

WHY ARE UNIVERSITIES OPEN ACCESS LAGGARDS?

Peter Baldwin

UNIVERSITY OF CALIFORNIA, LOS ANGELES

Copyright was invented in the eighteenth century to give cultural producers property rights in their works, allowing them to live from their efforts.¹ It was specifically intended to benefit those who worked independently, not for wages or salary. Work-for-hire was the only element of copyright dealing with salaried employees. That evolved only later in any detail, and then not equally in all nations. Work-for-hire gives employers — not the creators — most rights in works produced by their employees. It was introduced in the nineteenth century to deal with commissioned art works. Who owned a portrait, the painter or the commissioner? But it was elaborated in law mainly in the twentieth century, especially in the U.S., and largely at the behest of the film industry. It is not hard to see why. Film is an inherently collaborative art form, demanding cooperation among scores of different creators, all with reasonable claims to be important participants.

Copyright stakes two primary claims: the artistic or moral rights, like those of attribution and integrity, and the economic or monopoly rights. The first give authors the right to be identified as such and to prevent their works from being changed without approval. They are largely uncontroversial and need no further comment here. The property right grants a temporary monopoly over dissemination, thus stimulating creators to further efforts by rewarding them. Equally important, copyright's monopoly made dissemination possible in the first place. In the analogue era, publishing cost money: royalties and editorial efforts, but even more so the cost of producing and distributing the work, conventionally in the form of books. Who would front the money involved if others could publish the same work at the same time while dodging most expenses? By giving them a temporary monopoly, copyright protected the first publishers from piracy.

Since it was first institutionalized, two changes have fundamentally altered the legal landscape of copyright. First, most authors, or content producers, are no longer independent workers. Few authors make a living from their works alone. How many no one knows. A 1976 study calculated that only three hundred U.S. writers could live off their literary earnings (of ten million aspiring colleagues). A 1979 survey of

1 This is a revised version of a talk given at the German Historical Institute in Washington DC in June 2018. I am grateful to Sarah Beringer and Atiba Pertilla for the invitation, and to Ross Mounce and Michael Kellogg for advice and research help.

over two thousand writers revealed that almost half held paid positions besides freelance writing.² Instead, the bulk of authors today are employees of universities, think tanks, museums, other cultural institutions, or of corporations. Even most novelists and poets have day jobs as creative writing teachers. Such authors are paid for their work by salary. For them a property monopoly makes no sense. They do not rely on it to survive, nor arguably do they deserve it since they have already been rewarded.

At the outset of the copyright system in the early nineteenth century, that was not true. Even in the universities, tenured professors, whom we now regard as among those most comfortably ensconced in salaried employment, were a minority. When the German universities expanded in the nineteenth century, most teaching fell to irregularly employed *Privatdozenten*, paid — if they could collect them — by fees from students attending their courses.³ But today the norm is that the bulk of all content is produced by salaried authors. We live in an age of institutional patronage. Compared to when Hegel died, in the 1830s, Germany today has per capita a dozen times more professors.⁴ Similar trends hold elsewhere. Most authors are now salaried employees for whom — other than the aesthetic claims — copyright should be a matter of indifference.

It is surprising that this development alone has not encouraged reform of the inherited system. Compare Hollywood and academe. Film is a huge cultural industry that has largely exempted itself from the dictates of traditional copyright by invoking work-for-hire. Occasionally the screen writers' guild goes on strike. But in fact Hollywood has some of the strongest unions in the country, the envy of other industries, and the most employee-friendly contracts. That solves the property aspects of copyright. Attribution and other moral rights are resolved by detailed prescription, the outcome of which are those comically elaborate credits, with endless producers, executive producers, co-executive producers, and the like, all scrolling like the invitation list to a Moonie wedding before the action starts.

2 John Tebbel, "The Book Business in the US," in David Daiches and Anthony Thorlby, eds., *The Modern World* (London, 1976) 3: 533; Paul W. Kingston et al., "The Columbia Economic Survey of American Authors: A Summary of Findings," Center for Social Sciences, Columbia University, 1981, 14.

3 By 1950, professors made up only 26% of the teaching staff at German universities. Alexander Busch, "The Vicissitudes of the *Privatdozent*," *Minerva*, 1, 3 (1963) 319.

