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The American Library Association has been involved in an ongoing public relations campaign in order to attempt to convince the academic publishing world that the Open Access model is the correct one for academe. However, they have not followed suit with their own publications.

This paper is an exploration of this duality, set in a framework of the history of copyright and the Open Access and Free Culture movement. The history of copyright in the United States is presented with special emphasis to its relationship with libraries, and the philosophy of the Free Culture movement is examined in the same light. Specific ALA publications' copyright policies are noted, and compared/contrasted with the public positions that the ALA has taken on Open Access.

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THE PERILS OF STRONG COPYRIGHT: THE AMERICAN LIBRARY ASSOCIATION AND FREE CULTURE

by
Jason M. Griffey

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Approved by

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Paul Jones

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Introduction

The current state of intellectual property law is labyrinthine in every sense: it is difficult to follow, full of blind alleys, and the only people who know the way through it are the ones who designed it in the first place. Pamela Samuelson notes in *Towards a New Politics of Intellectual Property,* "copyright industry groups have cultivated relationships with policy makers in the executive and legislative branches over a long period of time" (98) and these relationships have been used to maintain control over copyrighted materials far beyond the length of time of commercial success of said materials. James Boyle noted that "the ground rules of the information society are being laid down by lawyers (strike one) employed by the biggest players in the field (strike two) all with little public debate or press scrutiny." (Boyle, "Sold Out")

My goal in this paper will be to examine the history of copyright, attempt to unite some of the disparate aspects of the open information meme, and finally to consider how this meme is being distributed (or not distributed) by academic librarians. I will also attempt to make prescriptive suggestions that might assist librarians in seeing the strengths of the Open Information memepool.

Libraries in the US have been one of the central victims of this lengthening of copyright, since copyright law limits the ability of patrons to interact with the intellectual property as they wish. This is especially true in cases of art and music, where re-

appropriation into new forms is a central part of the creation of new works.[1] With the addition of legislation like the Digital Millennium Copyright Act to the morays of copyright, libraries (and the general public) have had increasingly difficult times in dealing with what is and isn't legal. This confusion is exacerbated by the rise of the Internet in the transmission of intellectual property, the uncertainty in the minds of the public as to the copyright status of digital intellectual property like websites and digital photos, and the rise of peer-to-peer systems that allow for the ease of transmission of digital information.

This paper will attempt to examine the history of copyright and the role that libraries have played in this history. It will then focus on the digital information revolution of the last 10 years and how libraries have dealt with the increasing role of digital information and the attempted control of it by intellectual property owners. This will include a discussion of the rise of copyright alternatives and their defenders. Finally, I will attempt to look forward and examine how libraries should understand the future of intellectual property and the increased role they can have in setting the table for said future.

Before examining the current state of intellectual property too deeply, looking at the history of intellectual property and the academic library is a useful exercise in order to fully appreciate the importance of this junction at the beginning of the new millennium. First, we will examine a bit of the history of copyright, just to be clear on how we got copyright to the state that it is in. Second, we will look at how these laws

[1] The prime current example of which is "The Grey Album" by DJ Danger Mouse, a remix of Jay-Z's "Black Album" and The Beatles "White Album" that has been the subject of much publicity, including a review in Rolling Stone magazine. < http://www.illegal-art.org/audio/grey.html>

concerning intellectual property have been viewed by librarians, and how the laws have affected the public through affecting the library in their community.

Libraries have had to be sensitive to intellectual property issues throughout their history. Pre-Guttenberg, libraries were closed bastions of protection, charged not with the sharing of information as much as the protection of it from destruction. Libraries functioned much as we would think of museums or archives now, protecting the information involved from degradation and loss.[2] The invention of the printing press and the democratization of books put forth a completely new set of property rules to be considered. Prior to the press each book was, by necessity, unique in character. In addition to the handcrafted details of the bookmaking process, the uniqueness was due to the laborious process of hand copying the entirety of the text. Errors may have been (and were) introduced during reproduction and things were altered inadvertently by the scribes working to reproduce the books. The press changed that and led to publishers being able to reproduce exact copies of authors' works.

[2] On a humorous note, one of the most famous of these historic libraries, the Library of Alexandria, is believed to have grown its collection in an interesting way. From the Wikipedia: "By decree of Ptolemy III of Egypt, all visitors to the city were required to surrender all books and scrolls in their possession; these writings were then swiftly copied by official scribes. The originals were put into the Library, and the copies were delivered to the previous owners." <http://en.wikipedia.org/wiki/Library_of_Alexandria>

Chapter One: A Brief History of Copyright

Among many other cultural changes, the printing press created the beginnings of a concept of intellectual property and copyright as it's understood today. In England, the Licensing Act of 1662 and the Statute of Anne in 1710 both legally addressed intellectual property as worth protecting in some manner. The Licensing Act legalized the concerns of publishers who wanted controls on the reproduction of authors' works by granting the publishers a legal monopoly on said printing.[3] The Statute of Anne introduced for the first time the concept of a limited temporal monopoly, giving copyright a fixed length (14 years, renewable for 14 more) and focused on giving rights to authors rather than publishers. ("History of Copyright")

This basic concept for copyright and the protection of authors was brought across the Atlantic to the US[4] and codified in the Constitution. Article I, Clause 8, Section 8 of the US Constitution states:

> The Congress shall have Power…To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries…

From this somewhat humble statement, all of copyright law in the US flows. The Congress of the United States has crafted an enormous amount of law since these words were laid down over two centuries ago. The first of these was in 1790, when the Congress passed the Copyright Act of 1790, which like the Statute of Anne limited the copyright of

[3] It was also designed to allow the government to engage in censorship of material it deemed troublesome.
[4] It should be noted that there will be little discussion of "moral rights" as they are understood in relation to copyright in parts of the European Union and Australia.

an author to 14 years, plus another 14 if renewed. This effectively gave authors a "limited monopoly" on their work, ensuring that they would gain enough financial benefit to allow them to continue to produce works. The limitations on the monopoly were designed in order to allow for works to pass into the public domain, and thus be available for everyone to borrow from in the production of new works.[5] Over the last 214 years, the copyright term has been extended and extended again, first in 1907 to 28 years (with a renewable 28), and then in 1976 to the life of the author plus 50 years. Then again, in 1998, the Sonny Bono Copyright Term Extension Act increased the term of copyright to the life of the author plus 70 years, where it remains today. This increase in the speed with which copyright is being amended is increasing, and seems to bode poorly for the future. It took us 117 years to double the copyright term, but only 69 years to nearly double it again. Only 22 years later, it was extended yet again (and it should be noted that the 1976 extension, which based the term on the life of the author is important since people are living longer every year). This increase mirrors the speed of technological change noted by Ray Kurzweil in his essay "The Singularity." He claims that as we come to understand Moore's Law, "we're doubling the paradigm shift rate," and that this has been true even across technologies (from the electromechanical calculator to vacuum tubes to transistors). I mention this connection between copyright and Moore's Law only to help solidify the link between copyright and technology. It also gives us reason to believe that we can guess that Congress will find it necessary to extend copyright yet further around 2010.

[5] This has been compared at times to the "fertilizing" of the creative world, much in the same way a farmer will plow under a crop in order to ensure the continued fertility of the earth.

The technological innovation of the printing press drove the adoption of these copyright laws, and technology has continued to be the primary motivator in the reconceptualization of laws relating to intellectual property. With every new type of media, copyright law has expanded to cover it (photography, recorded music, film, software). And with every new technological advance for reproduction of any type of media, the copyright holders of that time have led a legal crusade to have the offending technology declared illegal, or hampered severely the efforts to bring the technology to market. This has been true in the US from the late 19th century battles over piano rolls to the current RIAA/MPAA issues with Peer-to-Peer file sharing. In every case where a new technology allows copying of media (photocopier, cassette tape, VCR) by the public, the primary copyright holder or organization has used intellectual property law to attempt to prevent the technology from being released. And libraries, by being a repository of intellectual property, have always been involved in these arguments. Arguably, they are the largest single type of institution affected by any change to the intellectual property laws of the country in which they reside. One example of the sorts of legislative rules to which libraries are bound can be found in the Code of Federal Regulations, Title 37, Volume 1, where you find the following:

> A Warning of Copyright for Software Rental shall be affixed to the packaging that contains the copy of the computer program, which is the subject of a library loan to patrons, by means of a label cemented, gummed, or otherwise durably attached to the copies or to a box, reel, cartridge, cassette, or other container used as a permanent receptacle for the copy of the computer program. The notice shall be printed in such manner as to be clearly legible, comprehensible, and readily apparent to a casual user of the computer program..

There are similar rules for any device that is capable of making a copy of anything. From photocopiers to cassette players, the “copyright industry groups” mentioned by

Samuelson have succeeded in writing the copyright laws to suit themselves, and Congress has arguably forgotten that they are charged with the protection of the public domain as well as the promotion of the arts and sciences.[6]

This isn't to say that copyright has been ignorant of the needs of libraries. One prime example of this is contained in the 1976 revision of copyright law, which allowed for specific exemptions in copyright law for libraries and educational use. This clarified the concept of Fair Use and gave some clear boundaries in regard to reproduction of materials. Section 107 of the 1976 revision allowed for copies to be made "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." Clearly the allowance for "teaching, scholarship, or research…" is particularly salient for academic libraries, where scholarship and research are assumed to be the primary role of the library collection.

