would mean more money for the common resources we need. We hope this norm can be established in a way that presidents and provosts will support. We hope we can prove Wenzler wrong and demonstrate that we can look beyond our narrow self-interest and act for the common good.

The 2.5% Commitment is a movement, not an organization or an institution. To be part of the movement all you have to do is commit your library to doing its fair share. Start by looking at your budget and seeing what your percentage contribution to open infrastructure and content is. You can look at our current thinking about what should count, or use your best judgement. Reflect on whether you should contribute more and what is the best way for you to do so. Talk to your colleagues and peers. Lobby the library groups you participate in to join the movement together. Hold each other accountable.

In his [BOAI 15 paper](#) Jean-Claude Guédon described a future for academic libraries that I believe is what we should be aiming for:

In the end, libraries can point out the fact that their future role actually points in two, apparently opposite, yet deeply complementary directions: on the one hand, they plunge deeply into the local production scenes since they aim at systematically sweeping, storing, preserving, and curating all that is produced in their hosting institution; at the same time, the libraries, with their sister institutions, are involved in the task of ensuring a vibrant knowledge-nurturing life for their documents: they will circulate, be discoverable, be interoperable, be evaluated, etc. With the first function, each library ensures its safe and strong function within its host institution; with the second function, the libraries connect to bring the knowledge infrastructure that we all really need.

Without a robust common open infrastructure that the academic library community controls, we cannot achieve this future.

At the end of the day, if we don't collectively invest in the infrastructure we need for the open scholarly commons, it will not get built or it will only be haphazardly half built. A 2.5% commitment will require some reallocation, but every academic library can do it if they choose.

It is time to get started. It is time to join the movement.

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A new contract

Sun, 05 Nov 2017 14:09:04, Kevin L. Smith

[Category: all-posts]

When I complained, in [a blog post written several weeks ago](#), about the contract I had signed, and regretted, for a book to be published by the American Library Association, I really did not expect the kind of reaction I got. Quite a few readers made comments about the unequal position of authors in publishing negotiations, and especially about the need for the library world to do a better job of modeling good behavior in this area; that was to be expected. A few people took me to task for agreeing to a contract I disliked so much, which was no more than I deserved. But I truly was surprised by the number of folks from the ALA, including current ALA president Jim Neal, who reach out to me and expressed a determination to fix the problem I had described.

Readers will recall that my principal objection to the contract was an indemnification clause that, in my opinion, made me and my co-authors responsible for problems that we could not control. In short, the original contract allocated too much risk to us and tried to protect the ALA from the potential consequences of its own actions by shifting those consequences to us as authors. Although other parts of the contract were negotiable, and I felt good about some of the things we had accomplished in discussions about it, I was told that this indemnification clause was not negotiable.

A couple of weeks after I wrote that post, I had a phone conversation with Mary Mackay, the new Director of Publications for ALA. She told me three things I thought were significant. First, that revising the publication contract used by ALA was on her “to do” list from the time she started. Second, that all aspects of their agreements are negotiable, and I should not have been told otherwise. Third, that I would get a new, revised contract.

Last week I received the revised contract, which my co-authors and I plan to sign, which will replace our current agreement. The difference in the indemnification clause is like night and day, and I want to present the clause contained in this new agreement as a model for appropriate risk allocation in such contracts.

The new clause is three short paragraphs. In the first, we authors warrant that we have the authority to enter into the agreement, that the work is original, that it has not been previously published, that it does not infringe anyone else’s copyright and that it is not libelous, obscene or defamatory. We also promise that it does not violate anyone’s right to privacy and “is not otherwise unlawful.” In the next paragraph, we promise to detail any materials incorporated in the work for which we are not the rights holders, and to provide documentation of any necessary permissions. Then comes the third paragraph, where the big difference from our previous agreement is most notable:

Author shall indemnify and hold harmless against claims, liability, loss or expense (including reasonable attorneys' fees) ***arising from a breach of the above warranties.*** (emphasis added)

In short, we agree to indemnify the publisher from liability for things we do, and for breaking promises we make. Unlike the first version, we do not indemnify for any liability “arising from publication of the work.” This is, to me, a huge and significant difference, and I believe that this second contract does what contracts are supposed to do; it apportions risk fairly between the parties.

I take three lessons away from this experience.

First, it is important to negotiate publishing agreements. Most publishers will negotiate, and when you are told that something is non-negotiable, it is still sometimes important to push back on that claim.

Second, the library community should, and sometimes will, take the lead in producing fair agreements for authors. This is a moving target, and we should continue to push our own profession to live up to the values we articulate.

Third, the American Library Association did something here that is all too rare; they admitted a mistake and took steps to correct it. For that, especially, I am grateful to them.

oasis-cvetov.ru

Accelerating academy-owned publishing

Mon, 27 Nov 2017 17:14:25, Shan Sutton

[Category: all-posts]

(Note: This post was collaboratively written by several members of the ARL project group described below.)

How can libraries develop more robust mechanisms for supporting services and platforms that accelerate research sharing and increase participation in scholarship? What kind of funding and partnerships do scholarly communities, public goods technology platforms, and open repositories need to transform into true, academy-owned open access publication systems? In an initiative formerly known as “[Red OA](#),” these are the questions a group of ARL deans and directors have recently committed to address through engagement with scholarly communities and open source platform developers.

The current system of scholarly journal publishing is [too expensive](#), too slow, too restrictive, and dominated by entities using [lock-in business practices](#). Fortunately, there are a growing number of [scholarly communities embracing services and platforms](#) that accelerate research sharing and increase participation in scholarship. Some of these communities are keenly interested in integrating journal publishing and peer review services into repository platforms, and bringing [greater transparency and efficiency to the peer review process](#) itself. At the same time, there is a [global movement to build value-added services on top of distributed, library-based repositories](#), in order to “establish [open] repositories as a central place for the daily research and dissemination activities of researchers,” rather than the commercial sphere.

As stewards of the scholarly record at research institutions, research libraries have a fundamental interest in maximizing access to and preservation of that record to further research, teaching, and learning. Research libraries have a long history of supporting open access scholarship, in the form of policy advocacy, open access funds to support authors willing to pay article processing charges (APCs) to make their scholarship [open](#) immediately upon publication, and through investments in open infrastructure to disseminate scholarship—including institutional repositories and established disciplinary preprint services like arXiv. But with more than 70% of a typical academic library collections budget consumed by paywalled electronic resources (databases and journals), it’s not surprising that the open alternative is under-resourced. (See [ARL Statistical Trends: Cumulative Change in Total Annual Ongoing Resource Expenditures by Library Type \(Public and Private\)](#))

“We want to honor the tremendous labor and advocacy that scholarly communications librarians in our organizations have put into advancing open access,” says Chris Bourg, MIT Libraries Director, and a member of this collective as well as the SocArXiv Steering Committee. “While also recognizing that the next big breakthrough requires that deans and directors, step up to the plate and put our combined resources and influence behind collaborative, high-impact initiatives.”

For journal articles, one pathway toward the goal of open academic scholarship lies in developing platforms for publishing open, peer-reviewed journals that are managed by the academy in conjunction with scholarly societies and communities. The ARL project group is particularly interested in models that are both free to read and free to publish, without APCs. There may be a place, particularly in a transitional time, for low-cost APCs in academically-grounded publishing models, but the group's long-term focus is on retaining control of the content and keeping the costs of sharing and participating in scholarship as low as possible.

While [green](#) and APC-funded [gold](#) OA have made some progress in making research articles more accessible to readers, these approaches do not by themselves transform the underlying economics of scholarly journals, and they allow commercial publishers to retain control of the scholarly record, a situation that does not serve the current and long-term interests of the academy. This group of library leaders offers an alternative vision in which the academy assumes greater responsibility for publishing research articles, contributing to a more sustainable, inclusive and innovative alternative to the existing system.

Through direct library investment in developing publishing layers on preprint servers and open repositories, these ARL libraries aim to influence the scholarly marketplace. The proposed strategy is designed to provide authors with high-quality, peer-reviewed publishing options; for example, through overlay journals, to accelerate the publishing capabilities and services available through open academic infrastructure. As these new journal forms gain traction with authors, research libraries will be positioned to redirect subscription and APC funds toward support for the development and maintenance of these new journals and the infrastructure that supports them. The project group also envisions helping subscription journals flip to a sustainable open model by investing in the migration of those journals to open platforms and services sustained by universities and libraries.

"If we want to improve the academic publishing system, we must invest in the development of trusted and sustainable alternatives," says Kathleen Shearer, Executive Director of the Confederation of Open Access Repositories. "Our work aims to help nurture a diversity of new models that will strengthen the open ecosystem, as well as contribute to defining a significant role for research libraries in the future."

This group, which is already engaging with scholarly communities in sociology, psychology, mathematics, and anthropology, will be meeting over the next two months to map out its 2018 plans and investments.

ARL project group: Ivy Anderson, California Digital Library; Austin Booth, University of Buffalo; Chris Bourg, MIT; Greg Eow, MIT; Ellen Finnie, MIT; Declan Fleming, UC San Diego; Martha Hruska, UC San Diego; Damon Jaggars, The Ohio State University; Charles Lyons, University of Buffalo; Brian Schottlaender, UC San Diego; Kathleen Shearer, Confederation of Open Access Repositories; Elliott Shore, Association of Research Libraries; Kevin Smith, University of Kansas; Jeffrey Spies, Center for Open Science; Ginny Steel, UCLA; Shan Sutton, University of Arizona; Kornelia Tancheva, University of Pittsburgh; Günter Waibel, California Digital Library

ARL staff liaison: Judy Ruttenberg

What does a journal brand mean?

Sat, 09 Dec 2017 13:49:54, Kevin L. Smith

[Category: all-posts]

Brands and branding are an important part of a consumer society, and they are largely about goodwill. Trademarks, which are, roughly speaking, the legal protection given to brands, are premised on the idea that consumers should have some assurance about the continuity of the source of the goods and services they purchase. A brand name is supposed to provide that continuity; whether you are buying from McDonald's or Land's End, the brand helps you know what you are going to get. This is why trademarks protect against any use that might cause consumers to be confused about whether the goods or services they are buying are really from the same source. The sense of continuity is what we call goodwill.

Branding is extraordinarily important in scholarly publishing. As a scholar quoted in a [recent WIRED article](#) put it, academic publishers hold a great deal of power in scholarly communications (his phrase was more colorful) because “we are addicted to prestige.” This addiction depends on journal brands and, I want to suggest, journal branding is a pretty slippery thing.

Most scholars believe that a journal's reputation is primarily based on the editorial board. If that board is populated by respected scholars, potential authors are inclined to believe that the review of their submissions will be useful and that others will be more inclined to see their work and view it positively. A solid editorial board is at the core of academic journal goodwill. So what happens when a board rebels against the journal?

Consider the *International Journal of Occupational and Environmental Health*, which is published by Taylor & Francis. A couple of weeks ago, the [entire editorial board of this journal resigned in protest of decisions made by the editor-in-chief](#). According to the reports, the disagreements that lead to the resignations were about fundamental matters that impact the quality of the journal, such as its approach to corporate-sponsored research. The question, then, is what is left to a journal brand when the editorial board that forms the core of its goodwill not only leaves — editorial boards turn over regularly, of course usually in an orderly process that preserves continuity — but leaves because they no longer trust the integrity of the journal.

[Retraction Watch reports](#) that, essentially, the publisher does not plan to change the direction of the journal and intends to appoint a new editorial board. At the moment, the [“editorial board” page on the journal website](#) only lists the new editor-in-chief, whose appointment was part of what prompted the mass resignation. So what remains of the brand for this journal, if “consumers” cannot trust the continued quality of the articles, as evidenced by the resignation of twenty-two board members?

Brands are an important part of the promotion and tenure process, and concern over branding, essentially, is sometimes raised to challenge publications in newer, often open access journals. Scholars sometimes worry that their open publications won't get the same respect as papers published in more

“traditional” journals. But if these traditional journals can change the editorial direction and their entire editorial board overnight, what is the brand that promotion and tenure committees really relying on? Will newer scholars now worry that publishing in the *International Journal of Occupational and Environmental Health* is not sufficiently respectable, that P&T committees might look askance at such papers?

Branding is a delicate exercise, and brands can shift and change as consumer perceptions change. Think New Coke. If the scholarly community is going to rely on brands, we ought to pay more attention and not accept that a journal that was respected and respectable a few years ago is still an acceptable outlet today.

It is sometimes said that the fundamental scholarly transaction is to trade copyright for trademark. We give away a valuable asset— the right to control the reproduction, distribution and use of the fruits of our academic labor — in exchange for a brand that will mean something to P&T committees. In an ideal world, I wish we depended less on journal reputation, not only because it is slippery and subject to the kind of editorial revolution described above, but because even at its best it does not actually reflect the thing that really matters in the P&T process, the quality of individual articles. This disconnect is most stark when an entire editorial board resigns and is replaced. But if we are going to make this dubious bargain, it is fundamental to our responsibility to the scholarly community to know what the key brands are and to be aware of events that compromise those brands.

As a dean responsible for the tenure processes of a large number of librarians, I meet every year with the University Promotion and Tenure Committee. The purpose of that meeting is to give me a chance to communicate important information that the committee needs as it evaluates candidates from the libraries — what is different about our field and what changes in our expectations and procedures they should be aware of. I wonder how many deans in the health professions who are going into such meetings will have the awareness and attention to remind P&T committees that the brand of this particular journal has been fundamentally damaged — it simply no longer represents what it did a few months ago — and that that damage should be considered as they evaluate publications? Will they talk about these events in faculty meetings and help their younger professors consider whether this new perception of the journal brand is potentially harmful to their academic careers? That, I believe, is our responsibility.

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Can University Presses Lead the Way in OA?