4 Forty per million in 1835, 507 in 2010: Claude Diebolt, *Die langfristige Entwicklung des Schulsystems in Deutschland im 19. und 20. Jahrhundert*, C.3. Anzahl der Lehrer in Deutschland (1835-1940), Deutschland,

Professoren an den Universitäten, 1997 [2005], Gesis, histat: Historische Statistik. Available at <http://www.thesis.org/histat/table/details/F19F3B-6F210A682349F308D8618F1DOC/>

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Statistisches Bundesamt, H201—Hochschulstatistik, Professoren nach Geschlecht, Insgesamt. Excel file provided by Statistisches Bundesamt.

Academe, in contrast, remains ensnared in traditional copyright. Not because it is smaller or less significant than the entertainment industry. Quite the contrary. However popular Hollywood's product, however well paid its top auteurs and moguls, the university world is orders of magnitude larger. American colleges and universities employ ten times as many people as the motion picture and recording industries, their income is at least five times as great.⁵ What distinguishes the entertainment from the academic industry, of course, is that one is for-profit, paying its own way. The university world in contrast is financed almost wholly by tax dollars, directly or indirectly. Whether via government grants or the tax deductibility of donations to universities, the research function is largely underwritten by the public. 80% of the world's academic research is thus funded.⁶ All the more reason why academia should no longer be governed by traditional copyright.

Besides the wholesale replacement of the independent by the salaried author, the second big change since the early days of copyright concerns dissemination. The expense of putting out books necessitated a guarantee to publishers of a temporary monopoly allowing them to recoup their costs. Digital technology has now upended this inherited ecosystem in a number of ways. Some are minor. It has, for example, streamlined the editorial process, making revision and typesetting activities that have been de-physicalized. Copy-editing has largely been replaced by word-processing software. Being a copyeditor at a publisher these days is akin to being an elevator operator in a push-button lift.

Peer review has been provided largely for free, apart from the costs of organizing it. That is therefore but a minor part of what publishers brought to the table in the first place. But even more revolutionary is the question now raised of why peer review has to be undertaken by publishers at all. Why must it occur before publication? The hard sciences have begun to turn peer review into a process less like a trial by jury and more akin to a conversation among colleagues. Instead of submitting a manuscript to reviewers, taking onboard one round of comments, and then publishing once and for all, digitality allows a more fluid process. A preliminary version is posted on the web, commented on by colleagues. Revisions follow. By this point everyone who cares about the subject has seen the manuscript and dissemination has effectually taken place. But only now does publication in a technical sense occur. In the hard sciences that is increasingly something

5 In 2009 four-year colleges in the U.S. had a staff of 3.7 million. With enrollments of almost 13 million in 2009 and an average tuition of \$21,657, that suggests an annual income from this source alone of \$280 billion. To that came approximately \$60 billion in federal and private R&D funding in 2011. 388,000 people worked in the motion picture and recording industries in 2013. Its gross intake was 61.2 billion in 2010. Figures from: Institute of Education Sciences Digest of Education Statistics, 2011 Tables and Figures, http://nces.ed.gov/programs/digest/d11/tables/dt11_196.asp; Congressional Research Service memo from Sue Kirchhoff, 9 December 2011 at <http://www.techdirt.com/articles/20111212/02244817037/congressional-research-service-shows-hollywood-is-thriving.shtml>; U.S. Department of Labor, Bureau of Labor Statistics, *Industries at a Glance*; Motion Picture and Sound Recording Industries: NAICS 512; Workforce Statistics: Employment, Unemployment, and Layoffs; Employment, all employees (seasonally adjusted), <http://www.bls.gov/iag/tgs/iag512.htm#workforce>.

6 <https://www.research.hsbc.com/midas/Res/RDV?ao=20&key=RxArFbnG1P&n=360010.PDF%20>.

that matters only to future historians, not to today's practitioners. The point of traditional prepublication review was to spare publishers the cost of bringing out works not worth it. Now that the expense of publication has dropped, however, this falls away. The review can be done before publication, as part of publication, or after it. The timing is largely irrelevant.⁷

Mathematicians, physicists, and computer scientists already work largely through pre-publication manuscripts posted online. ArXiv is one of the most successful of such sites, with costs of about \$10 per article to host.⁸ Since arXiv does not actually publish articles, a better comparison is Scipost (<https://scipost.org>), which provides journal certification as well, but still for a fraction of the lifetime cost of traditional subscriptions or conventional open access journals. Computer scientists are yet further along this route. They consider even articles passé and too cumbersome to keep up with the pace. Instead, conference papers are the currency of the realm — posted, commented, and revised at a rapid clip. Their promotion and tenure procedures have adjusted accordingly.⁹

These are important changes introduced by digitality to the editorial and review functions that publishers used to provide alone. All of them undercut publishers' claims to add value. But they pale compared to the effect digitality will have on dissemination. Once the work has been reviewed, edited, and made digitally presentable, it can now be accessible to everyone in the world at the further cost only of running and maintaining the servers where it lives. Other issues, like backward compatibility (ensuring that digital records are kept abreast of current technology), are part of digitality in general and not peculiar to publishing. They are equally a problem for any other form of record-keeping, whether government or corporate, and must be solved by society as a whole. With largely costless dissemination, the second major argument for copyright has also vanished.

