



**BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE  
INTERNET**

**HEARING ON INNOVATION IN AMERICA: THE ROLE OF COPYRIGHTS**

**STATEMENT OF THE LIBRARY COPYRIGHT ALLIANCE**

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel. LCA requests that this statement be included in the record of this hearing.

The subject of this hearing is the role of copyright law in promoting innovation in the United States. The starting point for understanding this relationship is the differentiation between the entertainment industry and other fields where copyrighted content is produced. Similarly, the creators of copyrighted content must be differentiated from the distributors of the content. Unfortunately, in copyright policy discussions, these distinctions often are overlooked. In this statement, LCA focuses on these distinctions. First, it discusses the diminishing role of copyright in incentivizing activity in one of the most important sources of innovation in the U.S. economy: scholarly communications. LCA then discusses the economic importance of collaborative activities such as open source software and Wikipedia, which do not rely on the incentive provided by copyright.

Finally, with respect to sectors that do appear to rely on copyright, LCA points out that many of the leading firms in those sectors are foreign owned. This suggests that the importance of copyright to maintaining U.S. leadership in the global economy may be overstated.

## **I. Open Access Models for Scholarly Communications**

One of the primary sources of innovation in the U.S. economy is scholarly communications: articles, monographs, and databases written by professors, graduate students, and other researchers in all fields of human endeavor. The ideas expressed in these writings stimulate new research, advance the scientific and technology enterprise, and encourage commercial development of marketable products and services. This conversion is by no means a trivial exercise. Companies often must invest heavily in research and development to convert basic research into useful products and services. But without the basic research and its dissemination through scholarly communications, many technologically sophisticated products and services would not exist.

Significantly, academic authors do not engage in scholarly communications for the purpose of receiving copyright royalties on their writings. Indeed, they typically assign the copyright in their writings to a publisher without any sort of payment. Instead, the academic authors are compensated by promotion in their institution, enhancement of their reputations, and increased funding from grantors.<sup>1</sup>

Judge Richard Posner of the Seventh Circuit, a prolific author on intellectual property matters, wrote a blog post arguing that scholarly works require little to no

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<sup>1</sup> To be sure, in some fields a researcher might be motivated by the possibility of sharing patent license fees, but a patented invention that results from research is completely different from the copyrightable expression in an article describing the research.

copyright protection from a policy perspective. Judge Posner acknowledged that “modern action movies often costing hundreds of millions of dollars to make, yet copiable almost instantaneously and able to be both copied and distributed almost costlessly,” require strong copyright protection to ensure their creation. Judge Posner then observed that

[a]t the other extreme is academic books and articles (apart from textbooks), which are produced as a byproduct of academic research that the author must conduct in order to preserve his professional reputation and that would continue to be produced even if not copyrightable at all. It is doubtful that there is any social benefit to the copyrighting of academic work other than textbooks....<sup>2</sup>

We are not suggesting that scholarly works should receive no copyright protection. But we do agree with Judge Posner that academic authors do not need the economic incentive afforded by copyright to motivate them to write scholarly works.

While the “publish or perish” system of advancement in higher education provides academics with ample incentive to create scholarly works, the publishers of scholarly communications have relied more heavily on copyright. Historically, publishers of scholarly communications performed critical functions that bore a cost: coordination of the peer-review process, and the printing, marketing, and distribution of the copies of the journals or monographs.<sup>3</sup> The publishers needed copyright protection to ensure that they would recover their investment in the production and distribution of the copies, even though they received the content itself at no cost from the academic authors.

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<sup>2</sup> Richard Posner, *Do patent and copyright law restrict competition and creativity excessively?*, The Becker-Posner Blog (Sept. 30, 2012, 10:30 PM), <http://www.becker-posner-blog.com/2012/09/do-patent-and-copyright-law-restrict-competition-and-creativity-excessively-posner.html>.

<sup>3</sup> Although publishers coordinate the peer-review process, they typically do not pay the peer reviewers. Members of the academic community donate their time to peer-review activities as part of their contribution to the scholarly enterprise.