Mon, 22 Jan 2018 11:22:39, John Sherer

[Category: all-posts, humanities, monographs, scholarly-publishing, scholarly-society-publishers, university-presses]

Last July at MIT Press, a press release went out that should have caught the eye of any reader of this blog. [MIT Press announced](#) the creation of a new leadership position called Director of Journals and Open Access and the appointment of Nick Lindsay to the role. To my knowledge, Nick is the only person in the North American university press world who has OA in his title. Last month, I sent him a few questions about this unique initiative.

JS: What was the backstory on the creation of this position?

NL: [The MIT Press](#) has a long-standing commitment to open access across both our books and journals programs and has taken a leading position in OA publishing within the university press community. Over the last decade in particular, the Press has grown its OA output considerably and we now publish seven OA journals using a few different financial models, along with over seventy books that have an OA edition available, with more on the way. This open spirit towards OA has led to some very successful projects such as Peter Suber's Essential Knowledge series book, [Open Access](#), and flipping our journal [Computational Linguistics](#) from subscription based to OA. Along with this growth has come a new set of challenges some of which are associated with the increased size of our program and others with the changing landscape of OA. In previous years the Press was able to publish OA books, primarily monographs, without significant concern that there would be a major decline in print sales for that title. In fact, there was some evidence that the presence of an OA version of a book actually enhanced print sales, which was the case with our book [City of Bits](#) in 1995

But today it's clear that the pressures on OA publishing are heavier and that acceptance of digital reading is much greater, which can imperil print sales revenues. The calculations the Press needs to make when considering OA options have therefore become much more complex and we have moved to a situation where subventions, embargoes, and royalties all need to be considered when publishing an open access book. Couple this with the development of new OA publishing platforms such as [PubPub](#) from the [MIT Media Lab](#) and the increased possibilities for experimentation with new dissemination models, it's become apparent there is a great deal of new work to be done. Press Director Amy Brand saw the need to bring stronger direction and more structure to our OA efforts so as to ensure that we don't miss out on these new opportunities and that we address future challenges effectively. That's what triggered the creation of the role.

JS: Are there models at other publishers you're looking at to duplicate or build from?

NL: I think just about all university presses are trying to figure out where they sit in relation to OA. At MIT Press it's perhaps slightly more urgent given the amount of scientific publishing we do but I know from talking about it with journals directors, press directors, and others at university presses that it's an issue that's top of mind for everyone. We've looked at the models that have been created at other Presses and there is much to be learned from them, but the Press is determined to chart its own course when it comes to OA. We've had extensive internal discussions across multiple departments at The MIT Press and have heard from many voices: acquisitions, financial, marketing and sales, and others, and we are constructing a flexible open access model that considers each book on its own merits and continues to uphold the quality standards readers have come to expect from The MIT Press. Up to now we have treated all of our OA books with the same level of consideration that we do for any title from The MIT Press: high quality design and production services, extensive marketing support and the same level of rigorous peer review and editing that we bring to all of our books and journals. We plan to ensure that this remains the case regardless of the business model used to support a title. One long term goal we have is to develop an open access fund that will allow us to not be constrained by available funding sources that authors may have for OA books. If we can build a sufficiently large fund we should be able to broaden our OA publishing opportunities.

JS: How are you managing the differences between OA models in journals and books?

NL: On the journals side we've become comfortable with different financial models for supporting open access and this has allowed us to go down a few pathways when it comes to how we structure our OA agreements. Societies and individual scholars with a journal idea have gravitated towards the MIT Press as a home for their journal since we started publishing serials in 1972. The combination of quality services and relatively low pricing has been appealing and with the acceleration of interest in open access we've seen an uptick in proposals with an OA component. Currently, we have a couple of titles where the sponsoring society is willing to cover all costs for publication including paying for a portion of the Press' overhead. It's a low-risk, low-reward approach but it works for us. We've also started three new journals in the brain sciences in 2017, *Computational Psychiatry*, *Network Neuroscience*, and *Open Mind: Discoveries in Cognitive Science*. All three are based on an APC-model and we're happy with the results so far. Adapting internal processes to account for new workflows such as APC payments presents some challenges, but these are smoothing out over time.

With books, author preferences strongly shape the decision to publish books openly, and these vary from field to field. In computer science, for example, the benefits of open models, particularly for software development, are well known and appreciated. In other fields, the decision might be made with the recognition that an open version may increase the dissemination of important scholarship and the global audience for books which might otherwise be limited to readers (mostly in developed countries) with access to adequately funded academic libraries.

Authors often select The MIT Press as a place to publish their work in part because of our reasonable pricing and we're pleased to be able to offer OA alternatives as well.

JS: What has been the reaction to the announcement?

NL: Very positive! From colleagues and MIT Press and MIT to others in the university press community it's been great and I suspect I'm going to have plenty of company when it comes to OA positions at other university presses in the near future.

JS: Is MIT uniquely positioned to do this or is this something that you think other university presses can also do?

NL: For journals in particular we undeniably have one big advantage in that we publish in STM. The financial models and customs are already in place and the idea of an OA neuroscience journal like *Network Neuroscience* coming from MIT Press is easy for the academy to accept. We know where the money is going to come from and we're already well-known by this audience and are in frequent contact with them at conferences and via social media and other outlets. Like many others we are waiting for a breakthrough in humanities OA journal publishing. This may come but as long as publishing grants are non-existent in the humanities and the publishing operations require market-based revenues to offset costs it's going to be a difficult proposition. But I don't see the need to develop a full-blown science-publishing program to at least begin a pilot in OA publishing. The investment to make this happen, if you already have a journals program and a platform, is quite reasonable given that with the APC model much of the publication cost is covered up front.

On the books side, we're open to open access discussions for books from all fields in which we publish and there are plenty of non-STM OA books on our list including John Palfrey's recent [Safe Spaces, Brave Spaces](#). We're also keen to develop OA books out of non-traditional sources such as pre-print servers. For example, the Press will be publishing a physics book that first appeared as a long article on the arXiv, "[Holographic Quantum Matter](#)" by Sean A. Hartnoll, Andrew Lucas, Subir Sachdev.

In both cases, books and journals, the Press does have advantages that come from being one of the first movers in OA, as they provide a strong base of knowledge and expertise on which to continue to expand our OA program. It's encouraging to see others in the UP community embrace OA and I look forward to seeing OA become a more regular part of UP activities moving forward.

Demanding More

Wed, 28 Feb 2018 10:17:25, April Hathcock

[Category: [alamw18](#), [mw18forum](#), [libraries](#), [open-access](#), [scholarly-publishing](#), [ubiquity-press](#)]

At the American Library Association (ALA) Midwinter Meeting earlier this month, I attended the Association of College and Research Libraries (ACRL) and the Scholarly Publishing and Academic Resources Coalition (SPARC) Forum on [“Shaping the Landscape of Open Access Publishing: Individually, Locally, and Collectively.”](#) One of the speakers was my friend Chealsye Bowley, Community Manager for Ubiquity Press, a U.K. based open access publisher. Bowley also happens to be a featured [“Woman Working In the Open.”](#)

During her talk, Bowley discussed what it means to be a “Community Aligned Service Provider.” Ubiquity, while a for-profit press, works hard to make sure its work, business model, and methods align with the values of its community, namely the scholars and libraries that use its content. Bowley noted, “Many in the academic community are concerned that commercial interests may be fundamentally misaligned with those of academic researchers.”

How can we be a better partner?

How can we reflect community values?

@chealsye

slides: bit.ly/mw18asc

Screen shot of C. Bowley’s slide

To combat against that misalignment, Ubiquity has created a Library Advisory Board (LAB) that helps to provide guidance and feedback to ensure services align with library and scholar values. However, unlike many other publisher advisory boards that exist, this one aims to actually and meaningfully incorporate feedback into Ubiquity’s practices. Thus far, based on feedback from the LAB, Ubiquity has initiated plans to make all its underlying code and platforms fully open source by the end of the spring and they are piloting the creation of an open source repository. Ubiquity is finding ways to shift its business model to meet the values of its users while still, well, keeping itself in business. Their thinking seems to be that if they make these important efforts, they can ensure long-lasting, and yes even profitable, relationships with their customers for years to come.

**Service providers work for libraries,
and should do the bulk of the work to align
themselves with the communities they serve.**

@chealsye

slides: bit.ly/mw18asc

Screen shot of C. Bowley's slide

Going beyond the specific Ubiquity model, Bowley, herself a librarian and scholar, went on to discuss the ways that libraries can demand more from their content providers: "Service providers work for libraries, and should do the bulk of the work to align themselves with the communities they serve. . . . [Libraries can and should] be critical of every vendor [and] push back."

Be critical of every vendor.

Push back.

Get contracts that reflect values.

@chealsye

slides: bit.ly/mw18asc

Screen shot of C. Bowley's slide

For *this* librarian and scholar working in the open, Bowley's presentation was a breath of fresh air and a source of hope for the future. It *is* possible for vendors and librarians to work together in mutually beneficial, value-directed partnerships. Ubiquity Press provides just one example of how we can get it right.

What's even better, [Bowley's entire slide deck](#) is available on the new [LIS Scholarship Archive \(LISSA\)](#) (of which Bowley is an advisory board member), an open access platform for sharing library and information science scholarship housed on the Open Science Framework (more about LISSA in a future post, stay tuned!).

Saying it doesn't make it so

Thu, 07 Jun 2018 08:40:57, Claire Stewart

[Category: all-posts, libraries, scholarly-publishing, textbooks]

[Authors note — this post was drafted back in January, so although the Scholarly Kitchen post that inspired it is a little old, the general themes are still relevant]

Joseph Esposito was being intentionally provocative, perhaps even tongue-in-cheek in places, in his post back in January, [Why Elsevier is a Library's Best Friend](#). There are some good exchanges with commenters, many of whom had the same thoughts I did as I read. Here are a few additional responses both to Esposito and to fellow SK'er David Crotty about the post and the back-and-forth in the comments.

Esposito on economies of scale:

We often hear that the monopoly in copyrights is what makes companies so profitable, but even publishers that lose money have full control of their copyrights. It is scale, not monopoly copyrights, that drives a high level of profitability. ... With a thousand [web sites] you can hire skilled professionals and negotiate with suppliers for better pricing. This is what RELX does. On a per-unit basis RELX is probably paying less than the average publisher for the materials and services it needs. Only its peers in scale (Springer Nature, John Wiley, and Taylor & Francis) have the same purchasing clout in the marketplace.

But this isn't just all about massive efficiencies, this is about the choices that have been made in exploiting the lack of substitution that comes with monopoly control of so many copyrights. Just because efficiencies of scale may be present doesn't mean we have to allow ourselves to be gaslit by arguments about the behaviors that follow, as though these behaviors are inevitable and ANY actor that achieved the control and scale that Elsevier has would act this way.

Esposito on why libraries could never work with 2500 publishers:

The administrative cost of doing so would be prohibitive. The aggregations of Elsevier and its ilk reduce the cost of assessing and purchasing publications for libraries. This means libraries need a smaller staff in acquisitions and all the support services that go with it. It is simply remarkable how much libraries accomplish nowadays because of their intelligent focus on workflow planning.

We do manage to work with lots of other kinds of publishers without suffering the kinds of inflation and forced title blob purchasing (from now on, this is what I'm calling the big deal packages and all the other bundling) that we have with publishers of the scale and power of Elsevier and its kind. Ever heard of jobbers? As commenter Suzanne Goettker pointed out, we do this already with subscription agencies. It has created interesting innovative opportunities for the third parties who have developed approval plan services and other solutions to simplify our purchasing operations. A cooperative between not-for-profit scholarly societies theoretically could have done the same thing. Or, believe it or not, libraries might have figured out this particular scale thing on our own, and we might yet. We are pretty good at it from time to time. We're creative about creating our own scaling solutions for sharing cataloging effort and

records, doing pretty astonishing things as we get better and faster at borrowing materials from each other, including making massive changes to our own physical infrastructures. I think Esposito's concern for libraries is misplaced. We are probably one of the most innovative, fast-moving (don't laugh) organizations on our campuses in our willingness to look at solutions, including those introduced by third parties, to increase our internal efficiency. And as Björn Brembs pointed out in his comment on Esposito's post, there are examples like [SciELO](#), too.

Esposito on why bundling is OK:

This is also how many consumer services work; think, for example, of your cable TV bill. It is a structural property of the marketing of media in a digital age, and in this Elsevier should not be singled out either for praise or opprobrium.

The 'everyone does it' argument has never been a terribly strong one, but using the cable TV industry as an example is surprisingly apt. It would be harder to find a more antiquated model than that one, with many, many consumers frustrated by the forced bundling not only of channels they don't want, but services they don't necessarily need (cable + VOIP land line phone + internet).

There's also this odd victim-blaming in the comments by David Crotty in response to another commenter, 'Elle':

What's interesting to me is that, even knowing these charges, you still chose to publish in that journal. Clearly the costs are overcome by what you perceive you're receiving from doing so.

'Elle' was describing the publication fees they were being required to pay (none of which, btw, seems to be an OA fee), a total of \$2247 for a single article. Since they say the publisher they're dealing with is one of the big 5, sounds like this is not a small not-for-profit. This response from Crotty reminded me of the types of comments made to people who live in economically depressed areas: "If it's so bad, why don't you just move?" without taking into account the overwhelming structural reasons why there are there in the first place, and how impossible it is to "just move."

And while we're on the subject, blaming the tenure and promotion system will only get us so far. The publishing imperative is not purely the creation of the academy. And to say that university faculty, in particular individual faculty, can buck or undo this system is to not only misunderstand academic power structures (faculty at most institutions are not as powerful as comments like Crotty's would suggest, no matter the shared governance traditions) but to ignore the role of publishers in growing the mania for publishing, and for publishing in certain places, that lie behind these structures. Impact factor, explosions of niche journals, etc.