One more recent example of how copyright law has intersected with libraries and technology was the VCR. In 1989, just as VCRs were becoming more and more common in private households, the copyright law had not been clarified as to whether the library was a private or public space for the purposes of viewing videotapes. This makes a difference, since they were (and still are) licensed for private viewing but not public display. Two articles[7] from American Libraries in 1989 discussed this and include relevant legal references of the day. The first of these pushes for a "gentleman's

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[6] The protection of the public domain is inherent in the framing of the copyright clause by the founding fathers. This is the reason that they denoted protection "for a limited time."

[7] "Copyright glossary." American Libraries. and S.M. and T.J.G. "Needed: A formal understanding between copyright holders and copyright users."

agreement" for library use of these resources, while doubting that libraries have the money to push forward with real legislation on the matter (a theme we will see repeated throughout libraries intersection with copyright).

Throughout the early 1990's, libraries struggled with the technology of the Internet and the rise of the World Wide Web (WWW). By late 1997 and early 1998, the Congress was debating on how copyright law should be understood in this new digital realm. The American Library Association was there as well, pushing for legislation that wouldn't cripple the libraries and would allow them some leeway in the digital realm.

With digital information, the idea of a "copy" becomes somewhat more problematic. There are several reasons for this. The most glaring difference between a digital copy and an analog copy is that with an analog copy, there is a significant cost in relation to the original. If you wish to make a copy of a book, the cost will quickly approach, in many instances, the actual retail cost of the item. Even in cases where the cost of the original is vastly higher than the cost of the reproduction, there is some investment of time and effort that is taken into account that offsets the making of a copy. With a digital copy there is nearly zero effort and nearly zero cost (when the copy is made over a network). There may be a time investment given the speed of the network, but this is machine time, and not actual human effort. So far, the only non-human reproduction of books is done by very expensive robotic scanners that are far out of the range of the average consumer.

In addition, in a very real way, the Internet works via making copies. When you go to a website and make the request with a browser to view the page, the hypertext transfer protocol retrieves the webpage and stores it (temporarily) on your computer. The

same process occurs with the photos on the site, along with any other pieces necessary to display the details in the browser. Thus, a simple prohibition of copying would render the very activity of a web browser illegal.[8] While this may be a somewhat fragile interpretation of making a copy, the status of copyright infringement as a civil and not criminal offense means that we must pay attention to the fringe cases. They cannot be overlooked, since the evidentiary requirements are different than that of a criminal charge. One example of this sort of fringe case is *MAI Systems v. Peak Computer* from 1993.[9] The summary of the case reads like it can't possibly be serious to anyone who understands how a computer works. The following summary is from Hoffman:

> MAI licensed its customers to use the software only for their own internal purposes. The defendant company maintained computer software for its clients. When Peak provided maintenance to a customer for MAI software, MAI sued, claiming that Peak had violated MAI's copyright in its software. When it performed maintenance on the software, the defendant **turned on the computer**, which **created a copy of the software in RAM** (emphasis mine). (Hoffman 73)

One other issue raised in Hoffman is the court's take on "derivative works." Two court cases have dealt with the fact that it is possible to take a webpage and cause it to display differently than the designer or copyright holder intended (such as with frames, where the page might display nested inside other, non-related pages). *Futurdontics v. AAI* and *The Washington Post Co. v. Total News, Inc*. both tested this, and both went in the favor of the prosecution (*The Washington Post v. Total News, Inc* actually settled out of court) (Hoffman 78).. The potential for abuse of this sort of litigation seems very high and smacks of the "moral rights" assigned to intellectual property elsewhere in the world. Is it an actionable offense if someone has their browser set to display a given page using

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[8] James Boyle noted in a New York Times editorial in 1996 that a "Clinton Administration proposal for intellectual propery on the Internet…would turn browsing an Internet document into a copyright violation."
[9] MAI Systems v. Peak Computer. 991 F.2d 511: 9th Cir. 1993.

different fonts than the original HTML document calls for (which is possible and common for people with visual disabilities)? These sorts of cases underscore the difficulty in applying copyright law to the digital realm. Copyright must redefine itself for this new digital age, or we risk the possibility that we will be stymied by unintended consequences of too draconian legislation.

The largest piece of copyright legislation of the last several years has been the Digital Millennium Copyright Act (DMCA). Passed in 1998, the DMCA was written with the backing of the major media property holders and has two main effects to copyrighted material contained within it. The first is that it contains legislation making it illegal to "circumvent a technological measure that effectively controls access to a work protected under this title."[10] Any work that is protected by copyright, and has a technology in place to protect or limit its access, is covered under this rule. This includes everything from DVD's (the prime initial subject of this clause) to any sort of Digital Rights Management that is invented for digital information distribution (this would include the Broadcast Flag legislation that the FCC has recently pushed, as well as lots of proprietary file systems and types). The second major section of the DMCA is concerned with giving Internet Service Providers indemnity from being contributory infringers if copyrighted material is posted on a website that the ISP merely hosts. As well, it provides for the ability of a copyright holder to subpoena information about the potential infringer from the ISP in question.[11]

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[10] "Title 17>Chapter 12>Sec 1201." Legal Information Institute: US Code Collection. 15 Mar 2004. <http://www4.law.cornell.edu/uscode/17/1201.html>

[11] One of the more interesting subsections of the DMCA is Title III, which provides protection from the very infringing behavior at question in *MAI Systems v. Peak Computer*, "so that those repairing computers

The DMCA is one of several pieces of legislation that attempt to put protections on intellectual property above and beyond the copyright law. Lessig describes several ways in which intellectual property may be controlled beyond the scope of just copyright. Indeed, property of all sorts, not just intellectual property, has varying levels of protection and control. As he puts it:

> Many things protect property against theft – differently. The market protects my firewood (it is cheaper to buy your own than it is to haul mine away); the market is a special threat to my bike (which if taken is easily sold). Norms sometimes protect flowers in a park; sometimes they do not. Nature sometimes conspires with thieves (cars, planes and boats) and sometimes against them (skyscrapers). (Code 123).

The Digital Millennium Copyright Act attempts to put another layer of protection on top of copyright, that which Lessig calls "code." Code is any general lock put upon content that prevents its use. This "code layer" that is now added to digital media allows control of intellectual property to be wrested from the courts and the Congress, and instead "[i]t puts the power to regulate copying in the hands of engineers and the companies that employ them. It takes the decision making power away from Congress, courts, librarians, writers, artists, and researchers" (Vaidyanathan 174). This additional layer of legal protection allows things that were in the public domain in one format to be "locked" in another format, and for legal penalties to be applied if they are bypassed. A film which is in the public domain may be formatted to DVD by a film studio, but if someone wishes to extract that film for any reason, Fair Use, library exemption, or other legally allowed use, they are in breech of the DMCA and can be prosecuted for circumventing a protection method.

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could make certain temporary, limited copies while working on a computer." <http://en.wikipedia.org/wiki/DMCA>

Chapter Two: Copyright and Libraries

This history of copyright has led to a series of crisis in academic libraries. It is no coincidence that after every copyright revision, there comes a series of books for librarians attempting to explain these new rules for conducting the business of the library. Any change in copyright law affects the basic operations of libraries and archives, to the point where they have been given an entire section of copyright law all to themselves so that they can continue to operate.

Title 17, Section 108 ("Limitations on exclusive rights: Reproduction by libraries and archives") is the section of the copyright code dealing with the operation of libraries and archives. The leeway given to libraries in copyright matters is broad, but specific and limiting. Jessica Litman in her work Digital Copyright is critical of the fact that libraries have often settled during copyright negotiations, saying:

> A long copyright history of negotiations with libraries may also have persuaded content owners that library groups were easily marginalized and not a significant threat. Library groups had a history of settling for very little….The effort made to accommodate library interests was accordingly modest, and seemed to focus primarily on first dividing libraries from the commercial opposition and then buying them off cheaply. (126)

That being said, section 108 gives libraries some rights above and beyond the "fair use" statutes. Section 108 even trumps Fair Use as far as challenges are concerned, since the exemptions are explicit, whereas with Fair Use they require interpretation as to whether or not the use of copyrighted information is legal. The exemptions given specifically to libraries include the making of a single copy for a user, or making up to three copies for

backup purposes (after meeting a long series of requirements, such as not being able to buy a copy for a "reasonable price" and ensuring that a copyright notice appears on each copy made).[12] These exceptions come because libraries have pushed for them, and largely they have come because publishers are reliant on libraries for their large purchasing power. However, libraries have largely settled for what they are given by content providers rather than pushing for comprehensive rights to materials. Litman describes the history like this:

> Neither book publishers nor libraries have any interest in making the library privilege broad enough so that it would be useful to users that aren't libraries…Negotiated privileges tend to be very specific, and tend to pose substantial entry barriers to outsiders who can't be at the negotiating table because their industries haven't been invented yet. (25)

Libraries have historically not pushed for more than the minimum of allowances of copyright use because they ran the risk of being denied any benefits at all. Libraries not making deals that involve tradeoffs with the content holders run the risk of forgoing these exceptions and being unable to operate as a library at all. The history of the development of section 108 is the same as the rest of copyright law, and the copyright holders have always held the reins. The next historical development in intellectual property law took place in a business that was, at the time, far removed from libraries. However, the impact of this next step in IP law will have a resounding effect upon libraries starting with the present.