What does this mean for the three main engines of dissemination: bookstores, libraries, publishers? Bookstores will continue to disappear in their current incarnation. Some books will remain in tangible form. Whether they are bought in physical locations or online will depend on consumer preference. As their dissemination function vanishes, bookstores will turn even more into what they have become already today: coffee shops with a somewhat more elaborate inventory.

7 Timothy Gowers, "The End of an Error? Considering the Alternatives to Formal Peer Review," *Times Literary Supplement*, 24 October 2017.

8 Richard Van Noorden, "Open Access: The True Cost of Science Publishing," *Nature*, 495, 7442 (27 March 2013), <https://www.nature.com/news/open-access-the-true-cost-of-science-publishing-1.12676>.

9 Matthew Hutson, "Boycott Highlights AI's Publishing Rebellion," *Science* 360, 6390 (18 May 2018): 699.

Most functions that libraries serve are equally doomed. Digitality ends the need for physical libraries to store and lend content. We used to go to the village well to collect our water, now we open the tap at home. So too will the digital flows be managed. In the medium term, libraries may well serve a socializing function, as educational facilities more like schools or adult education centers than repositories of content. We hear much about libraries' new functions as social centers. Sites of connection, not collection, says Frances Pinter.¹⁰ All well and good, but deep down, libraries are not part of the hospitality industry. Other perhaps than undergraduates, people do not go to there to socialize, but for a similar reason why Willie Sutton robbed banks, because that is where the content is.

Beyond that, the dirty little secret of the analogue library is that they all broadly replicate each other. Even the biggest research collections have much the same content as their competitors. Once that is digitized and posted online, what will be their point? A few items that each one alone might possess will remain, motivating some visits. But in that sense libraries will have become archives. And ultimately the same fate awaits archives as will overtake libraries even before that.

Yet there remains a crucial function that libraries may be well-positioned to accomplish. Digitizing all books does not solve all problems. Paper copies have to be kept as insurance against catastrophe. The Internet Archive stores its books in containers in the Bay area. Nicholson Baker's crusade on behalf of decommissioned periodicals was a farcical variant on that quest.¹¹ As the Google Books Project has shown, kinks remain to be worked out in the digitization process before copies become as good as possible. And some scholars will still need the paper copies for reasons of their own. Physical editions of past publications will not wholly vanish. But these are all minor issues.

More importantly, someone will have to be the long-term archivist. When libraries license e-books for their patrons, they are stored on the servers of the publishers or the middle-men. What happens when they go bankrupt? Who will be responsible for the ultimate storage of our patrimony? The content that is up in the cloud will need to be preserved, kept up to date, and otherwise usable in perpetuity. This function we cannot entrust to publishers in the future any more than today. Perhaps libraries will become the preservationists of the digital. The big difference is that instead of having to maintain 120,000 collections, we will have just one.

10 "An Interview with Frances Pinter," *Knowledge Unlatched*, <http://www.knowledgeunlatched.org/2013/01/an-interview-with-frances-pinter/>.

11 Nicholson Baker, *Double Fold: Libraries and the Assault on Paper* (New York, 2001).

Finally, the publishers: their main reason, disseminating works, no longer exists. One might expect them to follow the bookstores and libraries into oblivion. But in fact the opposite is happening. Rather than going quietly into that dark night, the publishers are putting up a kind of horror movie return from the dead, a last gasp of rent-seeking monopolistic behavior before the inevitable end.

Not the book publishers. Arguably, they have lost control of their enterprise. Digitality has provoked an explosion of creativity, most of it outside the conventional arena. While the number of traditional books has remained largely steady, born-digital editions, published through Amazon and the like, have avalanched. Three hundred thousand print and binding titles come out annually, but over four million non-traditional works were issued in 2010. This tsunami quieted somewhat in subsequent years, yet still triple the rate of conventional works at one million annually.¹² In the former Eastern Bloc it used to be said of scholars that, censored in what they could write officially, they wrote privately for the desk drawer — works that might one day be published after a regime change or perhaps abroad. Now it seems that everyone had manuscripts tucked away, just waiting for a new technology allowing this creative pressure to erupt. Who is writing, for whom, about what, not to mention where and how these works will be preserved for posterity — such questions remain largely unexplored.

