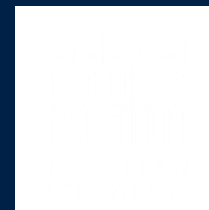


#OxFOS23



WED 8 MAR



THE FUTURE OF COPYRIGHT

Achieving Sustainable Universal Open Access
through Copyright Reform (A Debate)



This session will be
recorded



Slides and recording will be
emailed after the session



16:00–17:30 GMT

The Case for Amending Copyright To Achieve Sustainable Universal Open Access

John Willinsky

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The Open Access Consensus Was Realized on November 7, 2019

On that date, Kumsal Bayazit, newly appointed CEO at Elsevier, stated at the Charleston Conference: “I want to be very clear: Elsevier fully supports open access.”

- This signaled an open access consensus among scholarly publishing’s stakeholders (libraries, funders, societies, and publishers).
- Such a consensus makes a legislative reform of copyright in support of open access a far more realistic goal.

More Recently, Publishers Admit There Is No Clear Path to this Goal

Steven Inchcoombe, Chief Publishing Officer, Springer Nature: “I think the greatest challenge is for us to find a way to make the transition to Open Science, including open access (OA), sustainable and equitable for all... We strongly believe in the benefits to the whole research process of immediate OA” (Jan 30, 2023).

- This reflects a widespread stakeholder uncertainty around how to achieve sustainable universal open access.
- The lack of a path for open access is resulting in contractual complexity, foot-dragging, and price gouging.

Following the Pandemic, Open Access Takes on a New Urgency

The White House OSTP makes 2023 the Year of Open Science. Its head Dr. Alondra Nelson, states: “When research is widely available to other researchers and the public, it can save lives, provide policymakers with the tools to make critical decisions, and drive more equitable outcomes across every sector of society” (Aug 22, 2022).

- Yet OSTP’s focus remains on tax-payer claims to federal research, rather than on universal OA given the consensus it is best for science.
- It continues to threaten publishers (with zero embargoes), rather than leveraging their part in the consensus to advance universal OA.

Open Access' Progress and Pricing

Ask yourself: (a) If in 2021 open access accounts for 12% of market revenue and 30-40% of the literature (Simba, 2023), and (b) in 20123 the top five commercial publishers published 50% of the literature in (Larivière et al., 2017), then how long until there's universal open access and what will be the price?

- The commercial sector is very slowly moving down the OA path, while there is no means of leaving them out of any future picture.
- Given the consensus and urgency, structural changes are needed to address the pace and cost of open access.

The Copyright Turn

Copyright is not the cause of open access' shortcomings. But neither is it helping with open access, as it did with print subscriptions. Meanwhile, we work around copyright (funder contracts, embargoes, final drafts, illegal copies) with limited success.

- Copyright reform is burdensome and risky, while the piecemeal alternatives offer no end of expensive nuisances for researchers.
- The time has come, the walrus said, to talk of copyright reforms hold promise for advancing sustainable universal open access.

How Bad Is It?

Imagine the MacArthur Foundation offering a million-dollar prize for coming up with a less sustainable, less comprehensible, less coherent, less certain or predictable, but still profitable, means of moving to universal open access than we have now. And nobody wins the prize (with credit to Jason Ballard's drywall prize).

- This failure to deliver a shared goal of greater public good at a sustainable price signals a scholarly publishing market failure.
- At the same time, scholarly publishing is overdue for the type of digital-era copyright reform that other cultural industries have achieved.

A Copyright Reform Proposal

We could, for example, apply a century-old legal remedy for market failure, namely, *statutory licensing*, to enable copyright to *promote* – rather than impede – the progress of science.

Such a reform could require a licensing of research publications along the following lines:

Research publications are required to be open access, and their publishers fairly compensated by the publications' institutional users and funders. Under these terms, researchers grant publishers no more than a right of first publication.

If this were to start
in the U.S.A., then the
Copyright Act would require
these additions.

Copyright Law of the U. S.

§ 101. Definitions

A “research publication” is a work
that has been published as a result
of scholarly review and oversight.