The Internet has dramatically changed the economics of the scholarly communications market. Email and collaborative software tools have reduced the cost of coordinating the peer-review process; the Internet has cut printing and distribution costs. These reduced costs have enabled the emergence of open access business models, where readers can obtain online access to the writings for free. At the same time, the restrictive licensing terms and conditions and the skyrocketing cost of science, technology, and medical journals have encouraged researchers and scientists to promote new models of scholarly communication. Additionally, scientists are attracted to the functionality permitted by open access models, including the linking of databases and journal literature, and the mining and manipulation of these resources.

An academic author typically grants the open access publisher a non-exclusive copyright license to distribute the writing to the public at no charge. The open access publisher covers its costs by charging the author a fee for publishing the article or by receiving funding from another source, such as a granting agency or the institution that hosts the publication.<sup>4</sup>

Over the past fifteen years, the number of open access publishers has increased dramatically, as has the number of materials they have published. Since 2000, the members of the Open Access Scholarly Publications Association (OASPA) have published over 250,000 articles under open licenses, including over 80,000 in 2012 alone.<sup>5</sup> Over 20% of all peer-reviewed articles are now published in the more than 4,700

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<sup>4</sup> Many granting agencies now include extra funds in grant awards to cover publisher fees for publication in an open access format.

<sup>5</sup> Claire Redhead, *Growth in the use of the CC-BY license*, OASPA (Mar. 8, 2013), <http://oaspa.org/growth-in-use-of-the-cc-by-license-2/>.

open access journals.<sup>6</sup> The Directory of Open Access Books, created in 2012, already lists 1,271 academic peer-reviewed books from 35 publishers.<sup>7</sup> The demand for open access publishing among academic authors and readers is so strong that even highly profitable publishers such as Oxford and SAGE (plaintiffs in the electronic reserves case against Georgia State University)<sup>8</sup> have open access publications and are members of OASPA.<sup>9</sup>

There are significant public benefits from open access publication:

- Open access to published research results enable faculty and researchers to build upon the findings of this research, both cutting-edge and historical, in their own research efforts. Building upon prior studies results in more efficient research efforts.
- Faculty, researchers, and students affiliated with research institutions collaborate on research and share their results in support of the scholarly and scientific enterprise. Providing greater access to these works through open access policies enhances this collaboration.
- Roadblocks negatively affect research productivity. In a survey conducted by the American Association for the Advancement of Science, a quarter of the respondents reported negative effects on their work because of difficulty in accessing the scientific literature. The consequences ranged from brief delay to abandonment of the research project.
- Open access accelerates the dissemination of basic research to entities that can make commercial applications.<sup>10</sup> While large technology companies often

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<sup>6</sup> Mikael Laakso, et al., *The Development of Open Access Journal Publishing from 1993 to 2009*, 6 PLoS ONE, no. 6, 2011, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3113847/>.

<sup>7</sup> Directory of Open Access Books, <http://www.doabooks.org/> (last visited July 24, 2013).

<sup>8</sup> *Cambridge University Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012), *appeal docketed*, Nos. 12-14676, 12-15147 (11th Cir. Sept. 12, 2012)

<sup>9</sup> *Members*, OASPA, <http://oaspa.org/membership/members/> (last visited July 24, 2013).

<sup>10</sup> According to the Battelle Technology Partnership Practice report, *Economic Impact of the Human Genome Project*, “the \$3.8 billion the U.S. government invested in the Human Genome Project (HGP) from 1988 to 2003 helped drive \$796 billion in economic impact and the generation of \$244 billion in total personal income. ... In 2010 alone, the human genome sequencing projects and associated genomics research and industry activity

subscribe to peer-reviewed journals directly relevant to their research and development, because of budget constraints, they usually do not subscribe to all journals of potential interest in related fields. Engineers and scientists in these companies are forced to conduct research with partial blinders on, seeing only what is directly before them and missing the potential interdisciplinary connections and the broader context that full access can provide.