The periodical publishers, however, are a different story. They have monopolies on non-substitutable goods. If readers cannot afford a certain article in a physics journal, it is not as though they can read another competing, cheaper one instead. Goods with this sort of monopoly pricing, like first-class postage or electricity, are usually carefully regulated.¹³ Publishers have mercilessly exploited this hammerlock — monopoly without regulation — increasing the subscription cost of scientific periodicals at triple the consumer price index over the past decades.¹⁴ Indeed, they are firming up their quasi-monopoly. Over half of all natural science and medical research is now published by the largest five academic publishing houses: Reed-Elsevier, Wiley-Blackwell, Springer, Taylor & Francis, and, depending on the metric, either the American Chemical Society or Sage Publishing. The social sciences are even worse off. In 1973, one in ten articles were published by the big five, now it is more than half. 71% of all psychology papers are published by them.¹⁵

However dire the situation seems though, this too will pass. The periodical publishers' rent-seeking monopolies cannot last. Increasingly,

12 <https://www.statista.com/statistics/248345/number-of-titles-published-in-the-us-by-type/>

13 Richard Edwards and David Shulenberger, "The High Cost of Scholarly Journals (and What to Do about It)," *KU ScholarWorks*, 2, <https://kuscholarworks.ku.edu/bitstream/handle/1808/12546/High%20Cost%20of%20Scholarly%20-%20Change.pdf>.

14 Association of Research Libraries, *ALR Statistics, 2003-04*, Graph 4, http://www.libqual.org/documents/admin/2012/ARL_Stats/2004-05arlstats.pdf. More recent continuing bad news in "Top Universities' Journal Subscriptions 'Average Four Million,'" *Times Higher Education*, <https://www.timeshighereducation.com/news/top-universities-journal-subscriptions-average-4-million-pounds>.

15 Vincent Larivière, Stefanie Haustein, Philippe Mongeon, "The Oligopoly of Academic Publishers in the Digital Era," *PLOS One*, 10 June 2015, <https://doi.org/10.1371/journal.pone.0127502>.

the governments that fund most scientific research see no reason to pay for profit margins of 30 and 40%. They are demanding that tax-financed research be freely available to those who pay for it in the first place. In the hard science periodical literature this is gradually becoming policy. Having started slowly in the late 1980s, open access periodicals now bring out almost a third of all published research.¹⁶ The humanities and softer social sciences, in contrast, have barely begun addressing the problem. And the issue of monographs, which remain the medium of choice in some of these fields, is only just now being broached.

The UK is perhaps furthest along in this process. Because most research funding flows through centralized government control, the British authorities can make demands without precedent elsewhere. Periodical literature that university departments wish to submit to determine their productivity, their rank, and thus their funding must now be largely open access. Even more ambitiously, monographs will soon have to be as well. An ecosystem of open access publishers is therefore slowly emerging in the UK and elsewhere to meet what promises to be a growing demand.

Several Anglophone publishers have already developed open access programs. To publish a book thusly means fronting the costs in advance to offer readers works free of charge. Such publishing fees vary quite a bit. Palgrave is \$17,500, Brill \$6940, Open Book about \$5000, Ubiquity between \$5000 and \$12000, Cambridge \$10,000, the University of California's Luminos series \$15,000 per volume. Where will authors find the money to allow the world to read their works? Assume that \$10,000 is what it costs to make a manuscript presentable in machine-readable form, post it on the web, arrange for printed copies for those who want to pay for them, and maintain its storage. Sticking with the U.S. figures to keep things simple, given that 300,000 conventional books are published annually, that requires an investment of three billion dollars. There are almost 120,000 libraries of various sorts in America. Their combined acquisitions budgets — not running costs or staffing or the like, but the cost of buying content — is \$4.7 billion for the most recent year available.¹⁷

In other words, through the enormously inefficient means of buying analogue copies in various numbers, distributing them randomly at nodal points in different quantities throughout the nation, and asking the public to make its way laboriously to these libraries to read books while sitting in expensive, centrally-located real estate, while being

16 Heather Piwowar et al., "The State of OA: A Large-Scale Analysis of the Prevalence and Impact of Open Access Articles," *PeerJ* (2018) 6:e4375, <https://doi.org/10.7717/peerj.4375>.

