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Open Access, Nonexclusive Licensing, Author Rights

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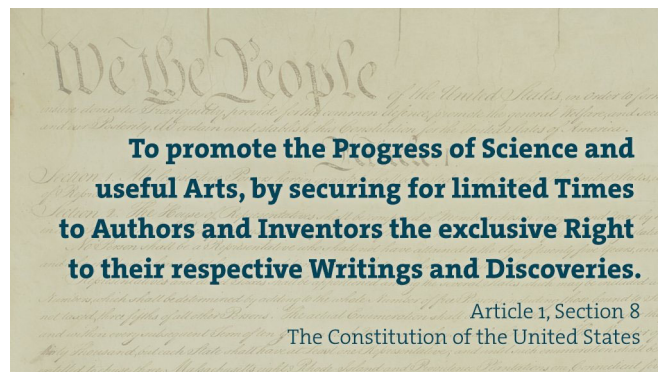
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OPEN ACCESS, NONEXCLUSIVE LICENSING, AUTHOR RIGHTS

Kyle K. Courtney & Laura Quilter



Publisher's Licensing Copyright Creep: "Draft Bill on Contracts and Authors Rights" (1737)

And forasmuch as the true Worth of Books and Writings is, in many Cases, not found out till a considerable Time after the Publication thereof, and Authors, who are in Necessity, may often be tempted absolutely to sell and alienate the Right, which they will hereby have to the original Copies of the Books which they have composed, before the Value thereof is known, and may thereby put it out of their own Power to alter and correct their Compositions, upon maturer Judgement and Reflection; Therefore, be it enacted by the Authority

And forasmuch as the **true Worth of Books and Writings is**, in many Cases, not found out till a considerable time after the Publication thereof, **and Authors**, who are in Necessity, **may often be tempted absolutely to sell and alienate the Right**, which they will hereby have to the original Copies of the Books which they have composed, before the Value thereof is known, and may thereby **put it out of their own power to alter and correct** their Compositions

What is open access?

From the Budapest Open Access Initiative (2002):

"By 'open access' to this literature, we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself."

Open-access literature is...

- digital
- online
- free of charge
- free of *most* copyright and licensing restrictions

Why open access?

- Even affluent institutions are unable to subscribe to all the peer-reviewed journals needed by their faculty and students.
- OA increases the visibility and retrievability of research.
- OA increases readership among fellow researchers, in every field and nation.
 - It enhances the scrutiny and reproducibility of new results.
 - It boosts the likelihood that those results will be taken up, extended, applied, cited, and integrated with other research.
- OA increases readership outside the academy, among...
 - policy-makers, manufacturers, journalists, non-profits, citizens, and voters.
- For all these reasons, OA increases the *usefulness* of research.

Heart of a good open-access policy

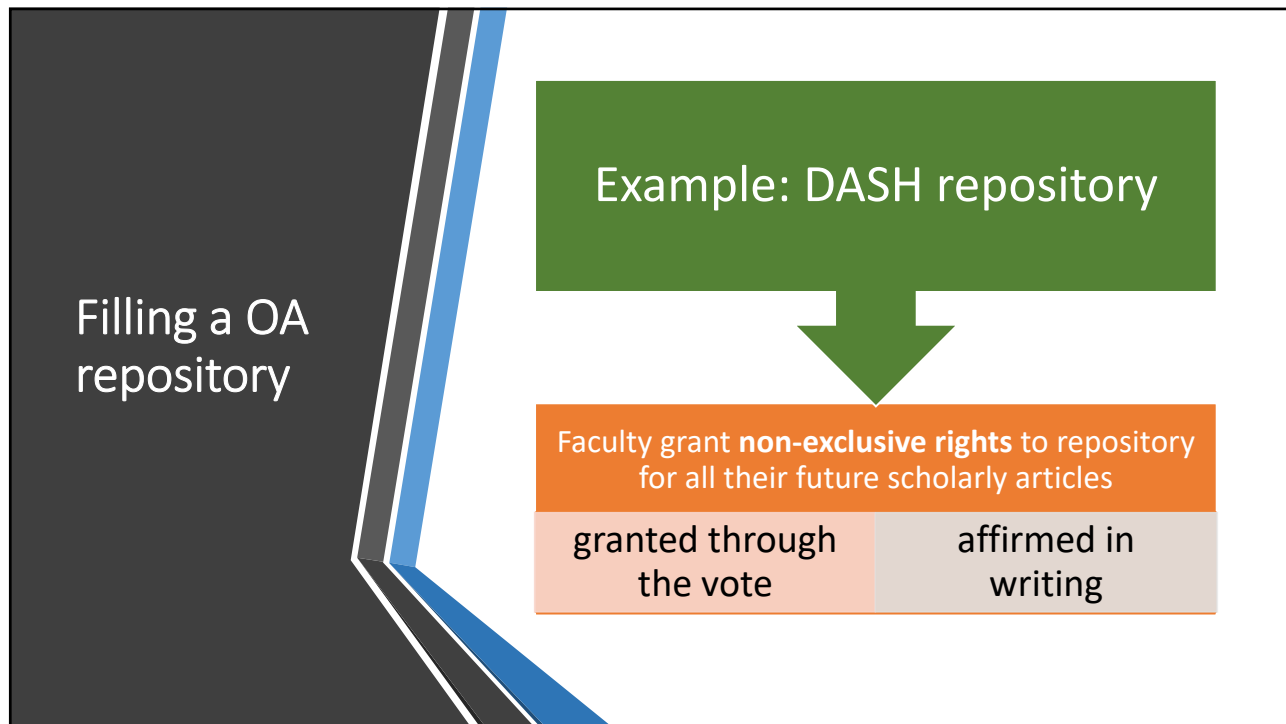
1. Launch an OA repository.
2. Adopt a policy to fill it.
3. Get permission to make the contents OA.
4. Deposit new works into the repository.