One of the effects that technological changes have on copyright is that they invariably frighten the status quo, and current copyright holders are frightened for their very existence. It is common for current media companies to opine that the past errors they have made in challenging what turned out to be enormous financial centers for them

[12] Title 17, Section 108. US Copyright Law.

(VCR's, radio, cable TV) are not the same as the current digital revolution. The digital transformation that is occurring is often described as fundamentally different, and that the current paradigm shift has no analog in history. Many on the other side of the debate feel differently, that this digital revolution is just another shift in the way media will be understood. Cory Doctorow has an interesting take on this:

> forget all that business about how the Internet's copying model is more disruptive than the technologies that proceeded it. For Christ's sake, the Vaudeville performers who sued Marconi for inventing the radio had to go from a regime where they had *one hundred percent* control over who could get into the theater and hear them perform to a regime where they had *zero* percent control over who could build or acquire a radio and tune into a recording of them performing. For that matter, look at the difference between a monkish Bible and a Luther Bible -- next to that phase-change, Napster is peanuts. ("O'Reilly")

It isn't entirely obvious that large media companies have learned at all from the past. Several members of the old guard of intellectual property have stepped down the rhetoric somewhat, but still lobby heavily for tight controls over what can legally be done with intellectual property.

One of the most outspoken of these old guards has been Jack Valenti, the current president[13] of the Motion Picture Association of America (MPAA). To compare and contrast the "copyright industry group" position on some of the old issues to the new digital ones, I've chosen two of Valenti's speeches.[14] The comment that has most often come back to haunt the MPAA is contained in the 1982 speech in which Valenti is discussing the Sony Betamax (the competitor to the Panasonic VHS video cassette recording system): "I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone."

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[13] Valenti has announced his retirement, and is planning to step down from the post in the spring of 2004.
[14] Valenti, "Hearings" and Valenti, "Moral Imperative."

Clearly, history has proven this to be a short-sited and unambitious evaluation of the importance of the VCR to the film industry. The home video industry is now one of the pillars of the motion picture industry, with both sales and rentals driving enormous amounts of money into the coffers of moviemakers.

Compare this to Valenti's comments from Duke University:

> While digital technology is a hyper-modern phenomenon, its molecular connection to the moral rostrum has an ancient ancestry. Many years ago, the British philosopher, William Hazlitt, wrote: "Man is the only animal who both laughs and weeps for he is the only animal who understands the difference between the way things are and the way they ought to be.
>
> The digital world has the capacity to unlock knowledge hidden behind doors previously only partially open, and mostly closed to all but a few. What is yet to be put in place is a clear understanding of how to conduct yourself when you have digital power available to you that you will not use because it causes injury to others. William Hazlitt summed up that choice for us better than anyone else.

Here he is closing his speech on the morality of intellectual property, and the ease of theft of digital information. Putting aside for the moment the discussion of copyright versus theft, it appears that Valenti (and thus, we may assume, the MPAA) is taking a slightly more nuanced stance on the copyright issue. They appear to be relying on a sort of notion of nationalistic guilt to convince us that copyright infringement is the equivalent of theft, and is thus morally wrong.

Earlier in the speech, he says:

> There are some critics who say, "Come on, movie industry, get with it. Stop your whining and get a new business model."
>
> Fine, except no business model ever struck off by the hand and brain of Man can compete with "Free." And if critics don't understand that, it's because they just love the status quo. When a new multi-million dollar film, just released, is suddenly on the Net being abducted by millions of visitors to file-swapping sites, then that, dear friends, is "the status quo." Not a congenial status. Not a pleasant quo."

There are numerous examples of business models that compete with “free.” Setting aside the numerous Open Source distributions of Linux that are sold at retail even though they are perfectly capable of being downloaded for free, there are examples of individual intellectual property creators that are making a living off of things that are available for free. Cory Doctorow is one such author. His first novel, Down and Out in the Magic Kingdom, was made available for free from his website, in addition to being able to be purchased via traditional dead tree methods of intellectual property consumption. In a post on his weblog, he looks back at his decision to release his novel in this manner:

> Just over a year ago, I released my first novel, Down and Out in the Magic Kingdom, as an experiment in what would happen if I allowed my precious copyright to be slightly eroded by one of the Creative Commons licenses. I chose the most restrictive CC license available to me, staying cautious, and I waited to see if the sky would fall.
> It didn't. (weblog)

This led him to release his second novel online as well, available for free, with a Creative Commons license. He subsequently re-licensed Down and Out in the Magic Kingdom with the least restrictive Creative Commons license. He sums up his position, and expresses a criticism of the copyright-rich media companies in a recent interview with RU Sirius, saying:

> Every other media revolution that we've had from Gutenberg to the radio to recorded music and so on, ended up with an industry that's a thousand times larger, that makes a thousand times more money, and makes available a thousand times more work. That happens every single time! If you go back far enough, you will find the guild of clavichord makers decrying the advent of the lute. *Our salon music is being disintermediated by wandering lutiers*! It's happened at every turn, and at every turn it just makes a bigger pie. So I want to figure that out before the other writers do so that I can make more money than they do. (interview)

Clearly there are creative authors out there who believe that you can compete with free, especially if you are giving away your own product in a complimentary way. The

wandering lutiers just might pay you for the rights to your content, even if they are free in one form or another. Just because you can listen to music or watch movies by downloading them, there are many valid reasons to wish to possess a physical copy of a creative work, even if you have to pay for it.

Chapter Three: Tragedy of the Commons

The ever-lengthening scope of copyright, combined with the ease with which something falls under copyright protection (i.e., anything put into a tangible form) has led to a new sort of Tragedy of the Commons. Instead of the commons being over-consumed,[15] the Commons are currently being under-produced.

The latest wave of intellectual property law first became an issue in the realm of computer programming. Richard Stallman was the first to publicly recognize the strength in the ability to utilize others' intellectual property (in his case, specifically computer code) within your own work. His take on this was codified in the GNU Public License; a software license that one could attach to code that was created in order to make it "free." Here free denotes freedom and not price, since the key to the licensing structure was found in two requirements: One, that the code for the program be included in the distribution of the program; and Two, that the license was a necessary part of passing the program along. This last requirement was the real breakthrough, since you could be assured that legally any changes or modifications to your software would remain free. From a personal and not technological perspective, the work of Rheingold[16] is also linked to this via his analysis of social networking and the strength of shared information.

[15] Originally used as a phrase by Garrett Hardin, the tragedy of the commons is one where an amount of pasture land is to be shared between multiple members of a community. If the pasture is grazed equally, everything is fine. However, if any one shepherd overgrazes his sheep, all of the shepherds will fail and their sheep will die because of the actions of the one greedy shepherd.

[16] Especially that of Smart Mobs.

If Richard Stallman is the brain behind the conception of free software, the marketing manager would be Eric Raymond. Raymond is credited with pushing the phrase “Open Source” in the place of “free” as a marker for the ideology of freedom of intellectual property as it relates to software, which he believed was needed for marketing purposes. Free is not something that commercial interests want to proclaim when it comes to their content.

Out of this undercurrent of freedom for code came a series of legal scholars led by Lawrence Lessig from Stanford Law School, decrying the dearth of content moving into the public domain. This depletion of the public domain has been addressed by organizations like The Center for the Public Domain and Creative Commons, and by individuals such as Lessig, Eric Eldred, James Boyle, and others. This movement of concern for the public domain does not as yet have a unified front in either presentation or brand, and so characterizations of it are at once varied and vague. Lessig himself uses the phrase “Open Culture” to describe the intended effect of licensing that is less restrictive than traditional copyright in the US.

The largest library group in the US is the American Library Association, and they have been slowly aligning themselves with the Open Culture movement. They have filed amicus briefs in several high profile cases over the last several years, the most important of which are: the 2002 Supreme Court case *Eldred v. Ashcroft*, the 2003 case *Dastar Corp. v. Twentieth Century Fox Film Corp*, *MGM Studios, Inc. v. Grokster, Ltd*, and *Recording Industry Association of America v. Verizon Internet Services, Inc*. These are some of the largest profile cases in copyright over the last 4 years, and several have ended either at the US Supreme Court or at a US District Court. Why has the ALA begun

insinuating itself into court cases having to do with copyright? Because they realize that copyright affects everything about a library. The various rights that make up copyright in the US (reproduction, distribution, adaptation, performance and display) all make a difference in the day-to-day activity of every library in the country. The surprising part isn't that the ALA became involved; the surprising part is that they are filing merely as a friend of the court and are not bringing suit themselves.

However, as we examine a few of these cases, we will begin to see a theme not only in current copyright law, but also in the concerns of libraries. Each of the cases deals with a very different aspect of copyright law, and each would affect libraries differently depending on the outcome.