17 Numbers from: Institute of Museum and Library Services; Research: Data Collection; Supplementary Tables; Public Library Revenue and Expenses; Table 26. Total collection expenditures of public libraries and percentage distribution of expenditures, by type of expenditure and state: Fiscal year 2012; Total collection expenditures; Total (in thousands), 73, http://www.imls.gov/assets/1/AssetManager/FY2012%20PLS_Tables_21_thru_31A.pdf; Tai Phan et al., National Center for Education Statistics, *Academic Libraries: 2012: First Look*, January 2014, Table 9. Expenditures for different types of information resources at academic libraries, by control, level, size, and Carnegie classification of institution: Fiscal year 2012; All information resources; All U.S. academic libraries, 12, <http://nces.ed.gov/pubs2014/2014038.pdf>; Amy Bitterman et al., U.S. Department of Education, *Characteristics of Public Elementary and Secondary School Library Media Centers in the United States: Results From the 2011-12 Schools and Staffing Survey: First Look*, Table 1, Number of public schools that reported having library media centers, by selected school characteristics: 2011-12; Total number of schools; Number of schools with a library media center, 6, <http://nces.ed.gov/pubs2013/2013315.pdf>; *Library and Book Trade Almanac*, 60th ed., ed. Dave Bogart (Medford NJ, 2015), 381.

heated, cooled, and otherwise maintained, we could be making every book published every year available to every inhabitant of the globe.

This still leaves a few loose ends. It does not cover periodicals, nor the existing materials in libraries — not that in the public domain, nor that which remains in copyright, whether orphaned or firmly parented. It is hard to know how many books exist. The best guess comes from a software engineer at Google Books in 2010 who estimated that there were 129,000,000 books in the conventional sense, and 146 million if we include bound volumes of periodicals and government documents.¹⁸ It has been estimated that perhaps 25% of these are in the public domain, so 36 million. And that there are 30 million books in print and in copyright. But since there are 28 million such in English alone, this is likely an underestimate, so let us call it 40 million. That leaves 70 million books in copyright and out of print. A combination of 106 million public domain and in-copyright but out-of-print works could thus be digitized.

Assume 100 million as a round number of works in need of scanning. At 200 pages per book that is 20 billion pages. The Internet Archive charges five cents per page to scan and run optical character recognition, thus a total cost of one billion dollars. Some of the work has already been done via Hathi Trust, JSTOR, Google Books project, and the like. Google alone is said to have scanned twenty-five million books. So this figure would be lower anyway. In other words, for about a billion dollars, all public domain and out-of-print works, not just those published in the U.S., could be made freely available on the web. That is of course a one-off cost. Let us then assume that making all periodicals open access will cost approximately the same as doing so for all books, viz three or four billion dollars annually. This is in line with estimates of total current costs of article publishing of \$10 billion globally, a figure that then needs to be discounted by the 40% profit margin baked in, the lower costs inherent in open access publishing more generally, and the participation of the rest of the world in raising revenues.¹⁹ That leaves us with the question where these funds will come from.

The total operational budgets (not counting acquisitions, which we have already earmarked for open access publishing) of public and academic libraries in the U.S. is well over thirteen billion dollars annually.²⁰ Let us assume that as content is digitized, half of these budgets that would otherwise go to cataloguing, storing, heating, cooling, lending, re-shelving, preserving, and all the other costs of keeping the books

18 Leonid Taycher, "Books of the World, Stand Up and Be Counted! All 129,864,880 of you," *Inside Google Books*, 5 August 2010, <http://booksearch.blogspot.com/2010/08/books-of-world-stand-up-and-be-counted.html?m=1>.

19 Ralf Schimmer, Kai Karin Geschuhn, Andreas Vogler, "Disrupting the Subscription Journals' Business Model for the Necessary Large-Scale Transformation to Open Access." *Max Planck Digital Library Open Access Policy White Paper*, 28 April 2015, 5, <http://dx.doi.org/10.17617/1.3>.

20 Numbers in Institute of Museum and Library Services, *Public Libraries in the United States Survey: Fiscal Year 2012* (December 2014), 8, http://www.ims.gov/research/public_libraries_in_the_us_fy_2012_report.aspx; U. S. Department of Education, *Academic Libraries: 2012* (January 2014), 11, 13, <http://nces.ed.gov/pubs2014/2014038.pdf>.

as physical objects circulating and in good shape, becomes redundant. The conclusion is that with the monies already sloshing around in the library system, we can both publish all future content as open access, as well as digitize and disseminate all existing library content.