Open Access at Harvard

- 2/12/08 Harvard Faculty of Arts and Sciences
- 5/1/08 Harvard Law School
- 3/10/09 Harvard Kennedy School of Government
- 6/1/09 Harvard Graduate School of Education
- 2/12/10 Harvard Business School
- 11/5/10 Harvard Divinity School
- 3/20/11 Harvard Graduate School of Design
- 11/26/12 Harvard School of Public Health
- 6/18/14 Harvard Medical School

- 2014-2017: Harvard research centers: *Berkman Center for Internet and Society*, the *Shorenstein Center on Media, Politics and Public Policy*, *Ash Center for Democratic Governance and Innovation*, etc.

2018: Individual Open Access License (IOAL)



Non-Exclusive Licenses

The engine that drive U.S. Open Access....

**Filling a
repository:
Non-exclusive
Licenses**

Policy is effective because of the presence of *17 USC § 205(e)*:

“A nonexclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or such owner’s duly authorized agent, and if—

(1) the license was taken before execution of the transfer; or

(2) the license was taken in good faith before recordation of the transfer and without notice of it.”

**Filling a
repository
*Non-
exclusive*
copyright
transfer**

Rights are not limited or restricted to one party

Granting non-exclusive rights to other parties still enables you to grant, assign (to publishers, other parties, etc.) or retain rights you had before.

Filling a repository: Non-exclusive Licenses

- Policy merely shifts default
 - includes waiver option
 - preserves faculty freedom to submit new work to the journals of their choice
 - Non-exclusive license does not interfere with future licensing

Filling a Repository: Non-exclusive license in UK

- S. 90(4) of the Copyright Designs and Patents Act 1988 (CDPA) provides:
- *(4) A licence granted by a copyright owner is binding on every successor in title to his interest in the copyright, except a purchaser in good faith for valuable consideration and without notice (actual or constructive) of the licence or a person deriving title from such a purchaser;*


Filling a Repository: Non-exclusive license in UK

- The non-exclusive license to a UK university will remain valid unless:
 - *The publisher took the assignment in good faith and paid what it was worth; and*
 - *The publisher had no knowledge – either actual or constructive – of the assignment to the university*

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Filling a Repository: Tying to Institutional processes

- Experimentation at department levels:
 - Tying to tenure and promotion process
 - Part of “faculty packet” upon arrival at institution
 - Tied to summer funding process
 - Part of the administrative tasks for yearly “publications review”



Permissions:
The Long and Winding Road

- Non-responsive
- Non-existent
- Non-negotiable

Impact: OA Stories

“ I am phd student in Iran, and I am doing my thesis on creativity, but because of the sanctions against Iran, we do not have access to many references, but I need many of them. Having open access to this site was a gift.

[Read "Perspectives on the Social Psychology of Creativity"](#)

“ I work as a professor at a university in Saudi Arabia. Philosophy resources are limited. Such open access sharing provides access otherwise unavailable and makes such materials available to improve teaching. I appreciate your working to make such access an important contribution to higher education for those of us working in lesser developed countries.

[Read "The Right to Lie: Kant on Dealing with Evil"](#)