My library has large, expensive journal contracts with all of the usual big scholarly publishers, whose title blobs have the usual pattern of both extremely high use and abysmally low use. Thanks, blobbing algorithms, for figuring that exactly how to keep us on the hook. In terms of annual percentage increases, Elsevier is not the worst one we deal with — they've actually been reasonable the past few years — it's just that that awesome scale thing makes it so painful, so even small increases are breathtaking for our bottom line. We also use the Elsevier Pure system as one of our primary Research

Information Management platforms. As I've half-jokingly said when someone raises an eyebrow at me about this, I can accept no blame for this choice, it happened before I came to Minnesota. We also retain, in our campus data warehouse, a local copy of all of the Pure data. But the reality is that this tool, at the moment in time it came to Minnesota, offered high-quality features and services and it was entirely reasonable to have selected it. My previous institution, Northwestern University (NU), did the same, although the product Northwestern was initially interested in was Collexis, which was purchased by Elsevier while discussions at NU were ongoing. (Elsevier later acquired Pure, also developed elsewhere, and combined it with what had been Collexis.) At both NU and Minnesota, the decision to get on board was a complicated one, partly because the library was not the only player in the game, but also because the primary use cases were complicated, messy, and emerging. Elsevier can and does sell to anyone at the university who will listen and who has an interest in their products. Anyone who has been paying attention to the textbook market has seen this same thing playing out, and accelerating, there too. Textbook publishers no longer see the bookstore as their only partner.

I don't think the answer is to try to block or outmarket either of these types of publishers. They have way more money to throw at sales staff to email everyone on campus until they get a hit than we have contacting those same people to let them know about the latest [Cengage all-in offer](#) to students. Did you think I was going to say I know what the answer is? I don't, but I'm working on it, as is almost every other academic librarian, and an awful lot of faculty and other actors, out there. Continuing to work on building strong collaborations with our campus partners and other institutions on shared services is essential. Just because that first (or even the first, second AND third) multi-institution collaborative repository project failed doesn't necessarily mean the idea is flawed. Pressing hard to limit payment for things that shouldn't be protected by copyright (like metadata), or whose copyrights should never have been transferred in the first place, is another. Planning for platform change, and more rapid platform change than we've had to manage in the past, would be a good way to go. Given a choice I'd rather deal with the Elseviers of the world in a competitive services market than their current content monopoly space. But I also have to be ready to jump ship if the good terms I presumably negotiated in year one are looking less good because of unreasonable price increases, sale of the company, or even just much better service and performance elsewhere. The Pure service was, and still is, far from perfect. Getting out, and especially getting out quickly, can take a lot of vigilance at contract time, plus contingency planning that is going to cost money. It's hard to do this alone, and the multi-institution conversations underway in the wake of the bepress buyout give me hope. My organization is migrating from one learning management system to another right now in an astonishingly complex, difficult, but still remarkably rapid way. Every single school or college and almost every faculty member is involved. Imagine what it would be like if these same actors were as invested in our library systems, our publishing systems, our research information systems.

I may not know the complete solution to the wicked problem we're grappling with, but I don't think we should have to agree with someone telling us there *is* no problem, let alone that Elsevier is actually doing us a favor.

Authors note: in case it needs repeating, I'm speaking only my personal opinions here, and not on behalf of my library or my university.

Vocational Awe, Invisible Work and Open Advocacy

Mon, 11 Jun 2018 07:13:45, Camille Thomas

[Categories: [openpros](#), [all-posts](#), [libraries](#), [open-access-outreach](#), [open-action-kit](#), [vocational-awe](#), [workflows](#)]

This post is inspired by a number of discussions in the library profession over the past few years. Fobazi Ettarh's article [Vocational Awe and Librarianship: The Lies We Tell Ourselves](#) in In Library with the Lead Pipe, the [Symposium on Invisible Work in the Digital Humanities](#) at Florida State University, and Stacie Williams' keynote "[All Labor is Local](#)" from the 2016 Digital Library Forum to name a few.

At OpenCon 2016, there was an unconference session in which many of us (whether librarians, researchers, students or other advocates) could commiserate about the specific kinds of burnout we experience. We started to get into how each of us coped, particularly with having to be the motivated, optimistic advocate who will educate, inspire and be prepared for resistance or difficult conversations. In a North American regional session at OpenCon 2017, we mapped out pain points and highlights for personas using design thinking. Those who were not librarians were intrigued by the common thread of multiple librarian personas (designated library advocates, other librarians who do open advocacy in addition to their regular responsibilities) who were doing a lot of work with little highlights to report. A third example is the increase of Memorandums of Understandings used in open or digital projects to transform heavy workloads with multiple stakeholders from traditional, subservient "service" to a collaborative, accountable "partnership". It is disappointing how easy it is for one example to remind me of yet another.

It is commonplace to see a great article like [Imagining the "open" university: Sharing scholarship to improve research and education](#) leave out the role of libraries or for open science researchers to keynote conferences, but not librarians. It is common for us to have a seat at the table, but be left out afterwards. Open advocacy has been the core of many of our careers in librarianship. Beyond a perhaps egotistical observation about the lack of labor recognition from our collaborators, is the toxic notion that acting as silent martyrs for the open movement is all just part of the job. Who will advocate for us? Are we to advocate for ourselves?

To be constructive, and not just air grievances, I'd like to shamelessly plug the [Open Action Kit](#) and [#openpros](#) community on Twitter. I am a member of the Open Action Kit Team [full disclosure]. When the group was brought together by SPARC, we quickly got into a conversation about how lack of awareness of the work that goes into open advocacy can be an obstacle to translating its value into traditional measures or objectives. We hope the toolkit can be of use to advocates.

The Impact of Big Deals on the Research Ecosystem

Sat, 16 Jun 2018 11:47:14, Kevin L. Smith

[Category: all-posts]

Earlier this month I read [this article by Kenneth Frazier from D-Lib Magazine](#) which argues that academic libraries should reconsider the value of so-called “big deals” from publishers. The core of the argument is that the downsides of these journal packages outweigh the benefits of convenience and an arguably lower cost per title. I say “arguably” about cost per title because, if one excludes the titles in a bundle that are rarely or never used when calculating per title cost, the value proposition is significantly different.

The simple fact is that publisher bundling “deals” are larded with what, from the point of view of usage, is simply junk – obscure titles of little value that can only be sold by tying them to more desirable resources. If I want “Cell Biology” for my researchers, I also must buy “Dancing Times,” even if no one on my campus uses the latter.* At my institution, to give just one example, over 30% of the titles in our journal package from Wiley are “zero-use,” but it is still less expensive to buy the package than to subscribe, at list price, only to the titles that would get substantial use. This tying of titles, and enforcing the bulk purchase by charging grossly-inflated “list prices” for title-by-title purchases, is highly coercive, as Frazier points out, but it also creates some perverse incentives for the publishers themselves, which led me to think about the potential consequences of big deals for things like peer review.

Publishers make more money using these big deals, of course. They justify the price tag of a package by highlighting how many titles we are getting. They claim that the annual price increases, which far outstrip any growth in our collection budgets, are justified because of the growth in the number of papers published. These sales techniques give the publishers a strong motive to encourage the proliferation of titles in order to increase the perceived value of their products and continue to raise prices for each package. In short, there is an incentive to publish more journals, even if they do not meet basic academic standards of quality or appeal only to a tiny niche of research that is unneeded on many campuses.

It is ironic that we hear a lot about the incentive to publish without attention to quality in the open access world, where the [unfortunate phrase “predatory publishing”](#) has become almost a cliché, but we often fail to notice the commercial incentives that encourage similar practices in the subscription market, thanks to these “big deals. More is better, regardless of quality, and it justifies ever increasing prices.

The impact on peer review is inevitable. As more and more articles are submitted, the bandwidth for review is stretched thin. We hear about this a lot; faculty members complaining about how many requests to review they get, and also complaining about the declining quality of the feedback they receive on their own articles. Yet we seldom make the obvious connection. Big deals, with the pressure

for more and more articles to publish, encourage the trend to require more articles in our tenure reviews, and to ask graduate students to have multiple publications even before they complete their degrees. These packages also have the effect of reducing the quality of peer review. This is simple logic – the more widgets you make, the less able you are to assure the quality of each widget while still remaining cost effective. As publishers turn out articles like so many widgets, the decline in peer review, attested to in so many stories of its failures, is as logical as it is damaging. It becomes no surprise at all when we hear faculty say, as I have heard twice in recent weeks, that the peer review process at non-commercial open access publications is the best and most helpful feedback process they have experienced in years.

Prestigious publishers keep their impact factors high by rejecting lots of articles. In the era of the digital big deal, those articles still get published, however, they just slide down to lower-ranked journals, and the standard of review decreases. Big deals do not just harm the sustainability of the library subscription market, although they certainly do that; they also undermine the very activity they were born to support. The scholarly publishing industry, which after initially trying to ignore the digital environment has now turned to ruthless exploitation of it, has become actively detrimental to the scholarly enterprise itself.

**Author's note: This example simply uses a very highly ranked title from Web of Science and a very low-ranked one; it is illustrative but does not necessarily reflect the actual subscription at my institution or any other.*

Offsetting as a path to full Open Access: MIT and the Royal Society of Chemistry sign first North American ‘read and publish’ agreement

Thu, 21 Jun 2018 08:36:44, Ellen Finnie

[Category: hybrid-open-access, license-agreements, scholarly-publishing, scholarly-society-publishers]

Over the past few years the MIT Libraries – like many US research libraries— have been watching with interest the development of “offsetting” agreements in Europe and the UK. In offsetting agreements, a single license incorporates costs associated with access to paywalled articles and costs associated with open access publication. This type of agreement has emerged [in Europe and the UK](#) and been the source of both new deals and [broken deals](#).

In the MIT Libraries, we have been following this offsetting approach closely, as it seems to have the potential to transition subscription-based journals to a fully open access model. We have felt, though, that there was one major contingency we would want met in order for us to go down this path: the agreement would need to establish that over the long term, the publisher plans to use the hybrid approach to enable a transition to full OA. Our concern is that —if perpetuated indefinitely— a hybrid model will not realize the full potential of open access to make research available to all, worldwide, rather than to only those with the capacity to purchase access.

Given this context, we are pleased to report that we have [just completed a license with the Royal Society of Chemistry](#) —the first “Read and Publish” license agreement among North American institutions – that contains language acknowledging that the read and publish model is a step on a path to full OA. The language reads:

Publisher represents that the Read & Publish model, with its foundation in “hybrid” open access – where some articles are paywalled and others published open access – is a temporary and transitional business model whose aim is to provide a mechanism to shift over time to full open access. The Publisher commits to informing Customer of progress towards this longer-term aim on an annual basis, and to adjusting Read & Publish terms based on its progress towards full open access.

The agreement will run for two years, through 2019; articles published by MIT authors during that period, when the MIT author is the corresponding author, will be made openly available at the time of publication. Costs are calculated through a formula based on the volume of MIT authorship and the volume of paywalled articles. The idea is that over time, as more universities adopt this kind of contract, the proportion of paywalled articles will decline, and funding will shift from paying for access to closed content, to supporting open access to research produced by authors on one’s campus. In this way, the read and publish model provides a mechanism for a staged transition from hybrid to full OA.

For the MIT Libraries, this contract represents an important experiment with a nonprofit scholarly society, in which we use library collection funds to accomplish open access to MIT research through a business model that aims to transition journal publishing more broadly to open access. This experiment builds on the idea that [there is enough money in the system](#) to support a move to open access, if there is a collective will to make that move, and it is accompanied by transparent, sustainable mechanisms (possibly, as some have called for, incorporating [author participation](#)) to shift subscription dollars towards open access models.

We take seriously our effort to [‘vote with our dollars’](#) by supporting publishers whose values and aims align with ours and whose business models have the potential to make science and scholarship more openly available. That effort includes assessing whether costs are reasonable and justifiable. We carefully considered whether increased library-based payments to the Royal Society of Chemistry, necessary in order to adopt the read and publish approach, was viable and justifiable for us. We concluded that it was a worthy experiment, particularly as the added costs are directly making MIT authored articles openly accessible, and because the Royal Society of Chemistry was willing to work with us to contain the cost.

These kinds of judgements and strategic decisions —within a complex and evolving market— are difficult. We recognize and are engaging with important questions about how a move to a publishing-based fee structure for journals could impact [universities](#) and [authors around the world](#). For now, we believe this experiment promises to be a productive one on the path to finding a workable model for scholarly societies to transition their highly-valued, high-quality subscription journals to open access, and for universities like MIT – whose mission is to disseminate research as widely as possible – to expand open access to articles authored on their campuses.

In order for the transition to full open access to take place, however, it will take more than the actions of one campus. We look forward to engaging with others throughout this experiment, and to thinking together about how we can collaborate to advance open access to science and scholarship in productive ways.

The Case for Fixing the Monograph by Breaking It Apart

Mon, 25 Jun 2018 09:24:55, John Sherer

[Category: all-posts]

Earlier this month the University of North Carolina Press (where I am director) received a nearly \$1 million grant from The Andrew W. Mellon Foundation to lead an OA pilot among multiple university presses (UPs). During the three-year experiment we will utilize web-based digital workflows to publish up to 150 new monographs. We intend to transform *how* university presses might publish their most specialized books while validating the legitimacy of high quality scholarship delivered in digital-first formats.

I have argued that there are two interlocking reasons why OA hasn't taken hold in university press monograph publishing. UPs are optimized for the creation of high quality print and so we are unprepared to publish in ways that maximize digital dissemination and use. And without a viable digital model with clear deliverables and accountability, there is no durable funding source for OA monographs.

But despite these obstacles, UPs must find a new way to publish their most specialized books. The current cost-recovery model, which works pretty well when sales are in the thousands, is falling apart when net sales number in the few hundred. We are incurring significant debt to create bespoke products available to a privileged few. And more and more books are fitting into the latter sales pattern. But these are vital volumes that are critical to the advancement of scholarship.

What we have proposed is a solution that requires a dramatic uncoupling and resequencing of our workflows. We need to take the book publishing process apart in order to ensure we're focusing primarily on creating high quality digital editions that will be widely disseminated and used. A switch away from *high-quality-print-with-trailing-digital* and toward *digital-first* will have some disruptions, but it should also lead to lower costs. It requires that our surrounding ecosystem embrace digital—where the digital editions of record will be the ones getting reviewed, winning awards, and being considered in promotion and tenure packages. It is pay-walled print that will be a secondary format, available to those that require (and can afford) it.