MGM Studios, Inc. v. Grokster, Ltd involved the question as to whether or not technology could be a contributory infringer to copyright. The Supreme Court had ruled on this conceptually in an earlier case, *Sony Corp. v. Universal City Studios*, where Sony won, and the Court put forward a standard that as long as the technology was capable of significant non-infringing uses that the creator of the technology can't be held liable for contributory infringement. On the surface, the MGM case appears very, very similar to the Sony case, and indeed was ruled such by a California Circuit court, which

> concluded that Grokster and Morpheus could not be held secondarily liable for the infringements of users of their software. The district court also relied on the ruling of the U.S. Supreme Court in the Sony (Betamax) case in 1984 when it held that the makers of the VCR should not be held liable for copyright infringement simply because the device could be used for infringing purposes. The district court found that it was undisputed that there are substantial non-infringing uses for the file-sharing software, such as to share public domain materials and government documents. (American Library Association, "Copyright Court Cases.")

The question here is, why did the ALA care about a peer-to-peer distribution client like Grokster? The answer is that the consequences of MGM winning would mean that there was a precedent for copyright holders to prevent technological innovation if said innovation appeared to be able to contribute in some way to copyright infringement (and we've seen the ease with which that can be claimed with *MAI Systems v. Peak Computer*). The brief did go out of the way to assure copyright holders that of course the ALA opposes willful copyright infringement, but that "free speech and the public interest are best served by rules that allow new and innovative mediums of communication to develop and flourish." (American Library Association, "Copyright Court Cases")

This is very different from *Recording Industry Association of America v. Verizon Internet Services, Inc.* The issue in this case revolved around a specific portion of the Digital Millennium Copyright Act that allowed copyright holders to request a subpoena from the court forcing ISP's to reveal the identity of the end user. As an example, John Doe uses a peer-to-peer service such as Napster, Grokster, Kazaa, or any of the myriad others to download a file that appears to be a copyright violation. The RIAA has the authority under the DMCA to issue a subpoena and determine the identity of John Doe in order to move forward with a copyright suit against him. The internet service provider would be required to provide the information under the DMCA, and that was what Verizon was fighting.

So again we ask the question, why would the ALA care about this? The definition of an internet service provider is not an absolute one, and it is entirely possible for a library, either public or academic, to be considered under that rubric, as far as the media associations (RIAA/MPAA) are concerned. A university writ large is certainly an ISP for

the student attending it. The ALA has a very strong statement of personal information privacy in its Code of Ethics for libraries and librarians:

> We protect each library user's right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired or transmitted. ("Code of Ethics")

Again, we see the separation of what is, at the center, a case resulting from copyright issues become nothing having to do with copyright at all. Instead the ALA takes a stand on privacy. This is not to say that privacy is not an important issue for libraries, but when given a chance in the amicus brief to make a statement about time limits of copyright, the ALA instead makes it very clear that they will do nothing to ruffle the feathers of the major copyright holders.

The last of the cases mentioned, *Eldred v. Ashcroft* is the most interesting for several reasons. It was solely concerned with copyright. Eric Eldred, the proprietor of Eldritch Press,[17] sued concerning the legality of the Sonny Bono Copyright Extension act of 1998. Eldritch Press is concerned with publishing public domain books freely on the internet, and Eldred clearly saw an issue with the 20 year retrospective extension on copyright. The case specifically charges that the Sonny Bono act violates Article I, Section 8 of the Constitution, which limits copyright protection as a "limited time." Eldred, and the others taking part in as plaintiffs in the case, claimed that the repeated lengthening of the copyright term made the phrase "limited time" meaningless.

This was the most high profile of the cases examined here, garnering a lot of press and fanfare. Eldred was painted largely as the "little guy" fighting the good fight against big government. The American Library Association signing on with an amicus brief is unsurprising, but it is also the boldest of the support discussed here. To effectively say

[17] <http://www.eldritchpress.org/>

that they agree that the copyright term is too lengthy is risky, especially given the tone of the other briefs filed in other cases. The message to the Congress and major media organizations appears to be distinct. It doesn't get much clearer than:

> Restrictive copyright laws adversely affect authors, artists, curators, archivists, historians, librarians, and readers÷ the creators, recorders, keepers, disseminators, and users of our culture. Amici submit this brief to assist the Court's understanding of the practical consequences of this unique case for large segments of the public. (Association of Research Libraries. "Statement of Interest of Amici Curiae")

The Amicus for Eldred also speaks directly to the harm that the copyright extension does to libraries:

> Primary disseminators of information include educators, archivists and librarians. These individuals and their organizations serve the public without commercial gain, seeking only to benefit users through promoting accessible information, exposure to arts and sciences, and cultural enrichment, drawing in part on the public domain. (Association of Research Libraries. "Statement of Interest of Amici Curiae")

This recognition of the need for the public domain in the work of libraries is not commonplace, even within large academic libraries. The necessity of having a public domain from which to assemble new works, the ease with which public domain works can be shared, and the freedom of having characters, plots, entire worlds to work with are not often discussed in libraries as being central to their purpose or goals.

There has been a slow undercurrent among the digiterati over the last 3-4 years recognizing that a strong public domain is necessary for creative work and that perhaps if the traditional copyright structure is too limited that an alternative is needed. From this need came Creative Commons,[18] a group founded by the Center for the Public Domain.[19]

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[18] <http://creativecommons.org/>

[19] A non-profit center dedicated to furthering the public domain and lessening the bounds of copyright. <http://www.centerpd.org/ >

Founded in 2001, Creative Commons is a group dedicated to providing free license services for use by authors of creative works ranging from music to film to still images. The GNU General Public license took care of attaching computer code with freedom from copyright protection, but until the Creative Commons there was no easy way for authors to label the intellectual property that they wanted to make more available than the traditional copyright license. The 1976 revision to copyright law made the registration of a copyright unnecessary, which means that anything created by anyone in the US is automatically off limits for others to use. The Creative Commons wanted to give people who created works the ability to allow others to use their works without simply putting them into the public domain.

The licensing scheme used by the Creative Commons revolves around three choices: attribution, commercial use, and modification. The license allows reproduction of a piece of intellectual property given that one abides by the details of the license. These details can involve giving the author credit (or not), being able to use the work in a commercial fashion (or not) and being able to modify the work (or not). This gives an end user eight different license variants that they can choose from, ranging from the most restrictive (attribute-non commercial-no mod) to the least restrictive (no attribute-commercial-mod).

Chapter Four: The Academic Serials Crisis

Libraries are caught in this crossroads of copyright and openness. They are at once the bastion of information access, providing information for the public at low or no cost, and also are responsible for upholding and understanding the law of the land. Libraries have been too long in the role of picking up the scraps of the media corporations, and have recently become entrenched in the fight against increased copyright terms.

Libraries and librarians have thus far not given much thought to alternatively licensed content, short of the Open Access movement in academic serials. This movement towards Open Access is only now beginning to foment in academia. The Directory of Open Access Journals defines what “open access” consists of:

> We define open access journals as journals that use a funding model that does not charge readers or their institutions for access. From the BOAI, Budapest Open Access Initiative, definition of "open access" we take the right of "users to read, download, copy, distribute, print, search, or link to the full texts of these articles" as mandatory for a journal to be included in the directory. The journal should offer open access to their content without no delay. User registration online is accepted. (Directory of Open Access Journals, “Questions and Answers.”)

But even this movement has been largely ignored by academic libraries. When searching the four member libraries of the Triangle Research Library Network (the University of North Carolina at Chapel Hill, Duke, North Carolina State University, and North Carolina Central University) for a sampling of Open Access Journals, the results were less than impressive.

Title	In UNC?	In Duke?	NCC	NC State
Bioscene: journal of college biology teaching	no	no	yes *	no
Journal of Biology	no	no	n	yes
PLoS biology.	no	yes *	no	yes
Journal of Applied Clinical Medical Physics	no	yes *	no	yes *
The Mount Sinai Journal of Medicine	yes *	yes *	no	no
Annals of Mathematics	yes *	yes	yes **	yes *
Journal of Arabic and Islamic Studies	no	yes	no	no
Australian Humanities Review	no	yes	no	no
History of Intellectual Culture	no	no	no	no
Duke Environmental Law & Policy	yes	yes	yes **	no

* noted in the catalog "available to" the appropriate campus online. No note on any catalog concerning free availability by anyone.
** listed in catalog, but no online note at all

Chart 1: Open Access Journals in TRLN library OPACs

From a random sample of ten journals (drawn primarily from the areas with the highest concentration of journals in the database), the availability was checked for in the library catalogs of each member institution. There were four different outcomes noted: either the title was available in the catalog with a note concerning general online availability (indicated by a yes), it was in the catalog but with a note just about the availability to that school (indicated by a yes *), listed in catalog but no notice of online availability at all (indicated by yes **), or it wasn't listed in the catalog at all. The results can be seen in Graph I.

Of the Open Access journals checked, 42.5% were listed as available in the respective libraries catalogs. Duke University had the highest percentage of journals listed in the catalog, at 70% of the sample being listed. However, of the journals listed in Duke's catalog, 43% had a note attached that they were available to Duke students online, not that they were freely available. This may seem a small matter, but it does make a difference to the perception of the resources. Since the general public as well as academics use these libraries, the lack of identification as Open Access journals could be

seen as not only an oversight, but the patrons of the library may view it as a judgment made by the library in regards to the journal.

There are many reasons why these catalog records may be incomplete, or have been overlooked. Catalogers in academic libraries are overworked as it is, and for many libraries it may simply be impossible to increase the number of acquisitions added to the catalog. As well, it isn't clear for most libraries how to count these new Open Access journals, whether they are electronic resources, journals, or some combination. Should they be listed just as serials? These questions haven't been sorted out quite yet by the library community, and may account for some of the inequality of access seen in the graph above.