- The Information Revolution has democratized research to an unprecedented degree. An individual with a laptop and a broadband connection has the capability of developing software solutions to extremely complex problems, provided that he has access to data and know-how developed by others. These software solutions can lead to the birth of new companies, or can hasten the rate of product-development by existing companies. Access to the results of academic research adds dramatically to the set of building blocks for these independent developers.

A specific example of the different incentives that exist in the scholarly communications sphere involves articles that result from federally funded research. In 2008, pursuant to direction from Congress, the National Institutes of Health (NIH) adopted a mandatory public access policy.<sup>11</sup> Under the policy, all investigators funded by the NIH are required to submit an electronic version of their final, electronic peer-reviewed manuscripts to the National Library of Medicine's PubMed Central, which then makes the manuscript publicly available within twelve months (or sooner, depending on

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directly and indirectly generated \$67 billion in U.S. economic output and supported 310,000 jobs that produced \$20 billion in personal income. The genomics-enabled industry also provided \$3.7 billion in federal taxes during 2010.” Press Release, Battelle, \$3.8B Investment in Human Genome Project Drove \$796B in Economic Impact Creating 310,000 Jobs and Launching the Genomic Revolution (May 10, 2011), *available at* [http://battelle.org/media/press-releases/\\$3.8b-investment-in-human-genome-project-drove-\\$796b-in-economic-impact-creating-310-000-jobs-and-launching-the-genomic-revolution](http://battelle.org/media/press-releases/$3.8b-investment-in-human-genome-project-drove-$796b-in-economic-impact-creating-310-000-jobs-and-launching-the-genomic-revolution). See Simon Tripp & Martin Grueber, Battelle Mem’l Inst., Economic Impact of the Human Genome Project: How a \$3.8 billion investment drove \$796 billion in economic impact, created 310,000 jobs and launched the genomic revolution (2011), *available at* [http://www.battelle.org/docs/default-document-library/economic\\_impact\\_of\\_the\\_human\\_genome\\_project.pdf?sfvrsn=2](http://www.battelle.org/docs/default-document-library/economic_impact_of_the_human_genome_project.pdf?sfvrsn=2).

<sup>11</sup> Department of Health and Human Services Appropriations Act of 2008, Pub. L. No. 110-161, Div. G, Tit. II, § 218, 121 Stat. 2187 (2007). See also *NIH Public Access Policy Details*, National Institutes of Health Public Access, <http://publicaccess.nih.gov/policy.htm> (last visited July 24, 2013).

the author's interest and the publisher's embargo period) of the official date of publication.

In February 2013, John P. Holdren, Director of the White House's Office of Science and Technology Policy, issued a memorandum directing federal research funding agencies with research and development budgets of \$100 million or more to develop a plan within six months to support increased public access to the results of research funded by the federal government.<sup>12</sup> In essence, this expands the NIH policy to other federal agencies. The LCA strongly supports the Administration's objectives of enhancing the public's access to scholarly publications resulting from research funded by federal agencies and maximizing the return on federal investments in research and development.

Because the federal government pays for the research described in these articles, as well as their dissemination through government repositories such as PubMedCentral, copyright is not necessary for these articles' creation. Nonetheless, public access policies do not harm traditional publishers. Due to the embargo period, academic libraries continue to subscribe to journals that rely on copyright protection. However, once the writing is made widely available through an open access repository, the public benefits increase. Scientists affiliated with companies and institutions that cannot afford expensive journal subscriptions can then access the scholarship. Additionally, the open access repositories allow researchers to conduct data mining and manipulation that