§ 102 · Subject matter of copyright: In general

...Works of authorship include the
following categories:

(9) research publications

§ 123 Statutory Licensing of Research Publications ...

As well, two new agencies and a registry are needed,
as per the Music Modernization Act 2018.

Scholarly Publishing Review Board

Academic librarians appointed to identify works that meet the standards of scholarly publication.

Research Publications Registry

List maintained by Scholarly Publishing Review Board (staffed by librarians) and subject to publisher appeals.

Research Licensing Collective

Nonprofit collective management organization distributing fees to scholarly publishers, including societies and scholar-publishers.

The licensing will also utilize existing services.

Copyright Royalty Judges

Periodically setting fees, re: “willing buyer” and “willing seller” for publication types, and reviewing fee distribution disputes.

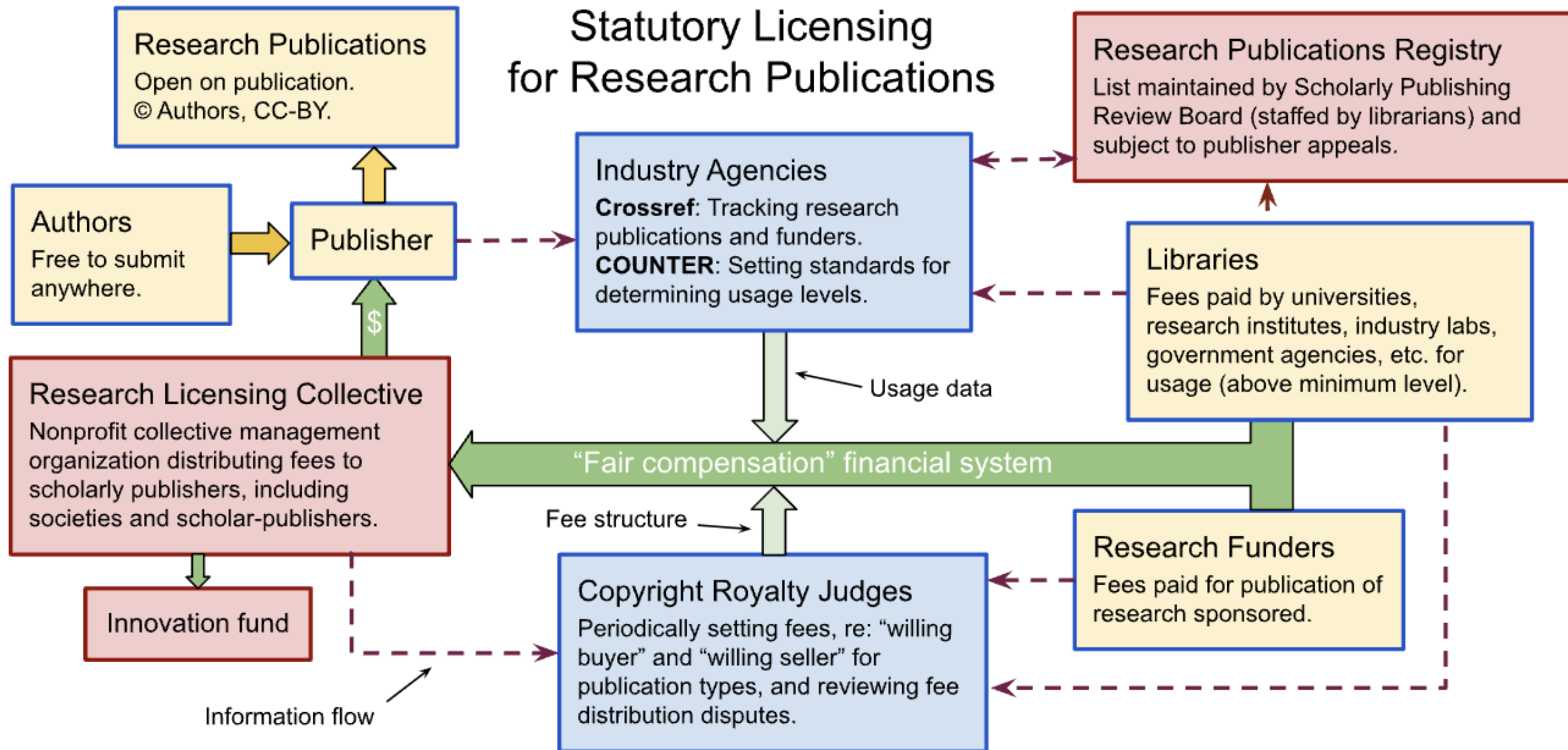
Industry Agencies

Crossref: Tracking research publications and funders.