The American Library Association (ALA), the Association of College and Research Libraries (ARCL), and the Association of Research Libraries (ARL) have all made major statements about Open Access to journal articles. The focus has been on academic journals (especially in the sciences) primarily because of the pricing crisis for large bundled serials, such as with the Elsevier group and other major academic publishers. This pricing crisis has forced academic libraries to cut major journals out of their serial collections due to price considerations, in both print and electronic form..This push towards open information has taken a few interesting turns.

One of these is the creation of a number of foundations and organizations dedicated to increasing librarian, faculty, and the public's knowledge of open information issues and resources. These organizations have largely focused on academic journals and scholarly publication in general rather than simply being interested in open culture for all information. They haven't spoken directly to things like Creative Commons or the Open

Culture movement, but the statements that have been made in support of Open Access have been very strong ones.

In 2001 ACRL and ARL created an organization called "Create Change" to educate librarians and faculty members about the serials crisis. The current advertising brochure for Create Change has the following plea:

> Where possible, publish in open-access journals, which employ funding models that do not charge readers or their institutions for access. Serve on editorial boards or review manuscripts for open-access journals. (brochure)

This is a plea from an organization claiming to be "[a] resource for faculty and librarian action to reclaim scholarly communication." (homepage). The goal seems to be very clear and straightforward, with open access as the central answer to the rising costs of academic journals.

On March 16th, 2004, the ALA, ACRL, ARL, and other library groups backed a declaration from a group calling for free access to scientific literature in Washington DC. According the American Libraries Online,

> A coalition of 10 library associations and public-interest advocacy groups is backing "Washington, D.C., Principles for Free Access to Science"—a declaration by 48 scholarly organizations and not-for-profit publishers affirming their commitment to "reinvest all of the revenue from our journals in the direct support of science worldwide, including . . . the free dissemination of information for the public… Applauding the publishers' "commitment to free access to peer-reviewed research literature where they conclude it is feasible," the coalition explained, "**Open access is our goal for scientific and scholarly communication** because it facilitates the open discussion needed to accelerate research, share knowledge, and enlarge human understanding." (Scientific Literature) (emphasis mine)

Again, this is a very clear statement looking towards the open access of journal articles. This statement is a bit more specialized, focusing just on the sciences. At the same time, we see a much wider base of support from not only the academic world, but the

professional world as well. Associations ranging from the American College of Physicians to the American Cancer Society joined the various academic library associations in the statement for Open Access. This statement is very common in scientific circles now, especially among larger universities.

Yet another academic Open Access initiative called SPARC (Scholarly Publishing and Academic Resources Coalition) was began by ARL and has joined ALA in several joint statements. It has, of course, another aspect of open access as one of its three key strategies:

> **Introduce open-access alternatives to the subscription model.** The access-restricting subscription model of financing publication of research is an artifact of the print environment. SPARC encourages new business models that support open electronic access to research by recovering publishing costs via means other than subscriptions (such as publication fees). (SPARC) (emphasis in original)

SPARC appears very clear in its position that open access is primarily electronic (something taken for granted by other statements) and that there are other methods of cost recovery that allow open access to be a valid decision for publishers.

In another statement, we find ARL and SPARC speaking up on the topic of open access as it relates to any federally funded research:

> The Association of Research Libraries (ARL) and SPARC (the Scholarly Publishing and Academic Resources Coalition) support the goal of timely, sustained, and reliable open access to federally funded research and encourage broad discussion on the most effective strategies to achieve this goal. (Association of Research Libraries “Federally funded research”)

Again, a different take on the source of open access, focusing on federally funded research. This actually takes its cue from the fact that all government documents (with a few exceptions such as classified information) are public knowledge and are required to be available to the public at low or no cost. It seems a small leap to take this idea to any

federally funded research. If public dollars are being spent, one would assume that the public has a right to be involved in the knowledge capital generated.

It even turns out that SPARC (and thus ARL, who founded it) are supporting the Directory of Open Access Journals online. Yet more statements of desires for open access to information can be found at ACRL:

> ACRL supports the following principles for reform in the system of scholarly communication:
>
> - open access to scholarship
>
> …
>
> - extension of public domain information… (American Library Association, "Principles and Strategies")

These statements of support for access to scholarly communication have been echoed at nearly every turn. Nearly every academic library association in the United States has said something about the importance of open access to scholarly communication.

We can even go up a level from just our national library associations. The International Federation of Library Associations and Institutions (IFLA) has an official Statement on Open Access to Scholarly Literature and Research Documentation that says:

> IFLA affirms that comprehensive open access to scholarly literature and research documentation is vital to the understanding of our world and to the identification of solutions to global challenges and particularly the reduction of information inequality.
>
> Open access guarantees the integrity of the system of scholarly communication by ensuring that all research and scholarship will be available in perpetuity for unrestricted examination and, where relevant, elaboration or refutation." (International Federation of Library Associations and Institutions)

Given this kind of support for Open Access at a national level by library organizations, one would think that libraries have a duty even above and beyond the

general presentation of knowledge. It would appear that the availability of free information (both as in beer and as in speech) is a core concern to libraries. ALA is the largest general library organization in the US, while the ACRL and the ARL are respectively the two largest organizations for academic libraries. When they come out on one side of an issue, it should be obvious that they are responding to the desires of their constituents, and that other libraries would take note of the changing tides of intellectual property wants and needs.

Chapter Five: Intellectual Property and the ALA?

Given the copyright background, the ongoing struggle with copyright legislation, and the endorsement of so many Open Access endeavors, let us turn our eye towards the ALA itself, and examine a list of its more popular serial publications. A list of all ALA serial publications can be found at <http://www.ala.org/ala/alalibrary/alaperiodicals/alaperiodicals.htm>. With over 40 serials, the ALA and its sections produce a large number of journals, magazines, and newsletters that are consumed for news, reviews, and scholarly articles by librarians at every level of the profession. These are not all peer-reviewed scholarly journals, but a large number of library journals (especially those dealing with special libraries or very narrow specialties) are peer-reviewed. Given that the focus of the ALA seemed to be directed at scholarly communication and peer-reviewed journals, the examination of how the ALA treats its own intellectual property seems necessary. While dealing with every publication is out of the scope of the length of this particular paper, I will now turn to an examination of the scholarly journals of the ALA.

There are seven journals that are connected in some manner to the ALA[20] that are peer-reviewed. The focus for the purposes of this paper is on peer-reviewed journals in order to most accurately represent the realm of scholarly publications, although I will

[20] They are either publications of divisions or sections of the ALA. The sole exception of this, to the best of my knowledge, is the Journal of the Medical Library Association.

briefly discuss more popular serials from the ALA such as American Libraries and Choice. The peer-reviewed journals to be discussed are:

- Journal of the Medical Library Association (JMLA)
- Children and Libraries: The Journal of the Association for Library Service to Children
- College & Research Libraries
- Information Technology and Libraries
- Knowledge Quest
- Reference and User Services Quarterly (RUSQ)
- School Library Media Research (SLMR)

These are all the premiere journals for their particular aspect of librarianship, and range from very the world of special librarians (the JMLA), school librarians (Library Service to Children and SLMR), and academic libraries (College & Research Libraries). These specific journals were chosen due to the fact that they are peer-reviewed, and thus the closest to the type of scholarly publication that the ALA seems centrally interested in. I was unable to determine if these are the extent of the peer-reviewed journals published by the ALA, but I took these as a representative sample of scholarly ALA publications.

The copyright policies for the different journals are all collected in Appendix 1. They differ in their restrictiveness; for example, the policy of Knowledge Quest (an ALA journal) states simply:

> A manuscript published in the journal is subject to copyright by the American Library Association for the American Association of School Librarians. Additional information about copyright policies is available from the **ALA Office of Rights and Permission**. (American Library Association, Knowledge Quest Guidelines)

Meanwhile, the policy for something like College & Research Libraries is much more specific about just how many rights the publisher (in this case, the ALA) is requesting:

> 1. In consideration for the publication of the Work by the Publisher in the above-referenced Journal, Author hereby **grants and assigns to Publisher all rights, title, and interest in and to the Work and all copyrights therein or relating thereto including the right to renew**, and Author shall take such action as Publisher may reasonably require at Publisher's sole expense to secure such copyrights.
> 2. The rights granted and assigned to Publisher are exclusive to the Publisher and include all rights of whatsoever kind or nature, now or hereafter protected by law including the copyright laws of the United States and of all foreign countries, including but not limited to **all publication, reproduction, and commercialization rights in all media**, including all rights to edit, publish, copyright, promote, translate and distribute the Work worldwide in all languages, and further including all collateral and subsidiary rights.
> 3. Publisher hereby grants to Author a royalty-free license to publish the Work in any book of which the Author is the author or editor, provided the Work is identified as having first been published in the Journal. (College and Research Libraries agreement) (emphasis mine)

While those are two of the more limiting copyright statements, others give the illusion of allowing some freedom with the intellectual property at question, such as Children and Libraries, where

> All material in CAL is subject to copyright by ALA and may be reprinted or photocopied and distributed for the noncommercial purpose of educational or scientific advancement. (American Library Association, "Policies and Procedures")

This effectively only allows the reproduction that would be allowed anyway via the Fair Use statutes, with the addition of the availability of copies used for "scientific advancement." The actual increase in rights is very small, and falls very short of being Open Access.