University Lecturer
Paraguay

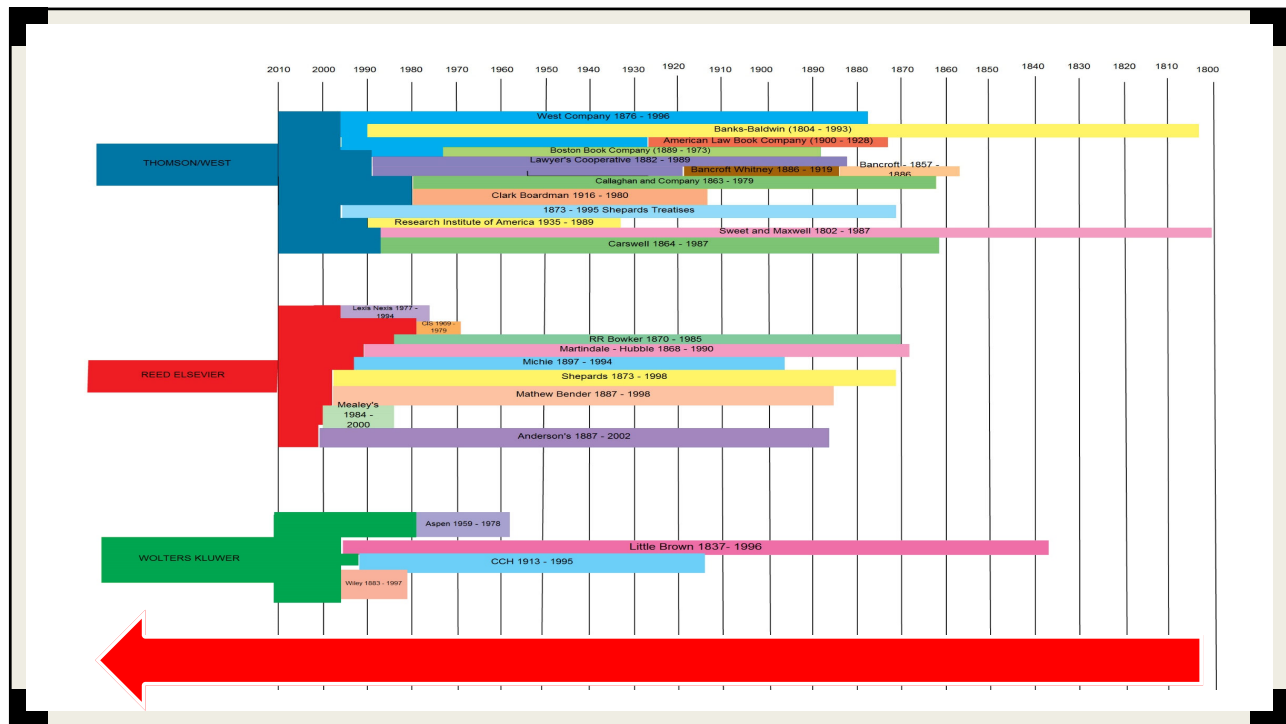


Open Access: An Answer to the Market



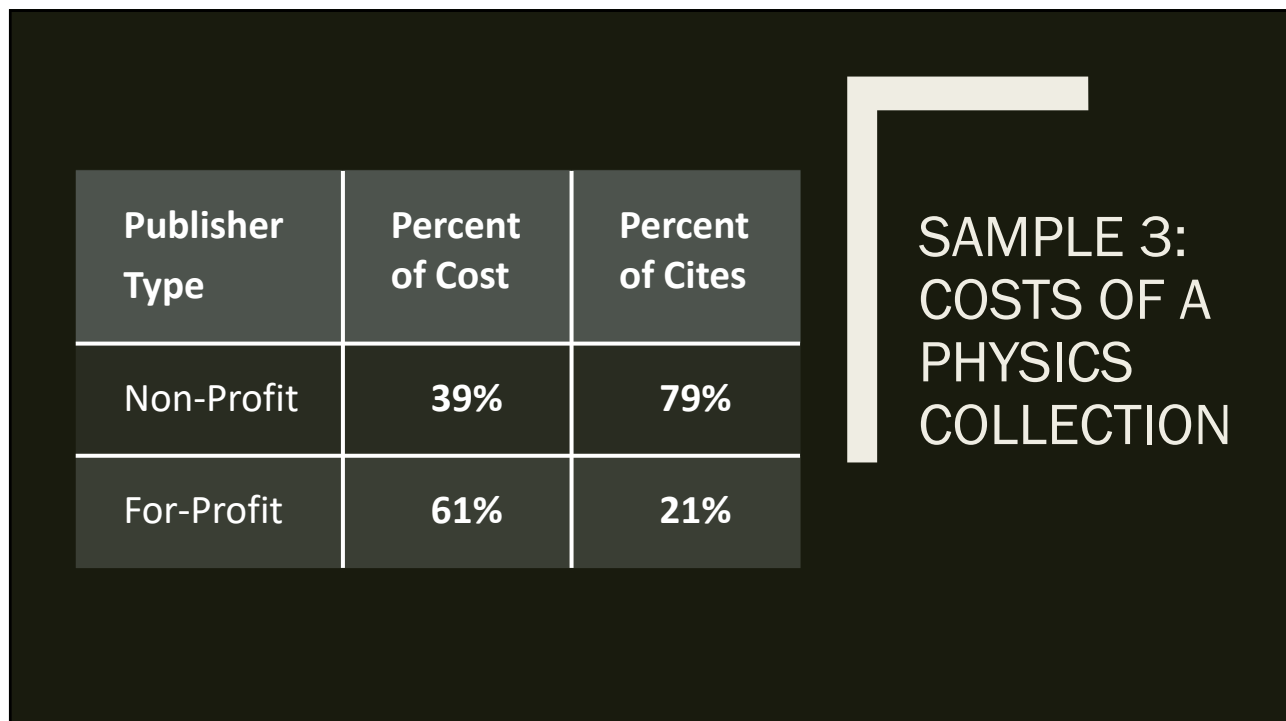
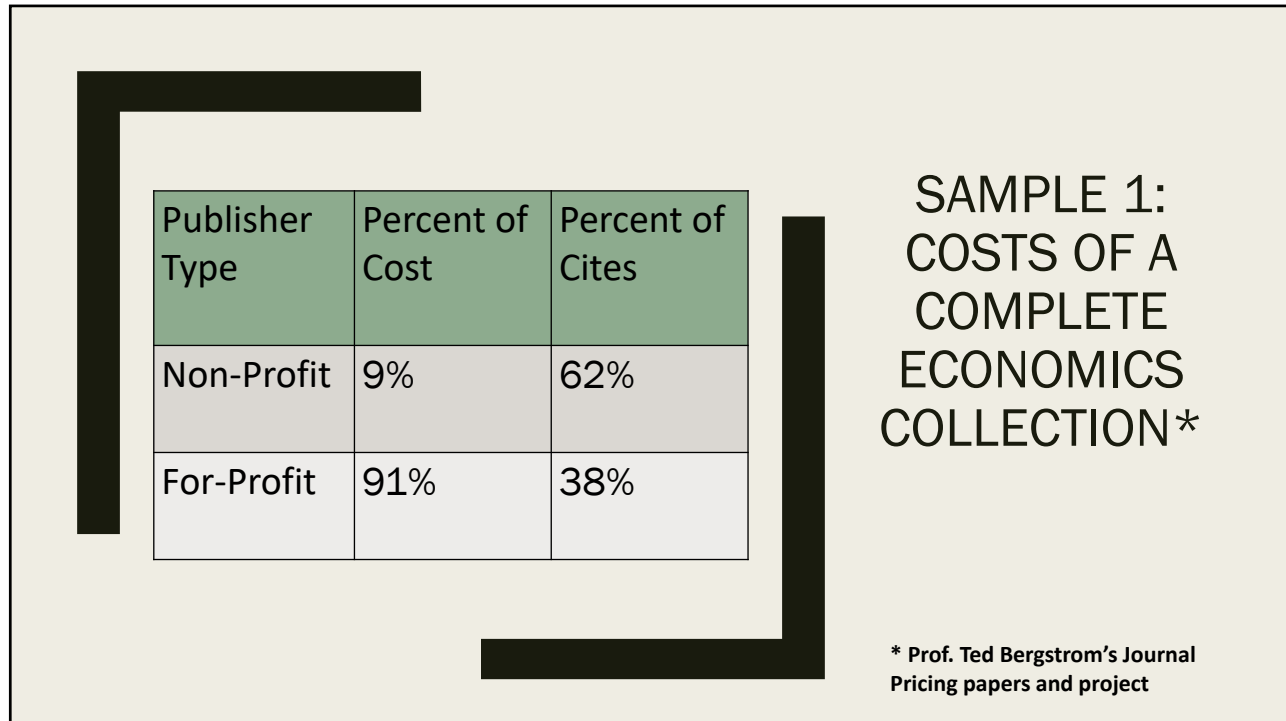
Journals Pricing