Breaking the publishing process apart helps clarify what parts of publishing should be subsidized versus the parts where cost recovery can provide funding. I operate in a state university system where “accountability” is almost always required to secure new funding. Our new paradigm looks to do just that. With streamlined costs, high levels of access, and robust analytics, it aims to ensure the long-term viability of humanities monographs as well as the university presses that are key to their creation and dissemination.

There's a lengthy post [here](#) with more detail about the rationale and details of the pilot.

Copyright in government works, technical standards, and fair use

Mon, 23 Jul 2018 07:37:49, Kevin L. Smith

[Category: all-posts]

It is one of the simplest, yet most frequently misunderstood, provisions of the U.S. copyright law. Section 105 of Title 17 says that “Copyright protection under this title is not available for any work of the United States government, but the United States government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest or otherwise.” A single sentence, but lots of nuance, both because of what it says and what it does not say. Last week, an important decision from the DC Circuit Court of Appeals again highlights some of the scope for confusion.

The clear point of this provision is that works created by the federal government – created, that is, by federal employees working within the scope of their employment — do not receive any copyright protection. Such federal works are immediately in the public domain. But there are some important points that have to be made regarding what this provision **does not** say:

- Government works from other countries can be, and usually are, protected by copyright. Section 105 explicitly rejects such “Crown copyright” for the U.S., but such copyrights are the rule, literally, in most other nations.
- Government employees can and do hold copyright in works they create that are not part of their employment. An EPA scientist has no rights in a report she writes as part of her job, even if it includes photographs she took to illustrate that report. But she is entitled to copyright in her own private photographs, in works of poetry she composes, and in the video she makes of her son’s soccer game.
- Independent contractors may have created many things that appear to be U.S. government works; such works likely do have copyright and the federal government may hold that copyright. That glossy brochure you can pick up when you visit the Grand Canyon, for example, might have been created by National Park Rangers (no copyright) or by contractors working for the government (a copyright was likely transferred to the federal government “by assignment... or otherwise”).
- Works by state and local governments are not precluded from copyright protection. Judicial opinions from state courts are pretty much universally recognized to be public domain, but the issue of local laws and regulations is very much up in the air. The State of Oregon, for example, has tried to assert a copyright in, at least, the collection of the Oregon Revised Statutes. With local regulations, and the thornier issue of privately developed standards that are made part of laws, which is the subject of the case I want to discuss, the situation is even muddier.

Last Tuesday, the Court of Appeals for the District of Columbia ruled in a case that raised a complex issue about copyright and state laws that incorporate, by reference, codes of industrial standards. The decision is a win for those who seek more openness in government, although the issues remain far from settled. It also offers a fascinating perspective on the interplay of the Constitution, section 105 of the copyright act, and fair use.

Public Resources is an organization dedicated to making the law and other government resources more widely available. Many governments use technical standards that are developed privately, on topics ranging from guidelines for tank barge overfill protection to psychological testing, and often even incorporate those standards into the law “by reference.” So Public Resources decided to make digital copies of a large number of such standards, that have been made part of the law in different jurisdictions, openly available, believing, in line with numerous legal precedents, that the law should be easily accessible to citizens. For doing this, Public Resources was sued by a group of “Standards Developing Organizations,” including the American Psychological Association (APA), the American Society for Testing and Materials (ASTM), and the American Educational Research Association (AERA). These groups, of course, sell the standards they develop, and having them incorporated into a legal requirement is naturally good for their bottom lines. The last thing they want is open access for their standards, but that seems to conflict with the principle of citizens’ right to know what the law is.

Public Resources lost its case in the District Court, which issued an injunction to stop the open distribution of the standards. The case decided last week – [American Society for Testing and Materials, et al. v. Public Resources.org, Inc.](#) – was an appeal from that decision, and the result was that the injunction was vacated and the issue remand for new proceedings in the lower court. The Court of Appeals frames the question it is facing like this: “whether private organizations whose standards have been incorporated by reference can invoke copyright and trademark law to prevent the unauthorized copying and distribution of their works.” The Court also points out how common such incorporation of standards is; they note that the Code of Federal Regulations alone incorporates by reference over 1,200 standards just from the ASTM.

Three points from the ruling stand out for me:

1. The Court of Appeals uses quite a bit of ink to emphasize that both technical standards and the methods by which they are incorporated into the law vary a great deal. Standards may simply be referenced in a law or government regulation, or they may clearly be made part of binding law. A standard might be used to trigger eligibility for a government grant or program or it might establish a “regulatory floor” for an industrial practice. Because of this level of variation, the Court is quite reluctant to issue a blanket ruling in the case. Public Resources is seeking a decision saying that once a standard becomes part of a law or government regulation, it loses its copyright, which they think follows from section 105 and the First Amendment. The standards organizations see it differently, of course, and the Court of Appeals is unwilling to decide this point without a much more detailed record than it has before it.

2. After this ruling, the existence of a copyright in standards incorporated into the law remains an open question. Although the Court does not decide it, one of the Judges, in a concurring opinion, takes great pains to point out that there are four ways in which a court could extinguish copyright in such standards, based on the fundamental principle that access to the law cannot be conditioned on the consent of a private party. The First Amendment, the Due Process clause of the Fifth Amendment, section 102(b) of the copyright law and fair use could all get us there. Judge Katsas insists that, if fair use does not do the work, he would entertain these other paths.
3. The entire panel, however, agrees that fair use is the best way to resolve the case without having to wrestle with Constitutional issues. Although the case is remanded for a decision about fair use for each of the standards at issue, in large part because of the variety already discussed, it puts a pretty heavy thumb on the scale in favor of fair use. Where the District Court found a commercial and non-transformative purpose for Public Resources' copying, the Court of Appeals thinks that facilitating public access to the law, especially by a non-profit, can reasonably be considered both non-commercial and transformative. They find that the standards are largely factual, and that the amount used must be considered in light of the public need being met, especially since "precision is ten-tenths of the law." On the issue of market harm, they instruct the lower court to gather evidence about how serious the economic impact of Public Resource's distribution is. It would be difficult, in my opinion, for the lower court to rule against fair use in any sort of categorical way, given these instructions.

After this ruling, we can add another gray area to those that surround the apparently simple rule that works of the federal government are in the public domain. In a real sense, this case is about how and when a privately-created work might become an unprotected product of the government, through the process incorporation into laws and regulations. It is a fascinating, and, I think, somewhat troubling question. The Court of Appeals seems mostly confident that fair use can resolve the issue in the particular circumstances it was addressing, but the question will surely come back to nag us in the future.

Why just 2.5%?

Wed, 01 Aug 2018 09:35:02, Claire Stewart

[Category: all-posts, building-open, Claire Stewart, scholarly-publishing, scholarly-society-publishers]

Sustainability planning is certainly a tricky business. Over the last several months I have been working with teams grappling with sustainability and other long-term plans for four projects: the [Big Ten Academic Alliance's Geoportal](#), [Mapping Prejudice](#), the [Data Curation Network](#), and [AgEcon Search](#). These are all cross-unit collaborative projects, and multi-institutional in most cases, but their common element is that my library serves as administrative and/or infrastructural home and/or lead institution. This planning has led to an interesting thought experiment, spurred by the AgEcon Search planning.

First, brief background: AgEcon Search is a subject repository serving the fields of applied and agricultural economics. The University of Minnesota (UMN) has been operating it since 1995, back in the pre-web days; the first iteration was Gopher based. It is still jointly sponsored by the UMN Libraries and the UMN Department of Applied Economics, but is now also a partnership that includes financial and other support from the USDA, private foundations, both the national and the international agricultural economics scholarly associations, and others ([full list and other info here](#)). There is tremendous support within its scholarly community for AgEcon Search and, increasingly, very strong international use and participation, especially in Africa.

The two UMN host units have started long-term sustainability planning. Right now, a leading strategy is a joint fundraising program with a goal of building an endowment.

Here's the thought experiment. Roughly speaking, a \$2 million endowment would generate sufficient revenue to pay most of AgEcon Search's annual staffing, infrastructure and other costs. \$2 million is about 11% of what the University of Minnesota Libraries spends annually for collections. So if we were able to take *just* 10% of what we spend in *just* one year on collections, we would be most of the way towards ensuring a long-term financial future for one project. And if Minnesota could double that, or even go to 25%, then in one year we would be able to do this for two similarly-sized, community controlled open projects. And if we did it for two years, we probably would have funded all four of these (Minnesota-homed) projects. And if we kept going, in the next and following years and be able to use that money to do the same for other projects, at other institutions. And if all academic libraries did the same, how many years would it take to put a really huge dent in our collective open funding problem?

Obviously, there are many, many practical, political, logistical and other challenges to actually doing this with our collections funding, but I'm leaving those aside for the moment, though they are far from trivial. This thought experiment has helped bring focus to my thinking about [David Lewis's 2.5% solution](#) (see also [his post on this blog](#) and his [later writings with other colleagues](#)), and Cameron Neylon's response in '[Against the 2.5% Solution.](#)' Which, spoiler alert, is not strictly speaking against the solution, but in favor of a number of things including an investment quality index that can guide these

investments, [a variety of different strategies](#), and in support of a much bigger investments than the 2.5%.

Which is where I think we absolutely need to be — more aggressively and more deeply investing in open. 2.5% per year is not enough. 25% might be getting warmer. Would I love for that money to come from our universities instead of from our collections budgets? Sure. But will it happen and how long will it take? Speed and agility will be increasingly important. To underscore that point: the Data Curation Network got its Sloan pilot grant funding and was well underway planning and (openly) sharing [rich information](#) about what it takes and how to do data curation when Springer announced it would offer for-fee data management and curation services. Wellcome Trust is now in a pilot to fund its investigators to use Springer's service (I'm not linking, use your favorite search tool). The Data Curation Network, like many collective projects, has been starting to make the case for community support, with the usual mixed responses. How many more projects will teeter on the brink of survival while publishers with a long history of enclosure and extortionate pricing gobble them up, or out-market us, or out-innovate us? What's your favorite open project or [workflow tool](#)? Has it been asking for support?

I am, personally, decidedly lukewarm on the all-APC flip that started the OA2020 conversation, but don't think we have the luxury of ruling out many strategies at this point. More, smarter, and faster are the words that guide my thinking and my hopes for a more open, community-owned scholarly communications ecosystem. I'm very much looking forward to the '[Choosing Pathways to OA](#)' workshop at Berkeley in October, and grateful to colleagues at the University of California, including [the faculty](#), who have injected recent energy and inspiration, and who have invested in space to bring us together to talk about advancing practical strategies. See other posts on this blog about [offsetting at MIT](#) and the [publishing layers \(formerly known as RedOA\) project](#). I hope we will be talking about both of these and more, and preparing for truly transformative change. Fast.

What does Icelandic fishing have to do with commercial publishing?

Mon, 27 Aug 2018 08:09:04, Kevin L. Smith

[Category: all-posts]

Siglufjordur is a small fishing village in the north of Iceland that my wife and I had the pleasure of visiting this past summer. It nestles between the mountains of the Icelandic highlands and the sea in a way characteristic of towns on the northern coast.



What is unusual about Siglufjordur is its economic history. It was a boom town in the 1940s and 50s, the center of the North Atlantic herring trade. In addition to fishing, a great deal of processing and packing was done in Siglufjordur, and the town was triple its current size. In the early 1960s, however, the herring industry in Siglufjordur collapsed quite suddenly, because the fishing grounds had been overfished. Now the town is a shadow of its former self, surviving on sport fishing and tourism (the Herring Museum, perhaps surprisingly, is very much worth a visit).

We often refer to scholarly communications as a kind of eco-system, and I think the problem of overfishing has an important place in that analogy. The proliferation of new journal titles, whose sole function seems to be padding out the “big deals” that publishers sell, using the growing number of titles to justify the ever-increasing cost, strikes me as a kind of overfishing. It is an example of pushing the market too far. In Siglufjordur, it was the product that dried up, however; in commercial publishing it is the customer base, which is being systematically priced out of the market.

A sign that they are creating a market where monopoly pricing is slowly pushing customers out is the growing gap between bundle pricing, which publishers now like to call a “database model” in order to distance themselves from the unpopular phrase “big deal,” and the list prices of journals. I was recently part of a conversation where a rep for one of the large commercial academic publishers told us, inadvertently, I think, that while the bundle she was selling cost \$800,000, the list price for all those journals would be about 9 million. If she intended to tell us what a great deal the bundle was, her comment had the opposite effect; it emphasized how absurd the list prices are. They are punitive, and obviously unrelated to the cost of production; when list prices are 11 times the price most customers

actually pay, I think they qualify as pure fiction. This pricing practice is equivalent to throwing an explosive into the water to drive the fish into the nets. It represents a blatant effort by these publishers to force customers to buy the bundled packages, so they can profit off junk titles they could not sell on their own merits.

There was a time when similar practices were called illegal tying under the U.S.'s anti-trust laws. Movie companies, for example, were found to be illegally using their intellectual property monopoly to force theaters to rent unwanted titles in order to get the movies they really wanted to show; the Supreme Court forbade such "block booking" in 1948. But anti-trust enforcement has changed dramatically over the years, and this kind of tying is now tolerated in the cable TV industry, as well as in scholarly publishing. (For the record, a U.S. court has held that bundling channels on cable is not illegal tying, but there are ongoing antitrust lawsuits over related practices.) Publishing, in my opinion, has pushed the practice even farther than cable TV has, as the bundle prices spiral upward, the list prices become more and more penal, and customers are forced to consider a draconian loss of access, the academic equivalent of "cutting the cable."