Even the journal Information Technology and Libraries from LITA hasn't moved towards Open Access. One would think that the technology section of the ALA would be

on the front lines of this particular battle, given the history of Open Source software and the outgrowth of Open Access from it. They do allow authors submitting to the journal to use the work in manners that are similar to Open Access, but they do require that the author assign copyright to the publisher, and any rights that the author has is via the agreement and not via actually holding the copyright to the work. The relevant sections of the agreement are:

> 1. Author hereby grants to Publisher all right, title and interest in and to the Work, including copyright in all means of expression by any method now known or hereafter developed, including electronic format. If Publisher does not publish the Work within two (2) years of the Effective Date, copyright shall revert back to the Author. Publisher agrees to always credit Author as the author of the Work.
> 2. Publisher hereby grants Author a royalty-free, limited license for the following purposes, provided the Work is always identified as having first been published by Publisher:
>
> - The right to make and distribute copies of all or part of the Work for use in teaching;
> - The right to use all or part of the material contained in the Work in a book by the Author, or in a collection of the Author's work;
> - The right to use and distribute the Work internally at the Author's place of employment, and for promotional and any other non-commercial purposes;
> - The right to use figures and tables from the Work for any purpose;
> - The right to make oral presentations of material from the Work;
> - The right to use and distribute the Work on the Author's Web site.
>
> Such license shall be effective thirty (30) days after the Work is first published in the above-referenced Journal. (ALA Copyright Assignment Agreement, Appendix 1)

The author thus has a handful of rights licensed to her, but those rights are unavailable to the general public. The article cannot be reproduced by anyone in a free manner, just the author, and even then only in such a manner as the publisher decrees.

Yet other copyright agreements for ALA publications have language that is perplexing at best. For example, RUSQ:

> A copyright agreement form will be sent to each author when the manuscript is accepted for publication. Authors may sign and return either a limited license or

> full agreement form. RUSQ subscribes to a generous educational use policy. (American Library Association, "Information for Authors…RUSQ.")

We can assume that the full copyright agreement has some explanatory language that clears up exactly what a "generous" policy would be, but educational use isn't something that's optional for intellectual property. Educational use is pretty generous as it stands. It is difficult to imagine what RUSQ allows that would convince them that qualifying their copyright statement in that manner is a useful designation.

By far the most interesting of all of the copyright statements in this short roundup is that of the Journal of the Medical Librarians Association. The JMLA acts similarly to the RUSQ journal above, allowing the authors to hold their copyright without signing it wholesale over to the publisher. However, they require a license that is amazingly lenient as to what rights the publisher has with the IP in question. From the JMLA Copyright License Agreement:

> The undersigned author or authors (singly or collectively, "Author") grants to the Medical Library Association ("MLA") exclusive, worldwide first publication rights in the article named below (the "Article") in the Journal of the Medical Library Association ("JMLA") or other MLA publication. Author further grants to MLA a non-exclusive license to publish, print, copy, transmit, display, distribute, archive, revise, and create new works derived from the Article (including the right to grant sublicenses to third parties to do all of the foregoing), for the duration of the Article's copyright, in all languages, throughout the world, in all media and formats.

So while the author may retain his copyright, and is thus allowed to do whatever he wishes with his work, so is the MLA.

An examination of these various licenses as they relate back to the five aspects of copyright law enumerated earlier in the paper (reproduction, distribution, adaptation, performance and display) and the Creative Commons choices listed above shows some

interesting patterns. The Creative Commons licensing structure is a very common one for opening content to the world. Much of the open content on the web, especially that of the digitally savvy, is licensed with Creative Commons licenses, including such luminaries as Lawrence Lessig (who released his newest book online the same day it was released in bookstores, licensed with a Creative Commons License). Since the Creative Commons has set the bar for Open Access on the web, it seems enlightening to compare and contrast the various copyright licenses of the ALA journals in question to the Creative Commons licenses. Doing so, we get the following chart:

Copyright summary chart	Reproduction	Distribution	Adaptation	Performance	Display	Copyright held by?
Journal of the Medical Library Association (JMLA)	"as long as the author and the Medical Library Association are acknowledged in the copy and the copy is used for educational, not-for-profit purposes"	"as long as the author and the Medical Library Association are acknowledged in the copy and the copy is used for educational, not-for-profit purposes"	No	No	No	Author
Journal of the Association for Library Service to Children	For "noncommercial purpose of educational or scientific advancement"	For "noncommercial purpose of educational or scientific advancement"	No	No	No	ALA
College & Research Libraries	No	No	No	No	No	ALA
Information Technology and Libraries	No	No	No	No	No	ALA
Knowledge Quest	No	No	No	No	No	ALA
Reference and User Services Quarterly (RUSQ)	No	No	No	No	No	ALA
School Library Media Research (SLMR)	No	No	No	No	No	ALA
American Libraries	No	No	No	No	No	Unknown
CHOICE.	No	No	No	No	No	Choice
(Attribution-NoDerivs-NonCommercial)	Yes, for non-commercial use and with attribution	Yes, for non-commercial use and with attribution	No	No	Yes, for non-commercial use and with attribution	Author
Least restrictive CC license (ShareAlike License)	Yes, as long as the license carries with the reproduction	Yes, as long as the license carries with the distribution	Yes, as long as the license carries with the adaptation	Yes, as long as the license carries with the performance	Yes, as long as the license carries with the display	Author
Dedication to the Public Domain	Yes	Yes	Yes	Yes	Yes	No one

Chart 2: Copyright Summary Chart for ALA publications as compared to Creative Commons Licenses.

Chart 2 references the copyright policies of the ALA journals and the Creative Commons licenses as they all relate to the public's interest in their intellectual property. If we were to construct a second chart outlining how the various journals copyright interacted with libraries, or education, or another more focused group, the results would be the same. The vast majority of the journals allow no flexibility with their intellectual property rights, and in the only two cases where there is some quarter given, it is given in areas where reproduction and distribution would be allowable even without an explicit license via the Fair Use statutes.

Authors for these journals voluntarily give up their copyrights as a tradeoff for publication, in a bargain that has been in place in academic publishing for years. The publisher runs the risk of the publication not selling, and thus bears the brunt of the financial risk involved in publication. This copyright bargain has driven the academic publication field for years, since authors (primarily professors or academic librarians) need to publish as part of their tenure review process.

In fact, this concern about tenure review is one of the primary reasons given for not converting an existing journal to an Open Access model. There is a fear that tenure review committees made up of entrenched faculty will not take Open Access publications seriously, as if there was some link between access and authority. It may be that there is some cultural bias (both in the US generally and in academia) that culture and information that are free is of low quality. Much of our media suffers from this concept: free newspapers abound in the US, but they are not often judged as high quality as national papers; information found for free on the internet is not judged by educators as authoritative, and students are forced to find the same information in a print source in

order for it to be accepted. This is a very common occurrence in colleges and universities, where professors will instruct students that they need certain types of sources for research, almost always biasing print over electronic. This would be understandable if these were not peer reviewed, but the journals in question typically undergo the same rigorous editorial control that print journals do, with the only difference being that they are published openly, online. This is a perspective that needs to be shifted towards the understanding that Open Access journals are the academic equals of their print, for profit counterparts.

This is a risk for the ALA, since by moving towards an Open Access model they could damage the reputation of their publications in the eyes of their main market. As well, librarians who publish in Open Access journals risk their publications not being acceptable by their tenure review boards. These are all valid, reasonable concerns, but do not speak to problems with the Open Access model. They speak to issues with the *perceptions* of the model. The ALA utilizing Open Access, however, would also move to demystify it, and hopefully there would be a public relations campaign that would help to educate the public and academia further. This is a secondary positive effect of the move toward open access, the general education of the masses about a valid, useful, and free information access.

Chapter Six: Conclusion

So why dwell on the copyright for a few journals? What does this say about the ALA and scholarly publication? The connection to Open Access is actually not completely apparent. The subtle connection is that strong copyright clauses nearly always equal closed intellectual property systems. In the case of these journals and the ALA, not one of the journals with a strong copyright policy was available as an Open Access journal. There were varying degrees of availability online, with most of the journals allowing their abstracts to be browsed, and occasionally an article or two. But in no case were the entire contents of the publication available online in an Open Access manner.

What we are left with is a situation where Open Access is publicly trumpeted by the American Library Association and its divisions and sections, but when it comes to intellectual property that is controlled by the individual groups, it becomes much harder for them to give up that control. The ALA has thus far gotten away with talking about Open Access, while actually doing very little from within to follow the tenets themselves. Lessons were learned by Open Source software development that any amount of closed content in a project is the weak point of said project. If you are coding, and any amount of the code that you need is closed, it represents an enormous waste to the development of the project. Much in the same manner, I believe that by keeping its own intellectual property closed and withheld from the public that the ALA is acting schizophrenically. It is saying one thing, yet doing another.