- The average cost of a serial subscription for ARL member libraries increased by 315% from 1989 to 2006.
- Exceeds the rise in the Consumer Price Index of 68%
- 2006 to present: still continue to rise by about 9% a year (some more...)
- Mergers and acquisitions have resulted in 37 publishers being controlled by 6 entities



- Reviews in 2012-2016 suggest a ratio of between **5½:1** and **7:1** of studies showing an open access citation advantage against those that do not.

Open Access Drives Scholarship



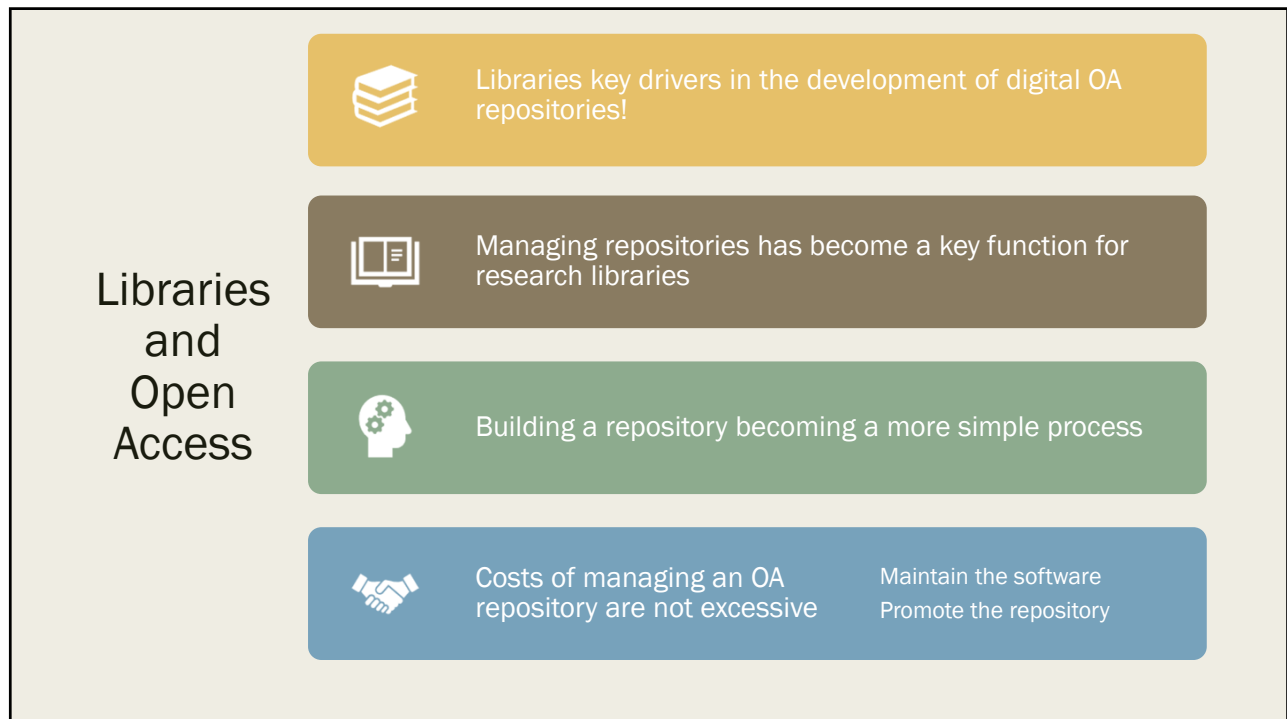
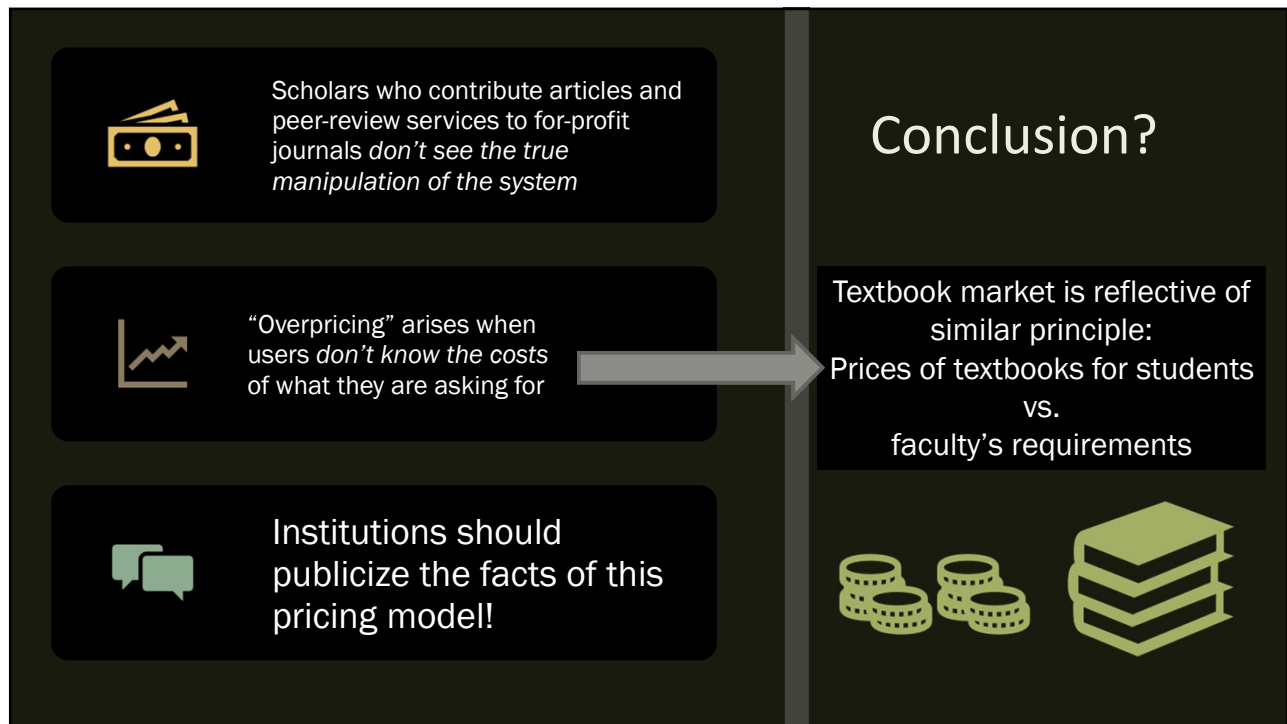
Survey of Physics Chairs and Librarians*