COUNTER: Setting standards for determining usage levels.

Then the current and newly created parts of this statutory license need to be fitted together...

Statutory Licensing for Research Publications



International Implementation

The Marrakesh Treaty (2013), which seeks to end the visually impaired's "book famine," offers a possible precedent. With a five-year implementation schedule, it now has 91 signatories, with some enabling its measures without legislation. This "Marrakesh Miracle" encouragingly demonstrates:

- Intellectual property law can advance human rights internationally, including on access to knowledge (A2K).
- Treaties can mandate copyright exceptions, and presumably licensing, especially as it offers robust copyright protection and compensation.
- Cross-border measures for copyright can be introduced, which will be necessary with open access to research.

Q&A

Extra Slides

My case in eight steps

1. Open Access is now valued by *all* scholarly stakeholders, from the biggest publishers to small societies.
2. Yet OA lacks subscription's legal protection, while APCs fail to serve all the disciplines or the world at large.
3. This mires the shared goal of universal OA in economic uncertainty.
4. Uncertainty prompts further monopoly pricing and complex OA contracts (e.g., R&P, back-issue access).

5. Researchers face burdensome workarounds, both legal and illegal (APCs, final drafts, embargoes, rogue copies).
6. The market cannot, under current law, deliver the desired OA in a timely manner at a fair price.
7. In other fields vital to humanity's future – gaming, TV, music, phones, etc. – digital-era uncertainties have led to copyright changes.
8. *QED*: It is time to reform copyright so that it can, once again, promote the progress of science and encourage learning.

If I may, I've three questions...

1. Why might it be or not be worthwhile adding copyright reform to the open access agenda?
2. Does statutory licensing show or lack promise as a legal strategy for OA?
1. Can I send you these slides to try this approach out with others?

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Passing the Berne Convention Three-Step Test (1967)

“In certain cases, to introduce compulsory licenses...”

1. “Certain special cases”: Research pubs possess a certain special economic and moral standing among copyright works.
2. “Does not conflict with a normal exploitation of the work”: A fairly priced exploitation by publishers is enabled by this proposal, while researchers’ “normal exploitation” is enhanced.
3. The proposal does not “unreasonably prejudice the legitimate interests of the authors.” It advances those interests to the benefit of science and humankind.

This proposal addresses only two goals:

1. Universal open access.
2. Fair pricing.

While leaving to other proposals:

1. Open data.
2. Do away with publishers.
3. End corporate concentration.
4. End Impact Factor.
5. Move away from journals.
6. Etc.

Secondary Publishing Rights

1. In Germany (2013), the Netherlands (2015), Austria (2015), France (2016) and Belgium (2018).
1. Research authors have unalienable right to make final draft of publicly funded articles freely available.
2. Following an 6-12 month embargo (to enable publishers to recoup their investment before authors).



UNIVERSIDAD DE BARCELONA



1st question

- What is the reason that justifies the notion that scientific publishing should be mandatory?
- Knowledge and Science are public interests, whereas copyright protects an individual interest



Preamble of the Spanish Copyright Act 1987

*“This law aims to give recognition to **those** who, by creating works, contribute to the development and progress of culture and science for the benefit and enjoyment of society”*