Yet this is, to some degree, understandable. There are risks associated with the opening of information, not the least of which is the fear that if information is opened that it is no long commercially viable. The argument is the same as that of Jack Valenti: How do you compete with free? We have several good examples of commercial success of works that have been made open (the aforementioned Cory Doctorow and Lawrence Lessig), but we should examine this concern more closely to see if it holds any weight.

In the specific journals examined in this paper, how would the opening of the information affect their commercial viability? These journals are primarily read by librarians, and in the cases of nearly all of the journals discussed (including American Libraries, College & Research Libraries, and RUSQ) are all given to members of the respective associations as a premium for being a member of the association. Those subscriptions would be unaffected by opening the journals, since members are unlikely to be members of the associations simply for the journal. The other audience for these journals (and the primary audience for CHOICE) is subscribers. Since individual librarians are more likely to simply be members of the organization, the likely subscriber base is libraries themselves. These are not journals that one is likely to find (again, with the possible exception of CHOICE) in a major bookstore. Academic journals in general have the commercial disadvantage of being interesting only to academics.

The effect of moving these journals to open access in regards to their commercial viability would be difficult to measure. On one hand, there is the possibility that free access online would decrease the subscriptions from libraries for the journals. On the other hand, the availability of the journals freely on the internet would increase the possible readership enormously. These new readers could spread the word concerning the

journal, which could result in more library and private subscriptions. Every instance of freely available media thus far studied, where the media in question was also available in a commercial form, has led to a rise in purchasing of the commercially available format. This has thus far been true of music[21] and books (see Doctorow and Lessig), there is no reason to believe that an increase in readership, even un-paying readership, wouldn't lead to higher overall subscription numbers.

This of course ignores the fact that open access appears to be the current movement in academic literature in general. Not only that, but since the ALA is clearly suggesting that others open their intellectual property, it seems only natural that they should be progressing towards a more open publication model.

So what steps should be taken in order to rectify this? First, the ALA should begin to open its publications, and find a way to shift costs from a subscription model to an alternative model. Following in the steps of other academic professions and moving to an author supported publication cost would allow the content contained within ALA journals to be opened to the public. Other possibilities involve simply opening content and continuing to publish physical copies of journals only for the library and for archival purposes.

The ALA should also have a blanket understanding of copyright, and should allow the author to retain copyright to his or her work. The author can license the ALA to publish the work in the appropriate manner (including a mandatory open format) but should retain his rights for derivative works and other copyright issues. The alternative

[21] Oberholzer

licensing schemes such as Creative Commons should be made available to authors so that they can fully understand the benefits of opening their ideas to the world.

While these few, small steps, the ALA could move from an organization that *represents* libraries and librarians to an organization that *leads* libraries into the future. As Lawrence Lessig says in Free Culture:

> The hard question is therefore not *whether* a culture is free. All cultures are free to some degree. The hard question instead is "*How* free is this culture?" How much, and how broadly, is the culture free for others to take an build upon? Is that freedom limited to party members? To members of the Royal Family? To the top ten corporations on the New York Stock Exchange? Or is that freedom spread broadly? (Lessig, Free Culture, 30)

How free is the culture in librarianship? How free is the ALA? How free is *your* organization?

A strong leadership role is necessary in the fight for Open Access, and the ALA should be looking towards the future and fighting against the RIAA, MPAA, and other large media groups that have thus far had copyright law written as they see fit. But until the ALA heeds its own speech, its position is weak. We need a strong organization on the front lines of this battle for history. As Cory Doctorow has said, the ever lengthening scope of copyright is the equivalent of "the slow motion burning of a library." ("Public Talk") It is important that the ALA does not stand idle as its own intellectual content goes up in flames.

Appendix 1: ALA Copyright Policies

Policies and Procedures
Children and Libraries: The Journal of ALSC

- DRAFT -

Section I: Children and Libraries: The Journal of the Association for Library Service to Children

A. Statement of Purpose

Children and Libraries (*CAL*) is the official journal of the Association for Library Service to Children (ALSC), a division of the American Library Association. The Journal primarily serves as a vehicle for continuing education of librarians working with children, which showcases current scholarly research and practice in library service to children. It also serves as a vehicle for communication to the ALSC membership, spotlighting significant news, activities, and initiatives of the Association.

B. Content

The text normally takes the form of original articles, bibliographic essays, speeches by award-winning authors, reviews of professional materials, and reports of division programs. The articles may be **refereed** **or** solicited by the editor. The division news section is the responsibility of ALSC staff.

CAL, in its responsibility as a vehicle for communication for the membership of ALSC, will contain divisional news, major articles, and other features. Divisional communication may take the form of reports to the membership prepared by the ALSC president and staff, summaries of the action taken by the divisional Board of Directors at the Annual Conference and Midwinter Meetings of the American Library Association, and reports of divisional membership meetings. Major articles may deal with any aspect of library resources and services to children in all types of libraries. Regular features may include editorials, letters to the editor, and guidelines for authors.

C. Publications Rights

ALA/ALSC holds "right of first refusal" to publish all speeches and papers presented at events sponsored by ALSC except for previously published and copyrighted material. This includes preconference and program events held during the Annual Conferences and/or Midwinter Meetings of ALA as well as any other ALSC institutes, workshops, conferences, or division-sponsored program activities.

D. Copyright

All material in CAL is subject to copyright by ALA and may be reprinted or photocopied and distributed for the noncommercial purpose of educational or scientific advancement. All such reprints and photocopies must include a credit line attributing the material to ALA and CAL. (Contact the ALA Rights and Permissions Office for specific text to be used in the credit line. See Item F below.)

E. Editorial Responsibility

1. The editor has the final responsibility for the content of CAL within the parameters of ALA and ALSC policies. The policies are located in the ALA and ALSC Handbooks. CAL is the official organ of ALSC. The editor assumes an obligation to represent the best interests of the division fairly and as fully as possible within the scope of the Journal and with due regard to the editor's prerogative for producing a balanced and readable publication. Detailed qualifications, duties, and

responsibilities are spelled out in a formal written position description for the editor.

2. The editor is hired by ALSC as an independent contractor. The annual contract is renewable for up to a three-year term contingent on performance. Editor is eligible for reappointment upon completion of each three-year term.

3. The Editor will be paid a stipend, determined by ALSC and agreed upon by the editor as outlined in the contract, annually to cover salary and minor editorial-related expenses (i.e., photocopying, communications). An additional stipend of $600 is available to cover expenses associated with each attendance at the ALA Conference and Midwinter Meeting on official journal business.

F. *Children and Libraries* Editorial Advisory Committee

The advisory committee serves to:

1. Develop editorial policies for CAL subject to review and approval by the ALSC Board.

2. Recommend to the editor individuals to serve as referees, reviewers, and contributors.

3. Review material submitted for publication upon request of the editor.

G. Advertising

All advertising is subject to publisher's (ALA and ALSC) approval. Publisher reserves the right to reject advertising. Advertiser and advertising agency assume liability for all content (including text representation and illustrations) of any advertisement printed, and also assume responsibility for any claims against the publisher resulting from a printed advertisement. The publisher assumes no responsibility if, for any reason, it becomes necessary to omit an advertisement.

Section II. Personnel

A. CAL Editor

The editor of CAL will:

1. Assume final authority for content of each issue, except for the division news section.

2. Be responsible for manuscript solicitation, management of the referee process in accordance with procedures developed with the editorial advisory committee, and editing.

3. Submit copy to ALA Production Services in accordance with established procedures and schedule.

4. Read and edit page proofs.

5. Serve as an ex-officio member of the Editorial Advisory Committee and carry out all remaining duties spelled out in the formal, written position description for the editor.

B. ALSC Executive Committee

The executive director of ALSC will:

1. Oversee all aspects of production, distribution, and financial management of CAL within the parameters of ALA and ALSC policies.

2. Serve as business manager and in that capacity will:
a. Prepare and submit the budget for review by the appropriate bodies.
b. Manage the CAL finances.
c. Delegate day-to-day responsibilities for CAL to an ALSC staff member who will:
   1) Provide information and copy for the ALSC News Section, including ALSC board actions, activities, programs, etc.
   2) Act as ALSC liaison with CAL Editor and ALA Production Services Department
   3) Arrange for indexing of CAL.
   4) Contract with an advertising manager to represent and sell display advertising for CAL.

C. ALA Production Services (ALA/PS)

ALA/PS, in conjunction with the executive director, will:

1. Submit production budget to the ALSC staff.

2. Establish and maintain contracts with suppliers, typesetters, and printers.

3. Establish the annual production schedule in consultation with the editor and ALSC staff.

4. File copyright forms received from the division/editor with ALA Rights and Permissions Office, process reprint requests, provide copyediting, page composition, and proofreading for CAL.

5. Manage distribution of CAL, e.g., postal permits, and mailing labels.

6. Receive, handle, and proof advertisements.

7. Manage advertising revenue and provide regular reports on income, ad pages sold, etc.

D. ALA Customer Service

The office shall record and maintain the subscription records of CAL.

E. ALA Rights and Permissions Office

The office, in consultation with ALSC staff, and in accordance with the ALA **Rights and Permissions Policy**, shall handle all requests for permission to reprint from CAL.

Draft: 11/14/02; 03/17/04

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Guidelines for Submitting Manuscripts

Last revised October 2002

Send all submissions to *American Libraries,* 50 E. Huron St., Chicago, IL 60611.