Which kind of journal do you think is more costly to libraries?

- Non-profit journals
- They cost about the same
- For-profit journals

Which costs more?

Librarians say:		Physics Dept. Chairs say:	
Non-Profits	0%	Non-Profits	8%
About same	4%	About same	38%
For-Profits	96%	For-Profits	53%





Contracts, Licensing, and Open Access

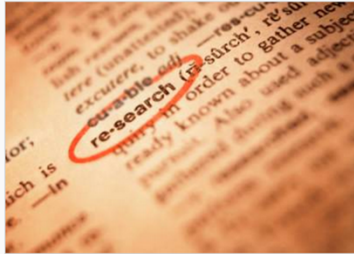
Contracts: Who is the “author?”

- Author → Publisher
- Bundle of Rights → Transfer
- Much confusion... still!
- Authors are generally ill-informed about their rights and confused by the licensing options as presented by publishers....

Elsevier's Research Takedown Notices Fan Out To Startups, Harvard, Individual Academics

Posted Dec 19, 2013 by [Kim-Mai Cutler \(@kimmaicutler\)](#)

713 SHARES



A familiar story is starting to play out in the Ivory Tower.

A powerful incumbent with a very lucrative business model gets reactive when the content it holds the rights for becomes too freely distributed on the web.

First, it was the music industry. Now it's happening in academia, one of the very last bastions to be affected by the free, unfettered flow of information on the web.

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Home > News > Elsevier acquires online community SSRN



Elsevier acquires online community SSRN

Published May 16, 2016 by Katherine Cowdrey

Share

STM publisher Elsevier has acquired the largest repository and community for social science and humanities researchers in the world, SSRN, to accelerate its social strategy and scale the network up for the benefit of "the entire scientific ecosystem".

Elsevier has not disclosed how much it paid for American research preprint repository and online community SSRN, but revealed it will be integrated with Elsevier's reference management programme Mendeley, broadening its offering and helping researchers to better manage the publication journey from start to finish.

SSRN, founded in 1994, focuses on what happens before a paper is published, providing an online community where researchers can share working drafts and preprint papers to help them evolve their research. According to SSRN's website, the platform has over 1.5 million papers and 100,000 members.

Elsevier Acquires Bepress, a Leading Service Provider Used by Academic Institutions to Showcase Their Research

Bepress to benefit from Elsevier's technology and analytics to expand offerings to more institutions, while helping Elsevier drive further adoption of its research data management tools

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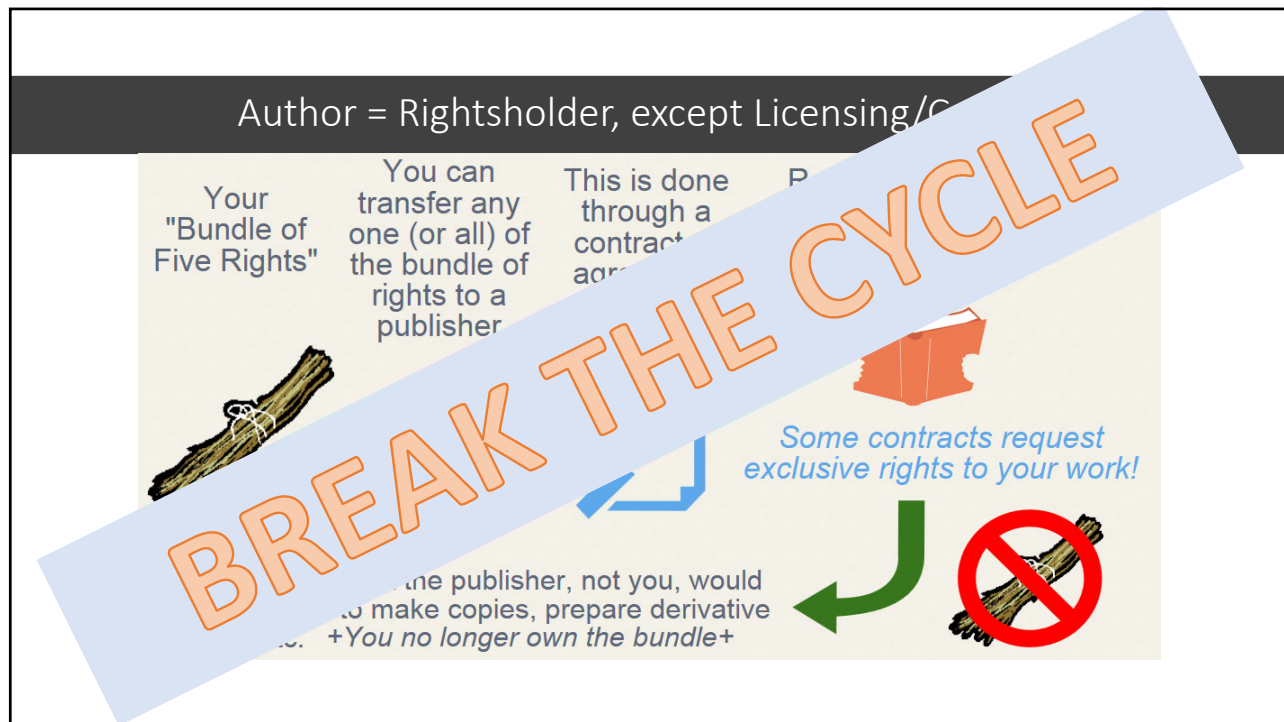