It bears repeating: with the monies already in the library system we can make everything in it and everything that ever will be in it available to anyone anywhere in the world who has access to the internet. Everyone will have the Library of Congress on their tablet, and as other nations follow suit, even more than that. And it will not cost a penny more than is already spent on a vastly less efficient system. For the first time in history we can make all content available freely to all humans. It is no longer a technical or physical impossibility. It is not even a financial issue. The obstacles now are purely legal. If every country does it too, the payoff becomes global.

That's the vision. How do we get from here to there? And why are we not falling over ourselves to do it as quickly as possible? Some movement in the right direction is occurring. Copyright law is slowly being softened up to allow digitizing orphaned works — those that, though technically still protected, are out of print and bereft of identifiable rights holders. Just a few years ago, the Norwegian *Bokhylla* project looked like an example to follow. It allows all books published in Norway before 2000 to be read on screen from IP addresses within Norway.²¹ Today, however, it seems more like a state subsidized boondoggle for publishers who double dip. If we licensed the Library of Congress's holdings at the same price per page paid by the Norwegians, it would cost a hundred million dollars annually. If, however, we take into consideration that the U.S. population is sixty times the Norwegian and rights owners forced us to scale up proportionately, the cost would be six billion dollars annually.²² Since that is well above the total library acquisitions budgets, it suggests that the Norwegians are overpaying.

Meanwhile, things have moved on. The Internet Archive has started a program of "controlled lending" that applies digital technologies to the traditional library model. It shifts the books it owns to digital. They cannot be downloaded, but anyone anywhere can read them on screen, one person at a time per copy owned. Has copyright been violated in the act of making the digital copy that is read on screen? Or can one argue that the Internet Archive is merely doing what we expect of libraries, but now harnessing the convenience of digitality to the task, thus permitting patrons to read anywhere?

21 "Literature Goes Online for Free in Norway," *Sydney Morning Herald*, 18 January 2014, <http://www.smh.com.au/technology/technology-news/literature-goes-online-for-free-in-norway-20140120-hv8zt.html>.

22 Peter Hirtle, "Norway, Extended Collective Licensing, and Orphan Works," *LibraryLaw Blog*, 21 March 2014, <http://blog.librarylaw.com/librarylaw/2014/03/norway-extended-collective-licensing-and-orphan-works.html>.

The New York Public Library is now emulating and expanding this approach by working directly with authors and their heirs to make more books available online. NYPL intends to produce a demand-driven open access request procedure for out-of-print works. A request for a book with no existing, easily available digital option will trigger a process in which, in collaboration with a group such as the Author's Guild, NYPL will try to find and make an agreement with the rights holder that enables scanning, conversion, and non-commercial digital distribution of the book. In return the rights holder will get a digital version from NYPL which they can sell online if they choose, as well as access to circulation statistics for their work. All sides win. Rights holders will discover something that only libraries (and perhaps second-hand bookstores) could tell them — which currently unpublished works remain popular and potentially commercially viable — and the reading public will gain unimpeded digital access to otherwise out-of-print works.

Other initiatives also seek to force-feed the circuits of works that can legally be digitized and made available. Carl Malamud's Public.Resources.Org is expanding the public domain to its full extent. U.S. copyright excludes "works of the U.S. government" from protection. That includes scientific research by federal employees — such as doctors at the Centers for Disease Control or the National Institutes of Health — conducted as part of their official duties. Malamud has found well over a million journal articles in this category.²³ He and others are also seeking to identify that half of all works for which copyright was not renewed in the period (1923-63) when the law still required authors specifically to apply to extend their rights.²⁴

Meanwhile, open access has become akin to going ecological or environmental. Everyone claims to be for it and to do it, but in fact there is a lot of greenwash, or in this case openwash. All the big scientific publishers now claim to be open access. They publish hybrid journals where authors can pay to make their articles available even as others remain behind the paywall. Universities are allowing contributing alumni continued access to JSTOR and other perks of the digital paradise they enjoyed as students before being ejected into the bleak post-lapsarian world on the far side of the paywall. But little of this goes to the core of the issue.

The publishers are double-dipping. They collect publishing fees even as they continue to charge libraries standard subscription rates.

23 Carl Malamud, "Who May Swim in the Ocean of Knowledge?" *Wire*, 2 March 2018, <https://thewire.in/228888/who-may-swim-in-the-ocean-of-knowledge/>.