Copyright enhances the role of researchers as providers of knowledge and culture

Copyright has a limited nature

Freedom of
expression

Authors'
Exclusive
rights

Scientific
Knowledge

Education

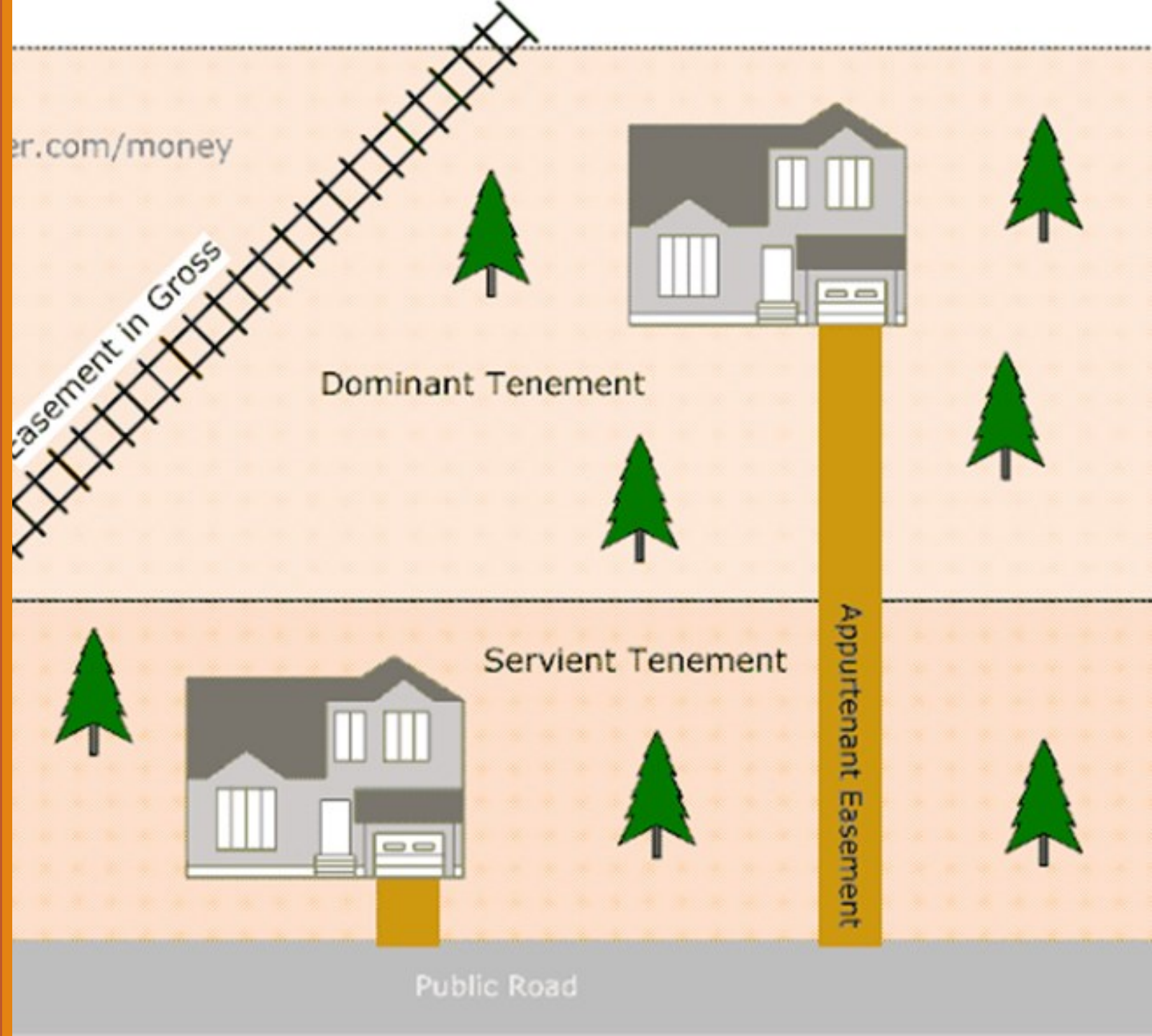
Culture

Property right on objects and land is also limited by public interests

Local planning of streets

Utility easements to deliver electricity, gas, water

right of way,



Scientific Knowledge as “Public interest”

Charter of Fundamental Rights of the European Union

art. 13 Freedom of the arts and sciences

The arts and scientific research shall be free of constraint

Spanish Constitution, art. 44

1. Public authorities shall foster and protect **access to culture**
2. Public authorities shall **promote science and scientific research to benefit society as a whole**

2 question



How far should the **public interest in scientific research** limit Copyright?