The problem with this kind of "overfishing" is that it is unsustainable; the commercial academic publishers are pushing the market so far that their customers simply can no longer afford the resources they need and, incidentally, create in the first place. The profits generated by these companies are still extremely high, in the range of 35% and rising, but, as happened in Siglufjordur, the bottom can drop out quite suddenly. In recent months we have seen whole nations, not to mention individual universities, start to reconsider not only whether the value offered by these publishers is worth the price, but even whether the price itself is simply out of reach. And back in June, the Financial Times reported that RELX, the parent of Elsevier, had suffered its biggest decline in value in 18 months, and the financial services firm UBS was advising investors to sell, to take their profits and get out, due to "structural risks." Structural risk is a very accurate description of the problem you create when you push your market well beyond its capacity.

The GSU Copyright Case: Lather, Rinse, Repeat

Sat, 20 Oct 2018 12:22:11, Kevin L. Smith

[Category: all-posts]

On Friday, a panel of the 11th Circuit Court of Appeals [issued its decision](#) in the publisher's appeal from the second trial court ruling in their lawsuit against Georgia State University, challenging GSU's practices regarding library electronic reserves. The decision came 449 days after the appeal was heard, which is an astonishingly long time for such a ruling. I wish I could say that the wait was worth it, and that the ruling adds to our stock of knowledge about fair use. Unfortunately, that is not what happened, and the case continues to devolve into insignificance.

The judges on the appellate panel seem to realize how trivial the case has become. After working on it for one year, two months, and three weeks, the court produced a decision on only 25 pages, which sends the case back, yet again, for new proceedings in the district court. The short opinion simply reviews their earlier instructions and cites ways in which the panel believes that Judge Orinda Evans misapplied those instructions when she held that second trial. What it does not do is probably more significant than what it does. The ruling does not fundamentally alter the way the fair use analysis has been done throughout this case. The publishers have wanted something more sweeping and categorical, but they lost that battle a long time ago. The 11th Circuit also affirms Judge Evans' decision to not reopen the record, thus preventing the publishers, and the Copyright Clearance Center that is pulling their strings, from introducing new evidence of licensing options that did not exist when they brought the case in 2008. Although it seems like a mere technicality, this ruling, another loss for the publishers, really points out how silly and out-of-date the lawsuit now is.

This time around, the circuit court seems to say more explicitly that they expect more of the excerpts that are at the center of this dispute to be found to be infringing. They clearly do not like the fact that, after the first appeal, and with their instructions to be less mathematical in her analysis and to weigh the fourth factor more heavily, Judge Evans found fewer infringements (by one) than she had in the first trial. So if there is a third trial, maybe the outcome will be six infringements, or even ten. But the big principles that the publishers were trying to gain are all lost. There will be no sweeping injunction, nor any broad assertion that e-reserves always require a license. The library community will still have learned that non-profit educational use is favored under the first fair use factor even when that use is not transformative. The best the publisher plaintiffs can hope for is a split decision, and maybe the chance to avoid paying GSU's costs, but the real victories, for fair use and for libraries, have already been won.

The saddest thing about this case is that, after ten years, it continues to chew over issues that seem less and less relevant. Library practices have evolved during that time, and publishing models have changed. Open access and the movement toward OERs have had a profound impact on the way course materials are provided to students. So the impact of this case, and of any final decision, if one ever

comes, will be negligible. The plaintiff publishers actually lost a long time ago, they simply lack the wisdom to recognize that fact.

Cambridge University Press, Oxford University Press and Sage Publishing v. J.L. Albert should have settled years ago. Instead it has devolved into a kind of punchline, much like *Jarndyce v. Jarndyce* from Dicken's Bleak House; the mere mention of it causes people to roll their eyes and giggle. The final resolution of this dispute may yet be a long way off, but at this point the takeaway from the case is clear: carry on with your daily work, teachers and librarians, there is nothing to see here.

Weighing the Costs of Offsetting Agreements

Fri, 16 Nov 2018 15:54:33, Kevin L. Smith

[Category: all-posts, hybrid-open-access, open-access-policies, scholarly-publishing]

A guest post by Ana Enriquez, Scholarly Communications Outreach Librarian in the Penn State University Libraries.

Along with others from the Big Ten Academic Alliance, I had the pleasure of participating in the Choosing Pathways to Open Access forum hosted by the University of California Libraries in Berkeley last month. The forum was very well orchestrated, and it was valuable to see pluralism in libraries' approaches to open access. (The [UC Libraries' Pathways to Open Access toolkit](#) also illustrates this.) The forum rightly focused on identifying actions that the participants could take at their own institutions to further the cause of open access, particularly with their collections budgets, and it recognized that these actions will necessarily be tailored to particular university contexts.

Collections spending is a huge part of research library budgets and thus — as the organizers of the forum recognized — of their power. (At ARL institutions, the average share of the overall budget devoted to materials was 47% in 2015-2016.) Offsetting agreements were a major theme. These agreements bundle a subscription to toll access content with payments that make scholarship by the institution's researchers available on an open access basis. The idea behind offsetting agreements is that if multiple large institutions pay to make their researchers' materials open access, then not only will a large majority of research be available openly but subscription prices for all libraries should come down as the percentage of toll access content in traditional journals decreases. The downside is that offsetting agreements tie up library spending power with traditional vendors; they redirect funds to open access, but the funds go to commercial publishers and their shareholders instead of supporting the creation of a new scholarly ecosystem.

Experiments with offsetting are underway in Europe, and [MIT and the Royal Society of Chemistry](#) have recently provided us a U.S. example. I look forward to seeing the results of these agreements and seeing whether they make a positive difference for open access. However, I am concerned that some see offsetting as a complete solution to the problems of toll access scholarship, when it can be at best a transitional step. I am concerned that it will be perceived, especially outside libraries, as a cost-containing solution, when it is unlikely to contain costs, at least in the near term. And I am also concerned that libraries and universities will commit too many resources to offsetting, jeopardizing their ability to pursue other open access strategies.

Offsetting agreements must be transitional, if they are used at all. They are inappropriate as a long-term solution because they perpetuate hybrid journals. Within a particular hybrid journal, or even a particular issue, articles from researchers at institutions with a relevant offsetting agreement are open access, as are some other articles where authors have paid an article processing charge (APC). However, other articles within that same journal or issue are not open access. An institution that wants access to all the journal's content must still pay for a subscription. In contrast, if the library that made the offsetting

agreement had instead directed those funds into a fully open investment (e.g., open infrastructure or library open access publishing), the fruits of that investment would be available to all.

Controlling the costs of the scholarly publishing system has long been a goal of the open access movement. It is not the only goal — for many institutions, promoting equity of access to scholarship, especially scholarship by their own researchers, is at least as important. However, with library and university budgets under perpetual scrutiny, and with the imperative to keep costs low for students, it is important to be transparent about the costs of offsetting. In the near term, offsetting agreements will cost the academy more, not less, than the status quo. Publishers will demand a premium before acceding to this experimental approach, as they did in the deal between MIT and the Royal Society of Chemistry. The UC Davis [Pay it Forward study](#) likewise estimated that the “break-even” point for APCs at institutions with high research output was significantly below what the big five publishers charge in APCs. In other words, shifting to a wholly APC-funded system would increase costs at such institutions.

The authors of the Pay it Forward study and others have written about structuring an APC payment model to foster APC price competition between journals. Institutions pursuing offsetting agreements should build this into their systems and take care not to insulate authors further from these costs. They will then have some hope of decreasing, or at least stabilizing, costs in the long term. Barring this, libraries’ payments to traditional publishers would continue to escalate under an offsetting regime. That would be disastrous.

Whether or not offsetting agreements stabilize costs, libraries will have to be cautious not to take on costs currently borne by other university units (i.e., APCs) without being compensated in the university’s budgetary scheme. What’s more, because offsetting agreements reinforce pressure to maintain deals with the largest publishers, they undermine libraries’ abilities to acquire materials from smaller publishers, to [develop community-owned open infrastructure](#), to invest more heavily in library publishing, to support our university presses in their open access efforts, and to invest in crowdfunding schemes that support fully open access journals and monographs.

To maintain this pluralistic approach to open access, either within a single research library or across the community, libraries signing offsetting agreements should be cautious on several points. To inform their negotiations, they should gather data about current APC outlays across their institutions. They should structure the APC payment system to make costs transparent to authors, enabling the possibility of publishers undercutting each other’s APCs. They should safeguard flexibility in their collections budgets and invest in other “pathways” alongside offsetting. And they should, if at all possible, make the terms of their offsetting agreement public, in the spirit of experimentation and of openness, to enable others to learn from their experience with full information and to enable themselves to speak, write, and study publicly on the impact of the agreement.

The First Step Towards a System of Open Digital Scholarly Communication Infrastructure

Sun, 09 Dec 2018 08:56:09, Kevin L. Smith

[Category: all-posts]

A guest post by David W. Lewis, Mike Roy, and Katherine Skinner

We are working on a [project](#) to map the infrastructure required to support digital scholarly communications. This project is an outgrowth of David W. Lewis' ["2.5% Commitment"](#) proposal.

Even in the early stages of this effort we have had to confront several uncomfortable truths.

First Uncomfortable Truth: In the main, there are two sets of actors developing systems and services to support digital scholarly communication. The first of these are the large commercial publishers, most notably Elsevier, Wiley, and Springer/Nature. [Alejandro Posada and George Chen](#) have documented their efforts. A forthcoming SPARC report previewed in a [DuraSpace webinar by Heather Joseph](#) confirms these findings. The second set of actors may currently be more accurately described as a ragtag band of actors: open source projects of various sizes and capacities. Some are housed in universities like the Public Knowledge Project (PKP), some are free standing 503(C)3s, and others are part of an umbrella organization like DuraSpace or the Collaborative Knowledge Foundation (COKO). Some have large installed bases and world-wide developer communities like DSpace. Others have yet to establish themselves, and do not yet have a fully functional robust product. Some are only funded with a start-up grants with no model for sustainability and others have a solid funding based on memberships or the sale of services. This feels to us a bit like the rebel alliance versus the empire and the death star.

Second Uncomfortable Truth: The commercial players are well resourced and are building or acquiring tools that can be integrated into an end-to-end scholarly and research workflow. The ragtag band of open source projects are underfunded and the tools they produce are at best only loosely integrated. Despite some early effort, particularly by [Bianca Kramer and Jeroen Bosman](#), there is currently no comprehensive view of the landscape (thus our project). We therefore do not know what is required, or where there are gaps and redundancies, for an open community controlled end-to-end workflow. While most projects adhere to accepted standards, efforts at integration are in their infancy. The work of the Joint Roadmap for Open Science Tools ([JROST](#)) is a good beginning, but it is only just starting. Importantly because we have only a vague picture of the open infrastructure community, we don't know what it will cost to build what is required. This means it is nearly impossible to build a case for system-wide funding, especially one based on ROI.

Third Uncomfortable Truth: There is little transparency anywhere. The large commercial providers have little interest in disclosing the particulars of their strategies, as they consider them trade secrets. Unfortunately, many open projects are not transparent either. In part because open projects have such a mix of organizational structures it is hard to find financial or even governance information about projects. It is thus hard for those who wish to contribute to projects to understand whether or not they are making good investments.

These uncomfortable truths lead us to make several suggestions to the open community. We believe that absent a significant change in the way in which the open community functions it will have little chance to successfully compete against the large commercial providers.

We believe the first required change is for open projects to become more transparent. In the current environment, as the recent failure of the Digital Preservation Network reminds us, too many projects fail, either a slow death because their financial support is inadequate to maintain their systems over time, or because their grant ends before a market ready product is delivered, or because they simply have no path to financial sustainability and just run out of money. Sometimes the project was just too technically ambitious or they have no capacity or understanding of how to market what they have built. We need a way to easily and reliably gauge the technical, organizational, and financial health of projects in order to assure investors that they are making wise use of their money.

We believe a lightweight, standard audit process for all open projects could help. [Geoffrey Bilder](#), [Jennifer Lin](#), and [Cameron Neylon](#) have proposed principles that can be used to create such a reporting mechanism. The Global [Sustainability Coalition for Open Science Services \(SCOSS\)](#) has developed a process for analyzing open projects, though to date it has only been used in a limited number of cases. Beyond financial information, a standard means of assessing the organizational capacity would demonstrate the health of the project's governance structure. Educopia's [Community Cultivation: A Field Guide](#) can serve as the basis for this. We need mechanisms for judging the fiscal, technical, and organizational health of projects. We think of this as providing the basis for an "Angie's List" for digital scholarly communications infrastructure. This will provide the community with the confidence necessary to make the needed investments to build infrastructure that is competitive with the commercial sector. If we do not do so, the only choice will be to take what is offered by the large for-profit players.

The second required change is to develop a map of the landscape. Our project intends to do this. The map will document the existing infrastructure and show gaps and redundancies. This is the first step in developing strategies for integrating systems across the whole of the scholarly and research workflow. Together with financial and organizational information, it will then be possible to create a roadmap for the development and maintenance of the full range of infrastructure that is required. From this it will be possible to develop a case to fund an alternative, community-owned and community-led system of infrastructure. We believe our roadmap will provide government agencies and foundations, as well as to universities and their libraries the confidence necessary to make significant and ongoing contributions to open systems.

Our project will provide some preliminary data, but regular and consistent collection of data from projects will be required, as will the maintenance of a continually revised roadmap. This will require an organizational and governance structure that is trusted by the community. Such an organization does not exist today. We need to start to thinking about how to create it.

As we begin to look at the projects that currently make up the open infrastructure for digital scholarly communication we believe there is much that the community can be proud of. But it is also quite clear that what we now have is far from what is required. We believe that a critical first step is to create a more transparent environment where it is easy to judge the financial, technical, and organizational capacity of projects. Without this transparency it will be impossible to build the trust necessary for projects to collaborate and integrate, and the trust that is required for funders to make the necessary investments.

We believe that developing the means of transparency is the required first step and that now is time to take it.