NEW YORK, August 2, 2017 /PRNewswire/ --

Elsevier, the global information analytics business specializing in science and health, today acquired **bepress**, a Berkeley, California-based business that helps academic libraries showcase and share their institutions' research for maximum impact. Founded by three University of California, Berkeley professors in 1999, bepress allows institutions to collect, organize, preserve and disseminate their intellectual output, including preprints, working papers, journals or

Author = Rights-holder





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AGREED BY CREATOR: Kyle K. Courtney, Esq.

Example: What is a “personal website?”

- “permit the author(s) to deposit for display a ‘final peer reviewed manuscript’ 12 months after publication of the final article on his/her personal website, **university's institutional repository** or **employer's intranet....”**
- Personal website = institutional repository?

Contracts: Rights Granted Back to “Creator/Author”

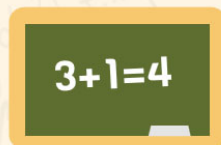
- “in return for the grant of the license, the [author] shall have the following rights for non-commercial use....”
 - *Right to reproduce a reasonable number for personal use and to send copies to colleagues*
 - *Use and distribution in classroom*
 - *Use and distribution at seminars or conferences (subject to a limit)*
 - *Use in “digital course-packs” (small percentage)*

THINK: FUTURE USE OF YOUR WORK



FUTURE WORK?

Will you want to use and develop your own work without restriction or reuse portions in a subsequent work?



CLASSROOM?

Will you want to place the work on course sites or make a copy for students or colleagues?



ONLINE ACCESS?

Will you want to deposit the work in an online archive for others to read, comment, and collaborate with you?

Negotiating Author Agreements

Kyle K. Courtney & Laura Quilter

CONTRACT REVIEW

- Contract review exercise. Take 10-15 minutes & read contracts. Look for:
 - Identify the ESSENCE of the contract: **What does the author give, & what does the publisher give?**
 - Identify KEY clauses of interest to an academic author.
 - Identify the BOILERPLATE.
 - What's missing?
 - GROUP DISCUSSION.
- How to talk to authors

ANATOMY OF A CONTRACT

Core contractual bargain.

*Look for language where the **author transfers or licenses their work to the publisher**. The publisher may or may not make commitments on their end. The publisher's give-backs (in terms of rights) may not be in this section.*

Common contract clauses.

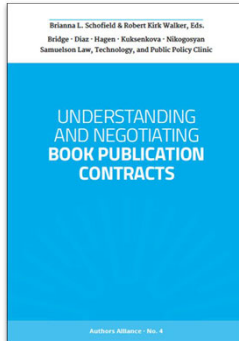
Warranties & indemnifications; choice law, choice of forum; merger clauses. These are common to many contracts, so generally useful to understand. Focus on helping them understand (1) reasonableness; and (2) risk assessment.

MODIFYING THE CONTRACT

Rights Granted, Copyright, Assignment of Publishing Rights, etc.

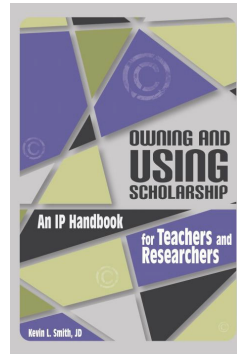
Specifies transfer of rights from author to publisher, and any rights re-granted back by publisher to author. Strike through and insert modified language.

RESOURCES



Authors Alliance, Understanding and Negotiating Book Publication Contracts (2018)

<https://www.authorsalliance.org/2018/10/15/announcing-the-authors-alliance-guide-to-understanding-and-negotiating-book-publication-contracts/>



Kevin Smith, *Owning and Using Scholarship* (2014)

http://www.ala.org/acrl/sites/ala.org/acrl/files/content/publications/booksanddigitalresources/digital/9780838987483_copyright_OA.pdf

Additional Resources for trade or practitioners:

- Authors Guild, *Model Trade Book Contract and Commentary* (members only)
- Authors Guild, *Fair Contract Initiative*
- Graphic Artists Guild
- NOLO.com

TALKING TO AUTHORS

Tell them WHY they should negotiate

- primarily about their own rights to use their content. Giving away their copyright means they are a legal stranger to their own work, and this is the heart of their professional work.
- AND they subject themselves to contractual risk

Empathy, education, alternatives ... (avoiding “legal advice” problems)

- empathize with their pain & unwillingness to negotiate
- reassurance: tell them it’s OK to negotiate!
- OA is the long-term solution.