Does it justify making universal **open access mandatory**? I don't believe so...

Mandatory open access

- It means depriving researchers from the **freedom** to decide how to publish their contributions

- *“Does copyright really constrain the progress of scientific research?”*

- Copyright protects originality and Advances in science are based in empirical knowledge



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Risk Factors for COVID-19 in Inflammatory Bowel Disease: A National, ENEIDA-Based Case–Control Study (COVID-19-EII)

by  Yamile Zabana ^{1,2,*}  ,  Ignacio Marín-Jiménez ³,  Iago Rodríguez-Lago ⁴,  Isabel Vera ⁵,
 María Dolores Martín-Arranz ⁶ ,  Iván Guerra ⁷ ,  Javier P. Gisbert ^{2,8,9} ,
 Francisco Mesonero ¹⁰ ,  Olga Benítez ¹ ,  Carlos Taxonera ¹¹ ,  Ángel Ponferrada-Díaz ¹²,
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Help



Cite



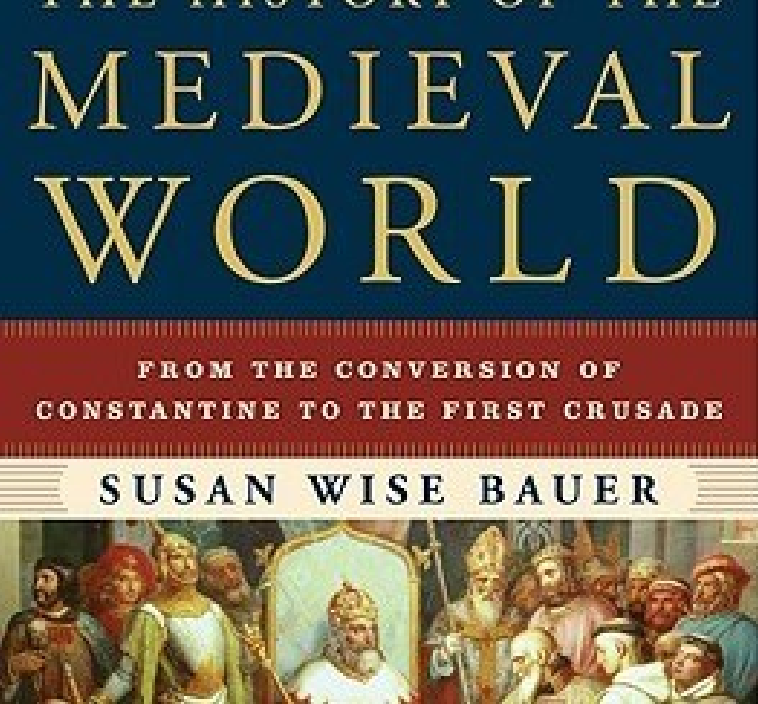
Discuss in SciProfiles



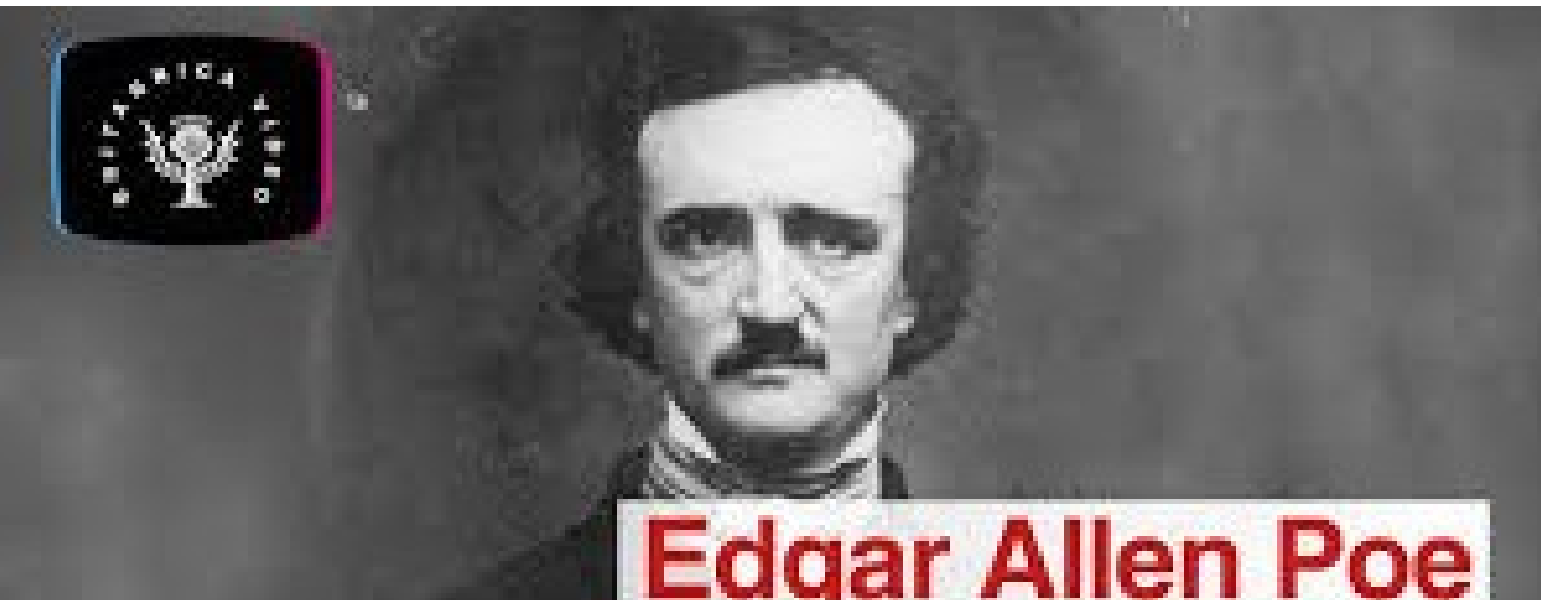
Endorse



Comment



Is the access to all
scientific publishing
equally relevant to
achieve advances in
science?



- Why only “research publications”?

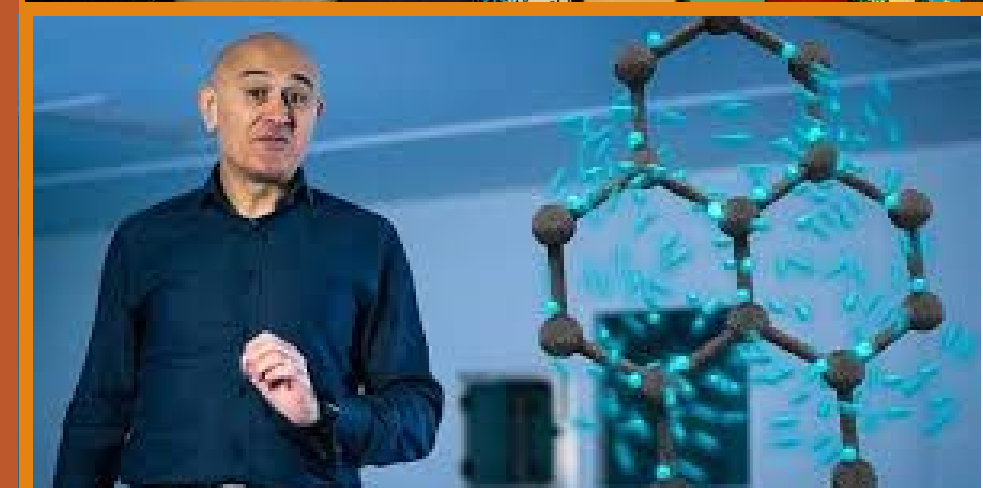
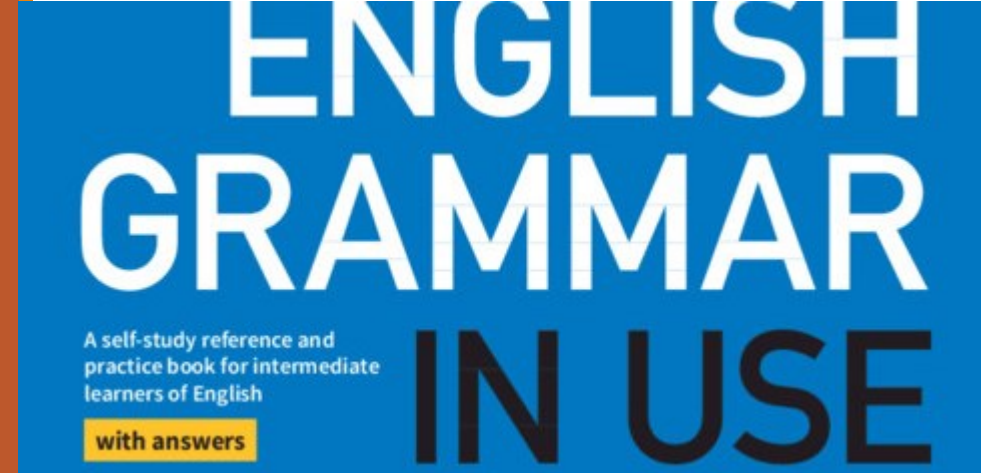
The public interest in fostering science does not justify imposing open access as a “universal mandate” on research publication