What really happens on Public Domain Day, 2019

Thu, 27 Dec 2018 14:57:57, Kevin L. Smith

[Category: all-posts]

The first of January, as many of you know, is the day on which works whose copyright term expired the previous year officially rise into the public domain. For many years now, however, no published works have entered the PD because of the way the 1976 Copyright Act restructured the term of copyright protection. 2018 was the first year in decades that the term of protection for some works – those published in 1923 – began to expire, so on January 1, 2019, many such published works will, finally, become public property. Lots of research libraries will celebrate by making digital versions of these newly PD works available to all, and the Association of Research Libraries plans a portal page, so folks can find all these newly freed works.

I want to take a moment to try to explain the complicated math that brought us to this situation, and to spell out what is, and is not, so important about this New Year's Day.

Published works that were still protected by copyright on Jan.1, 1978, when the “new” copyright act of 1976 went into effect, received a 95-year term of protection from the date of first publication. For works that were in their first term of copyright when the law took effect, this was styled (in section 304(a)) as a renewal for a term of 67 years, so that 28 years from when the copyright was originally secured plus the 67 years renewal term equaled 95 years. If a work was in a second, renewed term on Jan 1, 1978, section 304(b) simply altered the full term of protection to 95 years from date of first publication (or, as the law phrases it, when “copyright was first secured”).

So what is special about 1923? Prior to the 1976 act, copyright lasted for 28 years with a potential renewal term of another 28 years. This adds up, of course, to 56 years. Thus, works published in 1923 would be the first batch of copyrighted work that would receive this 95-year term, because they would be the oldest works still in protection when the new act took effect (1923 plus 56 years being equal to 1978). A work published in 1922 would be entering the public domain just as the new act took effect, and those works stayed in the public domain. But those published a year later were still protected in 1978, and they got the benefit of this new, extended term, which ultimately resulted in 37 more years of protection than an author publishing her work in 1923 could have expected. Therefore, everything published from 1923 until 1977 enjoyed an extension, first to 75 years, then, thanks to the Sonny Bono Copyright Term Extension Act, 95 years. Since 2018 is 95 years after 1923, it is those works published in 1923 whose terms expired during 2018, so they officially rise into the public domain on Jan. 1, 2019.

All this math does not mean, however, that everything published in 1923 has been protected up until now. Notice that, in the description above, we distinguish between those works in their first (28-year) term of protection and those in their second term. That is because, under the older law, a book, photograph, song or whatever, had to be renewed in order to continue to have protection past that first

28 years. Many works were not renewed, and the 1976 act only applies the extended 95-year term to those older works that were in their second term of protection when it took effect. So if a work was not renewed, and its copyright had already lapsed, the extended term did not apply. A basic principle is that the 1976 copyright law did not take anything out of the public domain that had already risen into it (although a later amendment did exactly that for certain works that were originally published in other countries).

What is really happening then, is that some 1923 works – those whose copyright term was renewed after 28 years (in 1951) – really do become public domain for the first time. But for a great many works, which were already PD due to a failure to renew, what really happens this week is that we gain certainty about their status. Research suggests that a sizable percentage of works for which renewal was necessary were not, in fact, renewed; estimates range from 45% to 80%. So many of the works we will be celebrating were certainly already public domain; after January 1 we just have certainty about that fact. Finding out if a work was renewed is not easy, given the state of the records. The HathiTrust's Copyright review program has been working hard at this task for a decade, and they have been able to open over 300,000 works. But it is painstaking, labor-intensive work that mostly establishes a high probability that a work is PD. On Public Domain day, however, we get certainty, which is the real cause for celebration.

Let me illustrate this situation by considering one of the works that the KU Libraries plan to digitize and make openly accessible in celebration of Public Domain Day, 2019. *Seventeen Nights with the Irish Story Tellers*, by Edmund Murphy, is an interesting collection of poems that is part of our Irish literature collection, one of the [real strengths of the Spencer Research Library at KU](#). It was published in Baltimore in 1923, and OCLC lists holdings for only 15 libraries. It is apparently not held by the HathiTrust, likely because no libraries whose holdings Google scanned owned a copy. But my guess is that it is already in the public domain and has been since the early 1950s. And there is no record of any renewal of its copyright in the [database of renewal records maintained by the library at Stanford University](#). That database only holds renewal records for books, and it contains no indication that *Seventeen Nights* ever received a second term of protection. So the chances are good that this work, like so many others, has been in the public domain for many years.

There are a great many works published between 1923 and 1963 that simply exist in a state of limbo, probably in the public domain but not (yet) subject to the effort needed to determine whether there has ever been a renewal of the copyright. On Public Domain Day, 2019, we should certainly be delighted by the “new” 1923 works, such as Robert Frost's *Stopping by Woods on a Snowy Evening*, that will become PD for the first time. But we also need to recall that many published works from the mid-20th century are already in the public domain. If we want to make the effort to do the needed research, there is lots of opportunity to free up some of these works without waiting for another January 1.

Happy [Public Domain Day](#) to all!

Lessons from the ReDigi decision

Thu, 17 Jan 2019 19:02:52, Kevin L. Smith

[Category: all-posts]

The [decision announced last month](#) in the *ReDigi* case, more properly known as *Captiol Records v. ReDigi, Inc.* was, in one sense, at least, not a big surprise. It was never very likely, given the trajectory of recent copyright jurisprudence, that the Second Circuit would uphold a digital first sale right, which is fundamentally what the case is about. The Court of Appeals upheld a lower court ruling that the doctrine of first sale is only an exception to the distribution right and, therefore, does not protect digital lending because, in that process, new copies of a work are always made. His reasoning pretty much closes the door on any form of digital first sale right, even of the “send and delete” variety that tries to protect against multiple copies of the work being transferred.

What is perhaps more surprising is that the 2nd Circuit also rejected a fair use defense for ReDigi’s system. Some were particularly surprised that fair use was treated so dismissively by Judge Pierre Leval, who is one of the most respected jurists in regard to fair use, and the author of [Toward a Fair Use Standard](#), the article upon which the Supreme Court relied when it transformed fair use thinking in the *Campbell v. Acuff-Rose* case. For my part, however, I am inclined to be a little less surprised, and to still think that we can learn several things from this decision.

An excellent analysis of the case by Jon Band, on behalf of the Library Copyright Alliance, [is available here](#).

The reason I am less surprised that Judge Leval did not find fair use in what ReDigi was doing is precisely because he wrote that famous article, which proposes the idea that activities that constitute fair use are those which are in some way transformative of the original work. Even though the Supreme Court reminded us, in the *Campbell* case, that non-transformative uses can still be fair use, Judge Leval may be more inclined to reject such uses because the notion of transformation is so close to the heart of his thinking. Once he found that ReDigi’s system was making a non-transformative use, and constituted a direct market substitution, he, perhaps even more than other judges, was not likely to find in favor of fair use.

I think there are several things we can learn from this decision, even though it appears to have mostly negative implications, especially when we consider [Controlled Digital Lending](#) (CDL), which is generating a lot of attention these days in library circles. What is most significant about this *Redigi* opinion is the directions it points us in as we consider how we could defend the idea that CDL is fair use.

First, any fair use defense of CDL would need to lay very heavy stress on the non-commercial nature of library lending. This is perhaps the biggest difference that suggests that CDL might be fair use even though Redigi’s facilitation of the resale of digital music was not.

While still thinking about the first factor, I also believe that there is a stronger argument that CDL would be transformative, even though, again, Redigi's use was found not to be. Judge Leval specifically endorses an interpretation from another Second Circuit case, *Fox New v. TVEyes*, that reads the famous Sony case (the Betamax decision) as saying that a use can be transformative when it "utilizes technology to achieve the transformative purpose of improving delivery of content without unreasonably encroaching on the commercial entitlements of the rights holder." Judge Leval felt that Redigi did not meet this test, but it is arguably a direct and succinct statement of what CDL is trying to do. Combined with its non-commercial nature, I think CDL has a MUCH stronger case on the first fair use factor.

Here we have the classic situation of "arguing in the alternative," a style of argument that allows lawyers to present different defenses that might seem to contradict each other – "my client did not shoot the victim, and, anyway, it was self-defense" – and let the court decide which is most applicable or credible. In asserting that CDL is fair use, we can argue regarding the first factor that the use IS transformative and, in the alternative, that even non-transformative use may still be fair use.

I also do not believe that the *Redigi* decision really undermines the effort to support a fair use analysis by pointing to the Congressional policy expressed in the law in another place. Specifically, the doctrine of first sale, found in section 109 of the copyright law, as well as section 108, which is specifically designed to support library activities, indicate that library lending is an important value. Even though CDL would not qualify for the first sale exception, the policy behind these provisions should help support a first factor analysis for fair use. Also, first sale indicates that rights holders should not be able to assert sales lost due to library lending in order to prove market harm; Congress has said that that market is simply not available to rights holders as a matter of policy. So, again, the policy behind these exceptions supports fair use, on the fourth factor as well as the first.

It is important to note that the *Redigi* decision did not comment at all on this argument about the policy that underlies other exceptions and its impact on fair use. Jon Band notes that this argument was made in the Library Copyright Alliance's amici brief to the court, but that Judge Leval chose not to address it. Jon finds this discouraging, which is understandable, but I want to emphasize that there was no comment one way or the other, and therefore nothing to undermine the argument in later fair use cases, where the analysis as a whole will be stronger, for the reasons discussed above.

Overall, I am optimistic that the fair use analysis for CDL is still strong, and that the *ReDigi* case did not seriously weaken it. Nevertheless, I think the policy arguments – apart from fair use — are important, and point to a reason why Congress ought to address the issue of digital first sale. The policy behind first sale is fundamentally that people should be able to resell their own property; this is a legal value called "free alienation of property," and it underlies quite a bit of Anglo-American law. The basic concept is that property will be used most efficiently when it is easy to transfer it from the hands of someone who no longer plans to use or exploit it to the hands of someone who will. When we look at this policy, something that has been favored in our law for centuries, we can see that the radical distinction between reproduction and distribution is both technologically outdated and leads to outcomes that are contrary to sound policy. It is time for us to rethink that distinction and to see if we can find a better approach, one that protects consumers in a digital environment and reinforces the

sound reasons for allowing free alienation even of digital property. There are several potential approaches here, such as restricting the ability to turn an apparent sale into a licensing transaction, or even by returning to the earliest U.S. copyright law and granting not a reproduction and distribution right, but simply a “right to vend” the protected work. But that is material for another post; this one is complicated enough as it is.

Transitioning Society Publications to Open Access

Mon, 11 Feb 2019 02:05:34, Kevin L. Smith

[Category: all-posts]

This is a guest post written by *Kamran Naim*, Director of Partnerships & Initiatives, Annual Reviews; *Rachael Samberg*, Scholarly Communications Officer, UC Berkeley Library; and *Curtis Brundy*, AUL for Scholarly Communications and Collections, Iowa State University.



The Story of Society Publications

Scientific societies have provided the foundations upon which the global system of scholarly communication was built, dating back to the 17th century and the birth of the scholarly journal. More recent developments in scholarly communication—corporate enclosure, financial uncertainty, and open-access policies from funders and universities—have shaken these foundations. Recognizing the crucial role that societies have played—and must continue to play in advancing scientific research and scholarship—a group of OA advocates, library stakeholders, and information strategists has organized to

provide concrete assistance to society journals. The aim is to allow scholarly societies to step confidently towards OA, enabling them to renew, reclaim, and reestablish their role as a vital and thriving part of the future open science ecosystem.

Aiding a Transition

To continue the progress towards an open scholarly ecosystem, a group of like-minded individuals from libraries, academic institutions, publishers, and consortia have organized to provide support, advocacy, and referral services within the publishing community and related professional organizations.

Our group, aptly called *Transitioning Society Publications to Open Access* (or, TSPOA), took root at the October 2018 [Choosing Pathways to OA working forum](#). The forum brought together more than 125 library and consortium leaders and key academic stakeholders to engage in action-oriented deliberations about a range of OA funding strategies so they could leave with customized plans for how they intend to support the global transition towards openness.

As participants closely examined how their own organizations might fund or otherwise support OA journal publishing, they were inspired to be proactive. A diverse group of participants expressed particular interest in providing support to trusted society publishers, given the uncertainty these publishers are facing under the current scholarly communications climate. Some participants wished to help societies with better understanding their OA publishing options and to share experiences and provide support in OA transition and outreach strategies. Others wanted to undertake OA advocacy within professional societies—helping to generate society OA principles or set standards for professional evaluation within various disciplines. What united us as forum participants was a desire to act—our intention to leverage our collective experience and expertise in order to yield a more open society journal universe.

Five Objectives

Drawing on the momentum from the forum, in November 2018 we established TSPOA. Our principal objective is to connect society journal editors and publishers (and any libraries or consortia that support or fund them) with useful resources and consultation services related to transitioning society publications to OA.

In doing so, we celebrate the work already being done by our colleagues elsewhere in offering guidance to society journals making the OA transition. Our efforts should complement existing undertakings, and hopefully can help draw even more attention to contributions in this regard.

We are also OA publishing model agnostic: We are not promoting any particular OA funding model, such as collectives or article processing charges. Rather, we seek to provide relevant resources/experience

working in collaboration with society publishing partners to help them develop an open access publishing model that is appropriate, effective and sustainable.

With all this in mind, we aim to:

1. *Support*: We will serve as a communication forum, clearinghouse, and advisory group in providing support for libraries, publishers, and scholarly societies working toward transitioning scholarly publishing from subscription-based to open access.
1. *Incubate & pilot*: We will engage in community discussions to assess opportunities for piloting new ventures and evaluating possible co-investment opportunities to support OA society journal publishing.
1. *Refer*: We will help connect willing partners with resources or consultative services that support libraries, publishers, and scholarly societies interested in transitioning to open access publishing.
1. *Advocate*: We will advocate within research communities and professional organizations or societies for open access publishing by scholarly societies.
1. *Report*: We will issue a fiscal year-end public summary of activities and projects completed or underway, with an included statement about future group directions.

What do these objectives look like in practice?