American Libraries is ALA's full-color monthly magazine and the primary perquisite of membership in the American Library Association. Each issue features articles on professional concerns and developments, along with news of the Association, library-related legislation, and libraries around the country and the world. Expression of diverse viewpoints and critical interpretation of professional issues make the magazine the premier forum for the exchange of ideas crucial to the fulfillment of ALA Goal 2000. Annual subscriptions are available to institutions at $60, $70 foreign.

STYLE: Informal, but informative. Factual article must be inviting and readable, with all statements backed by responsible research and interviews. The *Chicago Manual of Style* may be used in styling articles for publication, but extensive footnoting is discouraged.

FORMAT: Doublespaced, letter- or near-letter-quality on plain bond. One copy suffices. Manuscripts must be accompanied by a self-addressed envelope bearing sufficient postage for return.

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Reviewing for libraries

Since library acquisitions are additions to already assembled collections, one of the most important functions of a *Choice* review is to place an item in the literature of its subject field. *Choice* reviews should help library selectors determine how the material reviewed compares with similar material or whether a work is a first in its field. Reviews should state whether a title complements or supplants earlier publications, and whether earlier titles are still useful or are superior. **Negative reviews** are particularly helpful if they identify works that offer more comprehensive coverage, more recent data, more logical arrangement, better writing, a fuller bibliography, etc.

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Reviews should not comment on bibliographic details cited at the head of the review (i.e., scholarly apparatus, price, physical description, series title), unless any of these elements is particularly good or bad.

All reviews <u>should</u> comment on:

- Style and level of coverage.
- Scope. Describe overall content organization succinctly; do not simply list chapter titles.
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- **S**ection-specific considerations (e.g., literary works, reference titles, electronic titles). Special guidelines will be supplied by the section editor.

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Deadlines: Standard deadline is five weeks from the date a review item is sent. If a review is more than two weeks overdue, you will receive a query form. Please return query forms promptly. Reviews more than three months late may not be accepted.

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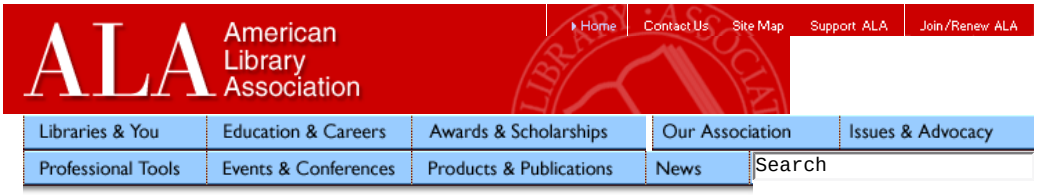

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- Check all statements, names, and references for accuracy.

Submission Format

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- Feature article manuscripts average 2000-3000 words in length; column manuscripts average 800-1000 words in length.
- Write a 100-word, descriptive abstract built around the key words found in the article.
- Submit references on separate pages at the end of the article. (Do not use the automatic footnote function.)
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Style

- Choose terms that reflect the philosophy in *Information Power: Building Partnerships for Learning* (Chicago: American Library Association, 1998). The terms *library media specialist*, *library media program*, and *library media center* should be used. Avoid sexist language.
- Consult the *Random House Webster's College Dictionary* for spelling and usage.
- Consult the *Chicago Manual of Style*, 14th ed. (Chicago:

University of Chicago Pr., 1993) for endnote and bibliographic style, capitalization, abbreviations, and design of tables. Endnotes should appear in the style described in section 15.3 of the *Chicago Manual of Style*, with the list of references arranged in order of their appearance within the manuscript. For example:

1. Grant Wiggins, *Educative Assessment: Designing Assessments to Inform and Improve Student Performance* (San Francisco: Jossey-Bass, 1998).
2. Charlotte Danielson and Thomas L. McGreal, *Teacher Evaluation to Enhance Professional Practice* (Princeton, N.J.: Association for Supervision and Curriculum Development, 2000).
3. Jo Ann Wahrman, "The Impact of Assassinations," *Knowledge Quest* 27, no. 1 (September/October 1998): 33-34.
4. American Association of School Librarians, *A Planning Guide for Information Power: Building Partnerships for Learning* (Chicago: American Association of School Librarians, 1999).

See chapter 15 of the *Chicago Manual of Style* for additional examples.

- Electronic documents cited should also be referenced. Examples for documentation of materials obtained from computer information services and standards adapted from the *Chicago Manual of Style* for citing electronic documents are provided in *Online! A Reference Guide to Using Internet Sources* (New York: Bedford/St. Martin's Pr., 1998), chapter 7: "Using Chicago Style to Cite and Document Sources," which is available online: **http://www.bedfordstmartins/online/cite7.html**
- Use references to document the text, not to amplify it.

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     4. John M. Budd et al., "User-Centered Thinking: Lessons from Reader-Centered Theory," *RQ* 34 (summer 1995): 487–96.
   - For an immediate subsequent reference:
     5. Ibid., 489.
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     6. Shera, *Libraries and the Organization of Knowledge,* 117.
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     8. John Brown, e-mail to the author, Aug. 31, 2000.
   - For more than one item in an endnote:
     9. Ellie A. Fogarty, "Reference Questions: Who, What, Where, When, How, and Why?" *New Jersey Libraries* 28 (summer 1995): 19–21; Sharon L. Baker and F. Wilfrid Lancaster, *The Measurement and Evaluation of Library Services* (Arlington, Va.: Information Resources Pr., 1991), 239.

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Manuscript Policy

Purpose | Manuscript Submission | Style | Acceptable Manuscript Content

Purpose

The purpose of **School Library Media Research** (**SLMR**) is to promote and publish high quality original research concerning the management, implementation, and evaluation of school library media programs. The journal will also emphasize research on instructional theory, teaching methods, and critical issues relevant to school library media.

As the scholarly refereed journal of the American Association of School Librarians, **SLMR** seeks to distribute major research findings worldwide through both electronic publication and linkages to substantive documents on the Internet. The primary audience for **SLMR** includes academic scholars, school library media and instructional specialists, and other educators who strive to provide a constructive learning environment for all students and teachers.

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Compiled on an annual basis, **SLMR** strives to provide researchers with contacts to concepts and ideas that will enhance school library media program.

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Manuscript Submission

Author Responsibility

- Original, research-based manuscripts are invited.
  Submit only manuscripts that have not been submitted or accepted elsewhere.
- Also considered for publication:
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  - Extensive research literature reviews.
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Submission Process

Four print copies and one disk copy of the manuscript should be sent to Daniel Callison, SLIS 005, 10th and Jordan, Indiana University, Bloomington, IN 47405. All manuscripts will be acknowledged by the editor. Manuscripts are reviewed through a blind referee process, which involves reviewers from the academic ranks of library education and established professionals in building-level, district, or state-level library media services. The review will

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Submission Format

- Double space the entire manuscript including references.
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- Write a 100–200-word abstract for the manuscript.
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Style

Resources to Consult

- Choose terms that reflect the philosophy in *Information Power: Guidelines for School Library Media Programs* (Chicago: ALA, 1988). The terms *library media specialist*, *library media program*, and *library media center* should be used. Avoid sexist language.
- Consult the *Random House Webster's College Dictionary* for spelling and usage.

- Consult the *Chicago Manual of Style*, 14th ed. (Chicago: University of Chicago Pr., 1993) for capitalization, abbreviations, bibliographic style, and design of tables. Take special note of citation style described in Chapters 15 and 16.

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For greater detail on the author-date system, consult the *Chicago Manual of Style*, Chapter 16.2.

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  (O'Toole 1980, 27)
  (Mathews 1987, 131-33)
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- A list of references should follow the style of "Literature Cited," *Chicago Manual of Style*, fig. 16.1. Examples are given below:
  - Alexander, R. D. 1974. "The evolution of social behavior." *Ann. Rev. Ecol. Syst.* 5:324-83.
  - Allen, G. M. 1939. *Bats.* Cambridge: Harvard Univ. Pr.
  - Altmann, J. 1974. "Observational study of behavior: Sampling methods." *Behavior* 49:227-65.
  - Anthony, E. L. P., and T. H. Kunz. 1977. "Feeding strategies of the little brown bat." *Ecology* 58:775-86.
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- Footnotes or Endnotes are not used in this system.

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Research

A substantial report of a research project in which there is adequate discussion of the research questions, application of appropriate methodology, review of and reference to supporting research literature, and conclusions are clearly stated.

The report is original and adds significant information to the field.

Data are reported in clear tables, graphs, and/or charts when necessary.

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Rejection by three or more of the referees normally results in rejection of the manuscript for further consideration. The editor may, however, inform the author of referee recommendations for further revision. Manuscripts may be revised and reviewed until a majority of the referees involved and the editor approve the manuscript.

Manuscripts are posted for full board review and majority approval before they are placed online for general public access. Manuscripts are subject to further critical review by any reader of the electronic journal. Constructive comments submitted to the editor may be shared with the author and may be posted as part of the article.

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A substantial, informed statement concerning issues which are of great importance to the field. Such statements will include extensive reference to the research literature where appropriate. A conceptual framework defining emerging theory and/or application of established theory should be evident.

Literature Review and Proposal

A substantial, organized, logical and critical review of the key literature supporting a research proposal or summarizing key issues from the research may be acceptable for publication.

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