24 University of Michigan, "Copyright Review Management System — IMLS National Leadership Grant," <http://wayback.archive-it.org/5871/20171110030439/https://www.lib.umich.edu/copyright-review-management-system-impls-national-leadership-grant>.

The libraries cannot resist because they have to have the full journal available regardless of how many open access articles it contains. Front-loading the payments for publication through gold open-access has created perverse incentives, now being exploited. The academic world is awash with faux open access journals whose primary interest is collecting publishing fees, then slapping the results — good, bad, and indifferent — up on a website somewhere, if even that. Six percent of U.S. academic articles appear in suspect periodicals — effectively professorial vanity presses.²⁵ Some serious self-policing is urgently required.

In all this, where are the big university research libraries and their core clientele, the professoriate? Absent from the vanguard and often fighting rearguard battles against open access, is the dispiriting answer. As a caste, the professoriate has ignored and at times resisted their universities' attempts to make them deposit at least prepublication versions of works in open access repositories. Even though the average academic monograph now sells but sixty copies, and even though professors happily collect that part of their salaries intended to cover the research effort, they insist on being counted among the independent creators, entitled to publish their works as they please and collect royalties as best they can.²⁶ The worst offenders are those who are vested in copyright as authors of textbooks which they hope will sell widely and make them wealthy. Scholarly societies in the humanities often live off the subscriptions to their journals. These were usually sold at reasonable prices, but many have now thrown in their lot with the big presses, becoming bundled as part of packages that are offered to university libraries in take-it-or-leave-it deals.

Many academics live within the university bubble without even realizing it. Jill Lepore — a force of nature and an enviable scholarly talent — gives voice to this academic obtuseness when she writes that “most of what academics produce can be found, by anyone who wants to find it, by searching Google.”²⁷ That is simply false, except in the plushy-feathered nest of a university proxy server. The professoriate is well-served by the existing system, but no one else is. Take as an example Wikipedia's footnotes. Wikipedia is the greatest assemblage of human knowledge ever, the closest we will ever get to the Enlightenment idea of a universal encyclopedia. And yet its sources, indicated in the footnotes, are largely locked down. For the entry “Holocaust” for example, there are references to about 150 books and articles. Of these, a dozen appear to be clickable, but only two or three actually go

25 “Publish and Don't Be Damned,” *Economist*, 23 June 2018.

26 Benedicte Page, “Group Action Needed to Safeguard the Academic Book, Warns Report,” *Bookseller*, 12 June 2017, <https://www.thebookseller.com/news/group-action-needed-safeguard-academic-book-warns-report-567951>.

27 Jill Lepore, “The New Economy of Letters,” *Chronicle of Higher Education*, 3 September 2013.

to the source without some sort of subscription or affiliation to JSTOR or other paywalled databases. The average reader who wants to check the source of a claim in the article is barred from doing so, except by going to the nearest major research library, wherever that may be.

Lepore's attitude is the smug insiderism that spurred Aron Swartz to release as much of JSTOR as he could download. It is what has made Sci-Hub one of the darlings of the open access movement.²⁸ It is now the largest open access academic resource in the world. After just six years of existence, it hosts 67 million papers, two-thirds of all published research, and is available to anyone.²⁹ It violates every copyright law in existence and continues only because it is hosted somewhere in the Ukraine, supported by Russia as a way of poking a stick in the eye of the West.

Why then do academics continue to submit much of their work to subscription journals and to sign away their copyright to publishers? Inertia and ignorance is part of the answer. Scholars are not the ones who have to pick up the tab. They do not care what journal articles cost those outside academia. They often do not even know how much that is. In the analogue era, authors could order offprints of articles to send to would-be readers without subscriptions. In the sciences, requests for offprints from developing nations often came on pre-printed cards with heartfelt appeals for a copy, pointing out that otherwise there was no hope of reading the work. Today such reminders of the global information divide no longer prick the consciences of the professoriate.

Prestige too is a motive. Commercial operators have bought many of the best-regarded journals. New alternatives that promise wider readership, but less status, are often shunned. Tenure and promotion still depend markedly on where content is published. Universities outsource much of their quality control work to publishers. It is not uncommon for tenure cases to be sustained once a book is accepted by a prestigious press. Academia's collective laziness prevents it doing the work that the presses supposedly undertake instead — even though the readers for the publishers are the same colleagues who should be evaluating for internal departmental review.³⁰ The desire for prestige blinds even young scholars to how, by sticking with traditional outlets, they effectively extinguish their work. To publish with a conventional press these days means to drop your book into a black hole where only those will see it who can afford the three-figure price of the average Routledge or OUP monograph, or who happen

28 Ian Graber-Stiehl, "Science's Pirate Queen," *Verge*, 8 February 2018, <https://www.theverge.com/2018/2/8/16985666/alexandra-elbakyan-sci-hub-open-access-science-papers-lawsuit>.