- We will **cultivate our website** to collect and offer useful tools and guidance for society journal editors and publishers, and the libraries or consortia who work with them.
- We will **help connect** those of you who contact us with localized groups, individuals, or consultation services to support you in your OA transition aims.
- We will **evaluate opportunities to support or encourage** new society journal OA publishing models or projects.
- We will **advocate within professional societies** through existing administrative positions or at society meetings, and will conduct **outreach and presentations** to promote OA outcomes.
- We will work to **highlight successful initiatives/partnerships** through publishing case-studies.
- We will **keep the scholarly publishing community up-to-date** on our efforts with a year-end summary of our goals and progress.

Group Membership

As set forth in our group [charge](#), TSPOA members are expected to actively pursue these group objectives. We are not merely setting up a listserv through which group members can stay informed

about society journal publishing; rather, this is a working team in which we members commit to undertaking efforts and projects that advance an OA transition. For purposes of both member accountability and group agility in achieving our TSPOA objectives, for our first year (through January 2020) we are experimenting with limiting membership to fifteen persons during this time. We hope to be able to grow membership in subsequent years once TSPOA workflows and activities are more firmly underway.

We will also be forming sub-committees to undertake particular projects that may solicit broader community involvement, and invite participants to engage. We will keep the community posted about projects with such opportunities.

In the meantime, if you are engaged in parallel efforts at your institution, we welcome the opportunity to highlight them.

We're here to help

TSPOA is getting its sea legs as a resource for transitioning society journal publications to OA. Please check out our expanding [web site](#) and reach out to us if you edit or publish a society journal looking to transition, or a library supporting society journal editors who wish to learn more.

Supporting the Transition: Revisiting organic food and scholarly communication

Mon, 04 Mar 2019 12:55:28, Ellen Finnie

[Category: all-posts, transformational-agreements]

This is a joint post by guest Jeff Kosokoff, Assistant University Librarian for Collection Strategy, Duke University, and IO author Ellen Finnie, MIT Libraries.

From the perspective of academic libraries and many researchers, we have an unhealthy scholarly information ecosystem. Prices consistently rise at a rate higher than inflation and much faster than library budgets, increasingly only researchers in the most well-financed organizations have legitimate access to key publications, too few businesses control too much of the publishing workflow and content data, energy toward realizing the promise of open access has been (as Guédon describes it) “apprehended” [to protect publisher business models](#), and artificial scarcity rules the day. Massive workarounds like SciHub and #icanhaspdf have emerged to help with access, but such rogue solutions seem unsustainable, may violate the law, and most certainly represent potential breaches of license agreements. While many of the largest commercial publishers are clinging to their highly profitable and unhealthy business models, other more enlightened and mission-driven publishers — especially scholarly societies — recognize that the system is broken and are looking to consider new approaches. Often publishers are held back by the difficulty and risk in moving from the current model to a new one. They face legitimate questions about whether a new funding structure would work, and how a publisher can control the risks of transition.

In 2016, Ellen asked us to consider the [metaphor of choosing organic products](#) as a way to understand the choices we in academia make about where and how to publish, and what we might subscribe to in libraries. The notion was that we vote for the food system we want when we spend our money on food; that if one wants to affect a reduction in the use of pesticides and inorganic fertilizers, one should buy organic. Consumer choices shape the market. Similarly, when we choose to spend our library budgets to support publishing models that are healthy, we are moving the needle towards a better system.

Perhaps we can again look to the food system for a helpful metaphor here, and to show us a path forward. It is impossible for a farmer to instantly convert a conventionally-farmed piece of land into one that produces organic products. It takes time for the soil to be cleansed of the inorganic, and during this time, produce grown cannot be sold as organic. The [USDA says](#):

“making the transition to organic production and handling takes both time and planning. Implementing an organic system requires a tactful approach to successfully carry out common agricultural activities, such as managing pests, building soil health, and improving livestock and herd health.”

The USDA has been studying how it might support this transition through means such as [offering labeling to farmers who have committed to a transition process](#). The idea is that when you buy produce labeled as “transitional”, you help support a farmer moving from an unhealthy to healthy production model. The Organic Trade Association has suggested such a transition would encompass two growing seasons. It is critical for a farmer to have an income during the shift, and being able to accurately and reliably label produce during that period as transitional provides a viable economic passage from one farming model to another.

Similar attempts to transition scholarly publications are underway. When Martin Eve was initially seeking support for the Open Library of the Humanities, an open access journal platform now including 23 titles, he asked supporting libraries to maintain their extant subscriptions through traditional publishers such as Wiley for five years. We needed to spend a little more for a few years to help the publishers make the transition.

Another example is Libraria, [which asks libraries to support a transition](#) for publishers committed to flipping journals to full OA, promising that: “the subscription fees that libraries are currently paying to access member journals will be directed to the cooperative in order to support the journals in moving open access”. OLH and Libraria thus aim to provide a mechanism and viable economic path for transformation in the ecosystem as we shift towards sustainable open access.

Transformative agreements are another transitional pathway towards more complete and sustainable OA. For example, the Royal Society of Chemistry’s “offsetting” model is based on a formula where payments to access paywalled articles are redirected over time — as more campuses sign on to transformative agreements — towards payments for open access publication of a campus’ authored articles. The Royal Society of Chemistry’s model lays out a path to open access that involves passage through the hybrid OA landscape, with [commitment to a complete transition](#). The University of California (UC) and others have been seeking transformative agreements with Elsevier. While the [results so far](#) have only resulted in failed negotiations and the [loss of access for scholars in the UC system](#), Germany, Sweden, and elsewhere, the insistence on a model that ensures openness and controls costs has clearly become a strong stance across this wide range of institutions. They insist on contracts that start down a transformative path, even in the face of short-term inconvenience.

Some of these transitional transformative agreements will need to focus on models other than article processing charges (APCs), as APCs are not viable for all publications, particularly where the articles are not original grant-funded research. One example is Annual Reviews’ [“Subscribe to Open”](#) program, a collaborative funding model with an aim to be sustainable. This program is the latest step in a transitional open access model Annual Reviews has been building, starting with the *Annual Review of Public Health*. For that title, in 2017 they used a variety of creative funding processes, including [“establish\[ing\] a collective fund to support the publication costs for the journal to sustain long-term open access”](#). As one element of the transitional approach, customers who paid a 2017 subscription were asked permission to assign the payment to the collective fund.

In an era when there are widespread —[and at times divisive](#)— debates about how to achieve the aims of worldwide open access for scholarly journal publishing, we see an opportunity for unity and progress by supporting viable and transparent transitional models. To encourage such approaches, we suggest:

- Developing a labeling system for journals in a transition to OA, based on standards regarding timetable and methods for transition. Developing and deploying such a standard could be a part of the [infrastructure David Lewis calls for](#), and could be taken up as part of the commitment to OA infrastructure that emerged from productive conversations at the [Berkeley Pathways to OA event](#).
- Leveraging collections budgets to support of a wide range of transitional open access models that meet requirements for viability, trustworthiness, commitment, and transparency.
- Requiring that transformational agreements include language committing to a transition to full OA, preferably on a timetable.
- Seeking opportunities to engage publishers about transformative experiments and pathways well before and during contract renewal.
- Educating and engaging and hearing your community. Such groundwork was critical at the University of California in the context of the Elsevier negotiations, as evidenced by the [strongly worded memo of support for scholarly communication transformation issued by the UC academic senate](#).
- Advocating on our campuses and with publishers to leverage existing institutional procurement mechanisms in order to help support these new transitional models. We can play an important role in adapting existing systems and processes to meet new models, and in partnering with publishers to devise models that work for our campuses.

The many efforts described here to transition the scholarly communication system towards openness are only a few of those emerging on our landscape. It is up to us, as stewards of our campus' funds, to invest wisely — to vote with our dollars— to support models that advance our aims, giving them the opportunity to succeed. Our investments should include support for transitional models — in particular, iterative, experimental models — that provide a pathway for more publishers to move toward a fully open, sustainable, and inclusive scholarly communication system, with its untarnished promise to accelerate science and scholarship and offer more equitable access to information and knowledge worldwide.

This is a joint post by Jeff Kosokoff, Assistant University Librarian for Collection Strategy, Duke University @JeffKosokoff & Ellen Finnie, Head, Scholarly Communications & Collections Strategy, MIT Libraries

“Subscribe to Open” as a model for voting with our dollars

Mon, 18 Mar 2019 08:15:40, Ellen Finnie

[Category: all-posts, open-access-business-models, subscribe-to-open]

Elsewhere in this blog I’ve made the case that academic libraries should [“vote with their dollars”](#) to encourage and enable the kind of changes in the scholarly communication system that we’d like to see — those that move us towards a more open and equitable ecosystem for sharing science and scholarship. Most recently, Jeff Kosokoff and I explored the importance of offering [financial support for transitional models](#) that help publishers down a path to full open access, and we called out Annual Reviews’ emerging “Subscribe to Open” model as a good example of one that provides a pathway to OA for content that is not suited to an article processing charge (APC) approach. Here, Richard Gallagher, President and Editor-in-Chief of Annual Reviews (AR), and Kamran Naim, Director of Partnerships and Initiatives, explore with us the rationale for AR’s pursuit of an open access business model that is not based in APCs, provide details how “Subscribe to Open” is intended to work, and describe its transformative potential.

Can you describe the “Subscribe to Open” model briefly? How is it a particularly good fit for AR?

Subscribe to Open converts gated access journals to open access using existing library relationships and subscription purchases. Institutions and individuals that already know and value Annual Reviews content simply continue to subscribe – there are no APCs or other additional costs – and as long as subscription revenues are maintained, the year’s volume will be published open access and the back volumes made freely available. If subscription revenue is insufficient to cover costs, for example as a result of institutions deciding to “free ride,” the journals will remain gated access. Thus, Subscribe to Open can be seen as an alternative subscription offering.

Subscribe to Open is a good fit because it allows librarians and publishers like Annual Reviews to work together to achieve the common goal of delivering of high-quality OA products. We are an independent nonprofit publisher, and the motives, goals and cost structure of the model are transparent. In addition, OA models based on author fees can’t be easily applied to our publications. Annual Reviews publishes long-form review articles that are written by invited experts. It takes weeks of labor to pull together a good review and authors rarely cite funder support, so presenting an APC to our contributors isn’t a good option.

You have explained elsewhere that your Subscribe to Open model is “contingent upon the participation of all subscribers,” making it “effectively a subscription” which “allows libraries to utilize their existing subscription spends to support an OA program.” This sounds like the kind of mechanism we need to redirect collections dollars from paywalled subscriptions to supporting open access. But can you say more about how this will work? Will there be some cutoff period each year when you determine if you have sufficient funds to make a title OA? And how can libraries (especially those that are state funded or

otherwise under tight procurement policies) explain why we need to continue to pay, if the content will be open?

The short answer to why libraries need to continue to pay is that they remain the source of funding for our journals under Subscribe to Open. Annual Reviews' income from subscriptions closely matches our costs. So, to publish Subscribe to Open journals we need to carry all of subscribers with us or face a deficit that would become unsustainable. To keep subscribers on board we have both a carrot and a stick. The carrot is a 5% discount on the Subscribe to Open titles. The stick is that if we lose subscribers the project becomes untenable and the journals will remain gated. Thus, the choice for institutions that require ongoing access is between subscribing to open or, if they choose not to, subscribing to a gated version of journal at a higher price. It is in the economic interest of institutions, including state funded libraries and those with tight procurement policies, to choose Subscribe to Open. Furthermore, their existing subscription spending will support conversion of journals to OA, maximizing the impact of their budget beyond the campus.

Annual Reviews will have to take go/no-go decisions on Subscribe to Open titles each year. Our starting position is that in 2020 the five journals will be supported by Subscribe to Open. We will monitor customer commitments throughout the year and reassess only if we see a growing imbalance between orders for the Subscribe to Open and the gated titles. If this gap reaches a level that we deem to be unsustainable, the titles without sufficient support will be reassigned as gated journals.

Our hope is that Subscribe to Open will succeed and quickly become normalized as an acceptable, even desirable, subscription mechanism. We also believe that the subscriber base can be expanded to include previously-non-subscribing institutions that regularly access the Subscribe to Open titles.

AR has been thinking about open access for years — indeed, Richard, I believe you came to AR with an OA agenda, is that right? — and your first move into OA was to make Annual Review of Public Health open. How was that funded, what were the results of that effort, and why are you shifting the approach for other AR titles?

Right from the off (I started at Annual Reviews four years ago) it seemed to me that OA fit with the organization's mission, which is to support the progress of science and the benefit of society. Annual Reviews is a major repository of scientific knowledge that we feel needs to be available to everyone – and not just the entire research community, but also legislators, lawyers, patients, parents, and so on – anyone looking for a thorough and accurate insight into a scientific topic.

A grant from The Robert Wood Johnson Foundation allowed us to test the value of this idea. The grant replaced subscription revenues for the Annual Review of Public Health for a year, and the 2017 volume was published OA. Usage skyrocketed. In 2016, the last full-year of gated access, there were 315,145 article downloads, while in 2018, there were 1,256,117, an increase of 300%. And it continues to rise: February 2019, usage is increased 560% over February 2017.

To explore who is now using the journal, we commissioned PSI to analyze usage log data for a five-month period (Jan-May 2018) using their IP registry. Articles were accessed from almost 10,000 institutions located 132 countries worldwide, compared to a maximum of 2,000 institutions pre-OA. And while there were many more universities, we also counted research centers, public health offices, government and state agencies, NGOs, corporations, schools, hospitals, and even prisons, among the users.

The second component of the grant from Robert Wood Johnson was to develop a sustainable model for Annual Reviews to convert titles to OA. After considering a number of options, we selected the approach described above, and named it Subscribe to Open. Great credit for this goes to Raym Crow, the consultant who proposed the idea and who co-developed it with us, indeed with the entire management team at Annual Reviews.

That data regarding increased reach and access when you made Public Health open access is eye-popping. Do you see the Subscribe to Open approach being attractive to other publishers who wish to expand usage and audiences by moving to OA,, particularly for publications where the APC is not a good fit? Does this seem to be a transformative model that is generalizable?