- Importance of constructing a FAIR BALANCE between

i) Copyright

ii) public interests and fundamental rights

- Copyright limitations must consider all the interests at stake



3 question



Is there any reason that may justify mandatory open access?

Yes, there is; the funders' interest to make the research they pay for freely available

Open Access becomes mandatory

- For those researchers who benefit from funders that impose it
- **Legal duty** → when researchers accept the terms and conditions of the funding
- “Open access policies” adopted by EU Research Programmes, national research agencies
 - UKRI
 - US National Science Foundation
 - Spanish National Research Agency...
- Legal response → introduction of an “open access right” in some countries: Germany (2013), Holland (2015), Austria (2015), France (2016), Belgium (2018)

Open Access right

It only applies:

(1) to scientific contributions “**in periodicals**” or “**short works**”

(2) if the author’s research was paid by **public funding**

(3) **respecting an embargo** period (6/12 months, “reasonable period”)

“A copyright limitation to publishers in disguise”

Antoon Quadvlieg

Complies the “3 Step Test” (Berne Convention, TRIP’s Agreement, WIPO Treaties, EU Directives)

2018



“Open Access in Europe: A National and Regional Comparison”

Scientometrics
January 2021

Effective measures for open access compliance?

Governmental
commitment
National agencies
measures
University policies....

- Spanish Law of Science (2011), amended in September 2022

mandatory green open access,
“immediately after publication”

How to implement this mandate???

- EU Research Agency → researchers are penalized from funders if they don't comply open access mandate
- UK Research Excellence Framework policy: open access as condition for submission

4 question



If we agree that **open access poses a great advantage** for the scientific community,
What will the best legal instrument be to **facilitate universal and sustainable open access?**

Prof. Willinsky's proposal

- Statutory Licensing
- It would apply to “research publications”
- Requires immediate open access, publishers are fairly compensated
- Reference US Modernization Act (2018) → Compulsory licences between music producers and music providers

Future of open access

- Agreements between publishers and authors/institutions

- New business models for Gold open access:

relevance of the Journals contribution → organizing research publications over the last 2 centuries



Disruptions in the scientific publishing market

- Scientific authors, peer reviewers and editors normally don't get paid
- Libraries have little power to negotiate licences (price, conditions...)
- Publishers are not transparent with their costs of publishing
- High degree of concentration of ownership in some big major publishers (some of them have around 2.900 journals)
- Abuse of a dominant position in the EU market
- Anti-competitive practices

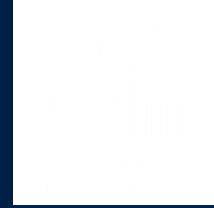
SOLUTION → Competition Law

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THE FUTURE OF COPYRIGHT

Achieving Sustainable Universal Open Access
through Copyright Reform (A Debate)

Thank you for attending



Slides and recording will be
distributed shortly