TALKING TO AUTHORS

Tell them HOW to negotiate

- strike through, write in ... addenda
- Figures! Practical strategies

REVIEWING THEIR CONTRACT*

- Clear up key confusions
- Anatomy of a contract
- What to look for: Clauses of key interest, what's missing [have sample alternate language]

WHY NEGOTIATE?

- Typical contract issues, like indemnifications
- Typical publishing contract issues, like credit, editing & revision rights, reversion of rights

But most importantly:

A career is made up of our publications; these are the most important asset we have, and scholars, librarians, and other researchers owe it to themselves to protect your rights to use the works.

When you assign your copyright you effectively become a legal stranger to your own work.

LEGAL STRANGER TO YOUR OWN WORK

If you transfer your copyright, you become a legal stranger to your own work. *You do not have rights over it any more.**

By law, you have to ask permission & possibly pay to:

- Reprint the article as a chapter
- Re-use a figure or illustration in a subsequent work
- Assign the paper to your students
- Share the work with your colleagues or on the job market
- Post the article on your website

* **Caveat:** In 35 years you might be able to terminate the assignment and become the owner again.

It's galling to have to ask permission or pay fees FOR your own work.

Figure reprint fees can be HUNDREDS of dollars.
\$\$\$\$\$

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Total Price: \$TBD
Update Price



CAN I NEGOTIATE?

- **Yes!** It's a contract. Just like buying a house, or a car, or hiring a contractor.....
- You are already giving the publisher something very valuable – the right to make a profit off of your work.
 - If you don't negotiate, you are not representing yourself well.
- Can't they reject me?
 - Won't happen. Negotiation takes place **AFTER** peer review, when the publisher has already made a significant investment in the work: In fact, for articles, it's the vast majority of the investment; for books, there's more play, but the author still has the upper hand.

HOW TO NEGOTIATE

- Write in and strike out
- Add addenda (such as the *SPARC Addendum*)
- Go back & forth with editor / publisher – sometimes several times
- Have a campus Open Access Policy that eliminates the need for individual negotiation (at least for articles)

MODIFYING THE CONTRACT

Strike through or write in!

Like negotiating for cars or houses.

1.2 The Publisher will have the right to make any decision they see fit concerning the form of the Work, including the number, format, period, cover, paper, printing, binding, and other physical characteristics of the Work.

1.3 The Publisher will not be responsible for any accident loss or damage to the Work while in their custody, or in the course of shipment.

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may be requested by the Publishers as a result of such review, have been made by the Author and accepted by the Publishers in writing.

3 Copyright

3.1 The copyright in the Work will remain the property of the Author. The copyright notice to be printed in the Work will be in the name of Anna Strowe with year of first publication.

3.2 (a) In consideration of the payment to the Author of the fee and/or applicable royalty percentages of the Publishers' receipts set out in Clause 9, the Author grants to the Publishers the sole and exclusive right and license to produce and publish, and to license others to produce and publish, the Work ~~as an abridgement, adaptation or translation of the Work, or any part of the Work, or the whole or any part thereof, in any form or by any means now known or later invented, in all languages throughout the world for the full term of copyright, (including all renewals and extensions of that term).~~

(b) The rights granted to the Publishers in this Agreement, shall include but not be limited to:

(i) the rights specified in Clauses 9 and 10; and

(ii) the sole and exclusive right to ~~edit, adapt, produce, publish, disseminate, enrich or otherwise make available and to license others to produce, publish, disseminate, enrich or otherwise make available the Work or any part of the Work in any digital, online or electronic form now known or later invented, in all languages throughout the world for the full term of copyright (including all renewals and extensions of that term) and the right to renew and extend that right.~~ *edit, adapt, produce, publish, disseminate, enrich or otherwise make available and to license others to produce, publish, disseminate, enrich or otherwise make available the Work or any part of the Work in any digital, online or electronic form now known or later invented, in all languages throughout the world for the full term of copyright (including all renewals and extensions of that term) and the right to renew and extend that right.*

3.3 The Author may use no more than 10% of material from the Work in academic or professional journals, and for the Author's professional purposes, provided that he/she informs the Publishers in advance, and acknowledges the Work and the Publishers.

3.4 The Author asserts to the Publishers their moral right to be identified as the Author of the Work in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

3.5 The Publishers undertake to place the following notice with due prominence in every copy of the Work published by them in the United Kingdom:

+ subject to the approval of the Author.

link to their

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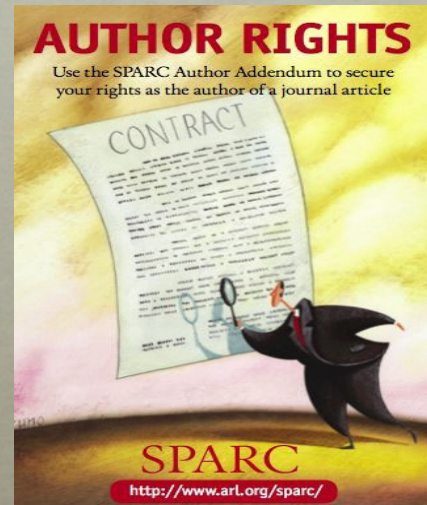
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Jimmy O'Dea
@jimmyodea

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(manuscript title) _____
(journal name) _____

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(corresponding author) _____
(Individually or, if one than more author, collectively, Author) _____ | (Publisher) _____

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Amend a publisher's agreement.

AUTHOR FAQs

Get answers to commonly-asked questions.