As much as Subscribe to Open was designed with Annual Reviews in mind, the underlying principle of redirecting existing subscription spending could work for other publishers. Given the diversity of content types, disciplinary concerns and availability of funding in the scholarly publishing landscape, a diversity of approaches will be required to attain the open research goal. Subscribe to Open could certainly be one of these.

Beyond that, do you see this model helping to address concerns some have about the APC approach potentially increasing barriers to publishing, even as it reduces barriers to access, for example in fields that are not heavily grant-funded, or parts of the world where waivers to APCs would be required in order to publish?

Subscribe to Open model avoids certain pitfalls of the APC model, including the marginalization of researchers in the low-income countries and communities. It places no additional financial burden on institutions or authors from low-income countries, and as such creates no new barriers to publishing.

It's very exciting to see a thoughtful, strategic, and transparent approach to OA for important scholarly content like AR, especially one that provides a path for publications where APCs are not a viable approach. How do we participate? When will libraries first see a call, for which titles, what if any choices will be offered, and where will the information be directed? Collections, scholarly communications, and acquisitions staff will all be interested — how will you get the word out beyond your typical billing address contacts?

Subscribe to Open launches on March 15. A lot of information, including a slidedoc, an infographic and an FAQ, can be found on the [Annual Reviews website](#).

The five Subscribe to Open titles for 2020 are the *Annual Review of Public Health*, the *Annual Review of Environment and Resources*, the *Annual Review of Nuclear and Particle Science*, the *Annual Review of Political Science*, and the *Annual Review of Cancer Biology*.

The success of Subscribe to Open is in the hands of the libraries. Subscribing librarians can best participate by continuing to renew their Annual Reviews agreements, and by encouraging their colleagues to do so. Annual Reviews sales staff will discuss Subscribe to Open with subscribers, and we would be delighted to receive feedback directly at rgallagher@annualreviews.org and knaim@annualreviews.org.

Thank you so much Richard and Kamran. It's energizing to hear about your plans for opening up AR, particularly given how important AR is to understanding the latest and most significant science and scholarship in areas of great concern globally.

We greatly appreciate the opportunity to present Subscribe to Open to IO readers. We'd like to acknowledge the input of the many librarians who helped shape the development of Subscribe to Open and address issues that it raises. Publishers and librarians working together make a powerful team!

Two posts in one

Mon, 22 Jul 2019 08:51:54, Kevin L. Smith

[Category: all-posts]

Farewell to Justice Stevens

As it did for so many people, the passing last week of Justice John Paul Stevens saddened me, and caused me to reflect on his remarkable tenure. It is curious to realize that, at his confirmation hearing, his health — he had recently had bypass surgery — and his ability to serve a “full” term on the Supreme Court was an issue. He went on to serve for nearly 35 years and was just short of 91 years old when he retired.

For me, Justice Stevens provided my first acquaintance with Supreme Court jurisprudence, since his ruling in *Sony v. Universal Studios*, 464 U.S. 417 (1984), was the second copyright decision I ever read. The first was the 1996 opinion of the 6th Circuit in *Princeton University Press v. Michigan Document Service*, and it was my gut feeling that that case was wrongly decided that sent me back to *Sony* and Justice Stevens, then on through a series of explorations of copyright issues, and finally to law school. So while, like most Americans, I have Justice Stevens to thank for my TV watching habits, I also think of him as at the beginning of what has been a marvelous journey for me.

Many of the memorial articles to Justice Stevens do not mention the *Sony* decision, so I want to recommend [this Washington Post piece](#) which, while it is a little bit flippant, does pay attention to what may be John Paul Stevens’ most lasting gift to America. It is worth noting, I think, that while the impact of many court decisions wane over time, *Sony* has grown more important over the years, because it provides a pathway for copyright to adapt to changing technologies.

Free Lunch for Trolls

Earlier this week, I started writing a post about [Senate bill S. 1273, the Copyright Alternative in Small-claims Enforcement \(or CASE\) Act of 2019](#). The Senate Judiciary Committee was about to mark up the bill, which includes voting to report it out to the full Senate, and I wanted to explain why I think the bill is a bad idea. Before I could finish my post, however, Stan Adams wrote [this important piece for TechDirt](#) that makes many of the points I had intended to make. So instead of repeating much of the same arguments, I decided the my most important task was just to make sure that readers of *In the Open* were aware of Adams’ excellent post.

Adams does a nice job of explaining where the legislation stands, and why it should not be enacted as currently written. I really encourage folks to read his post, and will add just these three summary points about the potential negative effect of the CASE Act:

1. First, the Case Act would disconnect statutory damages from the mechanism of copyright registration. That is, one could file, get a judgment, and collect statutory damages for a claim in

the new “small-claims” copyright court without having to register. Rights holders in unregistered works, if the tribunal found they had been infringed, would be able to collect up to \$15,000 in statutory damages. So the incentive to register, which can help prevent infringement by making it easier to find a rights holder from whom to seek permission, would be undermined.

2. Second, the CASE Act would increase nuisance claims. Because statutory damages would not be dependent any longer on timely registration, and because the barriers to bringing an infringement suit would be lowered, lots of people fishing for settlements — both real copyright trolls and rights-holders just “trying their luck” on weak claims — would be emboldened to send demand letters. Such letters are common for libraries and universities; they are time-consuming and expensive to deal with, even though most come to nothing in the end.
3. Which brings me to my final point, the chilling effect on fair use that the CASE Act is likely to have. Fair use is the proper response to many of those nuisance letters, and if they increase, the burden of exercising fair use will also go up. And more librarians and teachers will likely be discouraged from even considering fair use, if statutory damages are more easily available through this streamlined “small”-claims system, since \$15,000 is not a small amount at all to many of them.

The CASE Act is intended to address a real problem — the cost of litigation in federal court — but, in this case, the remedy is worse than the disease. For all the reasons given above and in Adams’ post this legislation, which has now been sent to the full Senate without any recommended changes, would undermine the core purpose of copyright law. It would discourage new creativity while benefiting the legacy content interests, which does not “promote the progress of science and the useful arts.”

Publishing, technology, and lawsuits

Sun, 08 Sep 2019 15:21:33, Kevin L. Smith

[Category: all-posts]

When Arizona State's University Librarian, Jim O'Donnell, posted a link to an article about the status and strategy of four lawsuits brought in the past few years by commercial publishers on the LibLicense list, it started me on a series of rather disparate reflections about the state of scholarly communications.

Jim's post was quite innocuous, of the "folks might be interested in this" variety, but he did note that some people might encounter a paywall. The article, "On the limitations of recent lawsuits against Sci-Hub, OMICS, ResearchGate, and Georgia State University," by Stewart Manley, was published this summer in *Learned Publishing*, which is available, only with a subscription, through Wiley. My institution ended its Wiley "big deal" a year ago because we could no longer afford it, so I did encounter a paywall — \$42 for this single, seven-page article (I ultimately obtained the article using inter-library loan, and am not providing a link to the pay-walled version). I commented, in response to Jim's post, on this high cost of access, which leads to my first observation about the state of academic publishing.

It is not surprising that many replies to my comment came from people who routinely use the LibLicense list to defend the status quo in commercial publishing, but I was bemused by a common theme that emerged, that I should obtain the article by subscribing to *Learned Publishing* via a membership in the Society for Scholarly Publishing, which, I was told, was a good deal at \$180, with a discount for librarians. Since one of the major points made by Manley, in the article this was all about, is that publishers are using litigation as a last-ditch effort to avoid the ramifications of digital technology, this struck me as quite ironic. The journal issue as a package for multiple articles, only some of which might interest any particular reader, is an anachronism related to print technology. One of the great new affordances of the digital environment is to break open the journal issue and provide article-by-article access. But, because of the continuing desire to maintain excessive profit margins, publishers have undermined this potential with big deals and paywalls. The solution suggested was to return to still another way of paying for lots of stuff I don't need in order to see the article I do want, just as I had to do in the print era.

One way to express the overall theme of Manley's article is that litigation has not been a successful strategy because technology has outstripped the models the lawsuits have been designed to protect. The second source of reflection for me is the kind of solution Manley proposes for this problem. He looks for technological ways in which authors and others could be directed into complying with copyright and contractual obligations. Manley's suggestions include blockchain and "smart contracts," concluding with the optimistic (?) possibility that there will come "a day when the sharing of digital code that we still call a document is controlled by the terms of a copyright agreement embedded in the very code."

I found myself wondering what effect such technology might have on scholarly authors. I continue to be amazed that authors are willing to sign some of the oppressive contracts presented to them by

publishers, but I have come to believe that most authors do not believe those contracts really mean anything. So many authors share their works without regard to the agreements they have signed and without any apparent sense that they are doing anything they shouldn't. These agreements try to impose a vision of scholarly communications that is one-sided and, frankly, unrealistic. Thus many authors seem to regard them as superfluous. What I wonder, however, is whether authors would rebel if these terms were imposed on them technologically, restricting much more definitively their ability to maintain any sense that their work is still their own. There is a lot of suspicion in the academy toward centralized technologies of control, and I tend to think that, if such technology were imposed by commercial publishing, the exodus to open access, where authors can retain the key elements of control that they seem to believe important, would accelerate.

Finally, as a copyright geek, I was fascinated by one of the arguments that Manley discusses, which is being used by ResearchGate in the lawsuit brought against it by Elsevier and the American Chemical Society, and a bit ashamed that I had not considered it before. To comprehend this argument, we must be clear about two facts regarding journal publication. First, most articles are written by two or more authors. Second, publication contracts are usually signed by only the "corresponding author." With these two facts in mind, ResearchGate is defending itself against the charge of infringing copyright by knowingly hosting versions of articles for which, allegedly, the publishers hold the rights by asserting that, in fact, publishers only hold non-exclusive licenses in most articles. Because the copyright law requires that assignments of copyright be in writing and "signed by the owner of the rights," (17 U.S.C. section 204a) and most publication agreements are signed by a joint author who only holds a share of the rights, the claim is that this can create only a non-exclusive license.

A joint copyright holder can exercise all of the rights that pertain to the rights she holds, but she can never transfer more than she owns, which, as a joint author, would be only a share in the rights. So, punitively, the publisher also holds only a share of the rights, and is subject to the right of other joint authors to exercise the rights as they see fit. That is, the publisher would hold only a non-exclusive license. And there is case law to suggest that a non-exclusive licensee cannot even bring a lawsuit to complain about infringement.

Manley notes that most publication agreements include a provision whereby the corresponding author avers that they are authorized by all co-authors to effect the transfer. But ResearchGate is asserting that this does not meet the requirement of section 204a. After all, if a joint author did exercise the copyright after such an agreement was signed, it is not at all clear if the remedy would be a copyright infringement case against that joint author, or a simple breach of contract action against the corresponding author.

I do not know if this will be a successful argument or not; the court has yet to rule on it. But I do believe it exposes a legal weak spot in the current way copyright is handled by the traditional publication system. That system was designed for an older time, when single-authorship was common, and when printing was the dominant technology. It is one of many pointers that lead Manley to a conclusion in which I certainly do concur: "one must ask whether our journal system is adequately serving enough of the researchers who live in the 'publish or perish' ethos that we have created and whether copyright in today's scholarly publishing world is serving its original purpose."

Introducing the Feminist Framework for Radical Knowledge Collaboration

Fri, 18 Oct 2019 14:13:31, April Hathcock

[Category: all-posts, building-open, diversity, diversity-and-inclusion, workflows]

This is an abridged version of a longer blog post. You can read a more complete description of our work in my post on [At the Intersection](#).

1. How has the patriarchy affected you?
2. How has the patriarchy impacted your work?
3. How have you been complicit in perpetuating the patriarchy?

These were the three questions we started with when beginning our reflection on what has become the [Femifesto: Feminist Framework for Radical Knowledge Collaboration](#).

My colleagues Sandra Enimil, Charlotte Roh, Ivonne Lujano, Sharon Farb, Gimena del Rio Riande, and Lingyu Wang began working on this idea several months ago as a proposal for the [Triangle Scholarly Communication Institute](#) in Chapel Hill, NC in the U.S., situated on the unceded lands of the Eno, Shakori, and Catawba nations and on land worked by countless enslaved people of the African diaspora. What initially began as a possible toolkit, quickly, through our individual and collective reflection work, evolved into a framework for thinking through equitable collaboration in knowledge work.



Word cloud of the Femifesto: Feminist Framework for Radical Knowledge Collaboration, created by Gimena del Rio Riande

The framework starts with a set of overarching principles, or our “Femifesto,” that serve to inform the context of our work:

- *Ethic of care/Ethical approach* – We approach this work as human beings fully recognizing the humanity of those around us, working with us, whose work we rely on.
- *Intersectional lens* – We adopt an intersectional feminist lens for our work because it is the framework that speaks most to us.
- *Radical* – We are committed to destroying the status quo for more inclusive, equitable, ethical ways of knowing and doing.
- *Inclusive* – We acknowledge that there are many ways of doing, being, thinking, and creating.
- *Language matters, lenguaje se importa* – Language is important and should be used as a tool for inclusion rather than a barrier to participation.
- *Not one size fits all* – translators and contributors should add their own examples; local context is valuable and valued
- *Process more important than product or deliverables* – Whatever we do requires thought, relationship-building, and critical care.
- *Importance of repatriation* – We work to stop justifying the harm we do as humans in a patriarchal system and instead redress historical and continued violence.

The framework then focuses on three main areas of knowledge work: 1) *Building empowering relationships*; 2) *Developing anti-oppressive description and metadata*; and 3) *Engaging in ethical and inclusive dissemination and publication*. Each area is followed by a set of principles, as well as some best practices and examples.

This is just a start, a work-in-progress, yet we welcome others who wish to engage with our work to do so starting right away: <https://etherpad.wikimedia.org/p/Femifesto>. At some point, we will take our version of the framework and move it to a more stable online space that still allows for community interaction, development, and growth. But for now, we’re ready to dig in, and we hope you’ll join us.