29 Daniel S. Himmelstein et al., "Sci-Hub Provides Access to Nearly All Scholarly Literature," *eLife* 2018; 7:e32822 doi: 10.7554/eLife.32822.

30 Themes I have discussed in Peter Baldwin, "Betting on Vetting: Evaluation, not Publication, Should Be Academe's New Priority," *Chronicle of Higher Education*, 17 February 2014.

to enjoy lending privileges at a major research university library. In the humanities and social sciences, monograph publication is effectively privatization.

It is time to bring the professoriate under a work-for-hire system, much like Hollywood. Naturally, the university world resists such suggestions. Professors still fancy themselves more akin to Romantic artistes than Hollywood's scriptwriters. But that is an increasingly archaic view. They are paid salaries for their research. They should have their work recognized by attribution and some version of the integrity right, allowing them to decide its final form. But why they should have a monopoly of dissemination remains a mystery.

In the meantime, while awaiting the millennium, what can we do? The vast majority of publications funded by public monies should be open access. That is on the verge of becoming reality in the UK. An ecosystem of open access publishers is springing up to meet the anticipated demand. In Australia that is already in place, and more monographs there are now published freely accessible than conventionally closed.³¹ Demands are heard to nationalize academic publishing, as a public function that is increasingly failing its duty.³² Research funding in the U.S. does not flow through the same central control as in Britain, but the problem still falls entirely within the universities' remit should they want to take it up. The academic world does not need to coordinate with publishers or anyone else to require that publications considered in the promotion portfolio be open access, or at least to give extra weight to those that are.

We can encourage periodicals to review open access books. Hoping to sprinkle a bit of stardust on the first cohort of authors in its Luminos series, the University of California Press took out a full-page ad in the *New York Review of Books*. Have the major academic review outlets — NYRB, LRB, TLS, NYT and so forth — reviewed their first open access book? Either way, the day it will have happened will be a milestone. And they should be encouraged to make it a habit. Imagine the pleasure of clicking to download at the instant of having read a review of an interesting book. And of course senior scholars — no longer in thrall to the demands of prestige — must show the way by publishing their own work in such formats. Lionel Gossman, distinguished professor emeritus of literature at Princeton, is an admirable exemplar, having published several works in recent years with Open Books.³³

31 Colin Steele, "Open Access in Australia: An Odyssey of Sorts?" *UKSG Insights*, 26, 3 (2013) 282-289, <http://doi.org/10.1629/2048-7754.91>.

32 David Matthews, "Is it Time to Nationalise Academic Publishers?" *Times Higher Education*, 2 March 2018, <https://www.timeshighereducation.com/blog/it-time-nationalise-academic-publishers>.

33 Of course, Amazon gives no hint that his works are available for free download from the publishers. See <http://commons.princeton.edu/lgossman/> My own attempt to set a good example was less successful. Only having come to an agreement with Princeton UP to release my latest book in an open access edition two years after publication did I notice that the press has no such program. After the agreed-upon interval they sent me a PDF, satisfied that they had kept up their part of the bargain. It is now available at <https://archive.org/details/thecopyrightwars00bald>.

Digitality has fundamentally undermined copyright. We are mostly salaried content producers now who do not need its protections. Dissemination has become significantly costless, removing the other main argument for copyright. The university world is that part of content production which least needs or deserves traditional copyright. It is that part which should be most interested in universal access and the extraordinary promise it holds out for the world outside the academic bubble. But despite that, it is barely a follower and often a hindrance. For shame!

Peter Baldwin is Professor of History at UCLA and Global Distinguished Professor at NYU. He is the author of books on the comparative history of modern Europe and the US, including *The Politics of Social Solidarity: Class Bases of the European Welfare State, 1875-1975* (Cambridge University Press, 1990), *Contagion and the State in Europe, 1830-1930* (Cambridge University Press, 1999), *Disease and Democracy: The Industrialized World Faces AIDS* (University of California Press, 2005), *The Narcissism of Minor Differences: How America and Europe Are Alike* (Oxford University Press, 2009), *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton University Press, 2014) available in an open access edition at <https://archive.org/details/thecopyrightwarsoobald>.