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Submit your scholarly work to DASH, Harvard's open-access repository.

contract clauses

“LICENSE” OR “TRANSFER”

Don't be confused by “license” language:

- “exclusive license” is the same as a transfer of copyright
- “non-exclusive license” means you keep your copyright

“Open access” and “Creative Commons” are examples of non-exclusive licenses.



Recommended reading: Peter Suber's *Open Access*
free download available at <http://mitpress.mit.edu/books/open-access>

OTHER ISSUES

- **Sign on Submission**
- **Joint Authors**
- **Proposals & Protecting Ideas: Copyright Versus Ethics**
- **Open Access Terms: CC-BY, CC-BY-NC, CC-BY-ND**
- **Funder Requirements**
- **Works Made for Hire Clauses**
- **Pro Tip: Treat Your Graphics as Separately Licensed**
- **Getting Permissions: STM Master Agreement, Negotiating Fair Use**

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Sample Addendum

See our [sample addendum](#).

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Submit your scholarly work to DASH, Harvard's open-access repository.

Not a “Grant Back” but a “Take Back!”

This Addendum modifies and supplements the attached or accompanying agreement (the "Publication Agreement") concerning the article titled "X"

The parties agree that wherever there is any conflict between this Addendum and the Publication Agreement, the provisions of this Addendum will control and the Publication Agreement will be construed accordingly



“LAW OF OPEN”

LET’S TAKE OUR
BIKES BACK!

ResearchGate



#ICanHazPDF

Creators don't see the true
manipulation of the law and
system
&
Don't know the fiscal costs and
legal risks of acceptance of
maintaining the "scholarly
status quo"

SOLUTION?

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NOT...

- Traditional law (too slow to adopt or change)
- Congress (slow and subject to financial exploitation)
- Funding requirements (great, but temporary)
- Any library associations (ALA gave an award to Rep. Darrell Issa last year)

MAINTAINING THE “LAW OF OPEN” IS UP TO US

Self- Help and Remedies

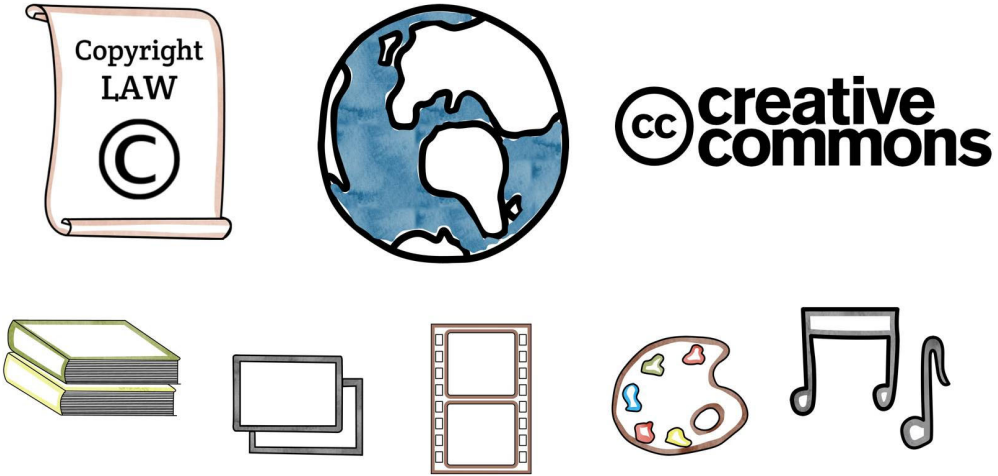




The collage includes the following elements:

- BOYCOTT ELSEVIER**: A banner above a tree with a person standing next to it.
- LSU Libraries**: A purple square with the text "LSU" in large yellow letters and "Libraries" in smaller yellow letters below it.
- Projekt DEAL**: A light blue box with the text "Projekt DEAL" in teal and "Bundesweite Lizenzierung von Angeboten großer Wissenschaftsverlage" in smaller red text below it.
- UNC UNIVERSITY LIBRARIES**: A blue square with the UNC logo (a building) and the text "UNC UNIVERSITY LIBRARIES" in white.
- UNIVERSITY OF CALIFORNIA Libraries**: A white box with a blue map of California and the text "UNIVERSITY OF CALIFORNIA Libraries" in blue.
- THE COST OF KNO WLE DGE**: A red square with the text "THE COST OF" in small white letters, and "KNO", "WLE", and "DGE" in larger white letters on separate lines.

SUPPORT AND LEARN FROM OTHER GRASSROOTS MOVEMENTS:
LIBRARIES OFTEN LEADING THE CHARGE



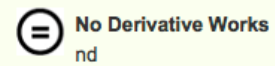
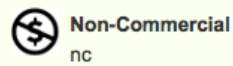
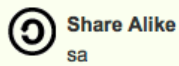
The icons include:

- Copyright LAW**: A scroll with the text "Copyright LAW" and a large copyright symbol (©).
- creative commons**: The CC logo (two 'c's in a circle) followed by the text "creative commons".
- Books**: A stack of three books.
- Computer monitor**: A simple icon of a computer monitor.
- Film strip**: A vertical strip of film with sprocket holes.
- Artist palette**: A circular palette with various colored paint spots.
- Music notes**: Two musical notes, one eighth and one quarter note.

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For licensing all copyrighted works

- Articles, books, chapters, textbooks
- Posters, Power Point presentations
- Blogs, Webpages
- Photos, Art, etc.
- Music



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Let us take a moment to reflect on our priorities for our researchers, libraries, and institutions — places where millions of dollars are being paid to outside parties to access the scholarship emerging from inside our campuses....




THE “LAW OF OPEN” IS
SUPPORTED BY YOUR
ACTIONS AT THIS
WORKSHOP

LET’S TAKE OUR
RESEARCH BACK!




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