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<sup>12</sup> Memorandum from John P. Holdren, Dir., Office of Sci. and Tech. Policy, Exec. Office of the President, on Increasing Access to the Results of Federally Funded Scientific Research (Feb. 22, 2013), [http://www.whitehouse.gov/sites/default/files/microsites/ostp/ostp\\_public\\_access\\_memo\\_2013.pdf](http://www.whitehouse.gov/sites/default/files/microsites/ostp/ostp_public_access_memo_2013.pdf)

cannot be performed on the traditional publishers' platforms.<sup>13</sup>

## II. Open Innovation

Open access to scholarly communications is one example of the new models for creation and distribution enabled by the Internet. Open source software is another. It cannot credibly be argued that proprietary software is more innovative than open source software, or that traditional journals promote innovation more than open access journals. The embrace of open source software by successful companies such as IBM and Google demonstrates that in the Internet era, the use of copyright to restrict reproduction and distribution is more a matter of business strategy than a necessary mechanism to recoup investment. This can also be seen in the music industry, where more artists are promoting and distributing their sound recordings on platforms such as YouTube and receiving compensation through ad revenue and ticket sales for live performances.

This evolution of copyright enforcement from an economic necessity to a business strategy requires the Congress to reevaluate the emphasis the federal government places on copyright enforcement and to explore other, perhaps more efficient, means of promoting innovation. Steven Johnson, the author of the book *Where Good Ideas Come From: The Natural History of Innovation*, describes four quadrants of innovators: 1) the classic solo entrepreneur, protecting innovations in order to benefit financially; 2) the amateur individual, exploring and inventing for the love of it; 3)

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<sup>13</sup> Open Educational Resources is a related area where open distribution models can allow a greater return on public investment. Public school districts spend billions of dollars each year on the purchase of textbooks and other educational materials from commercial publishers. More recently, some jurisdictions have paid educators to develop content that then can be made available online for free. These materials are easy to update and customize for different educational settings. Similarly, colleges and universities are developing massive online open courses (MOOCs), which may revolutionize higher education by making it more widely available at lower cost.

private corporations collaborating on ideas while competing with one another; and 4) the space of collaborative, nonproprietary innovation. Johnson observes:

The conventional wisdom, of course, is that market forces drive innovation, with businesses propelled to new ideas by the promise of financial reward. And yet even in the heyday of industrial and consumer capitalism over the last two centuries, the fourth quadrant turns out to have generated more world-changing ideas than the competitive sphere of the marketplace. Batteries, bifocals, neonatal incubators, birth control pills – all originated either in amateur labs or in academic environments.<sup>14</sup>

Johnson stresses that the fourth quadrant “is not locked in a zero-sum conflict with markets.” Rather, “this fourth space creates new platforms, which then support commercial ventures.” He views the Internet as “the ultimate example of how fourth-quadrant innovation actually supports market developments: a platform built by a loosely affiliated group of public-sector and university visionaries that has become one of the most powerful engines of wealth creation in modern times.”

Much of the software that underlies the Internet is collaboratively developed open source software. Additionally, the world’s most used reference website, Wikipedia, is a collaborative project of more than 77,000 active volunteer contributors. They work on over 22,000,000 articles in 285 languages. Wikipedia attracts more than 470 million unique visitors a month. English Wikipedia has 4,288,907 articles with 30,719,418 pages.<sup>15</sup> As Wikipedia has matured, its accuracy has surpassed that of commercial encyclopedias, and it is far more current and has a far broader reach. Wikipedia is maintained by a non-profit foundation that relies on donations to pay its costs, such as

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<sup>14</sup> Steven Johnson, *Innovation: It Isn't a Matter of Left or Right*, N.Y. Times, Oct. 30, 2010, at BU7, available at <http://www.nytimes.com/2010/10/31/business/31every.html>. The academic environments typically are dependent on government funding.

<sup>15</sup> *About*, Wikipedia, <http://en.wikipedia.org/wiki/Wikipedia:About> (last visited July 24, 2013).

Internet access fees. It is the starting point for research for many businesses, professionals, government officials, students, and consumers. Its ease of use, free accessibility, and broad coverage has led to its saving society billions of dollars in research costs.<sup>16</sup>

Steven Johnson argues that “the fourth quadrant has been so innovative, despite the lack of traditional economic rewards” because of “the increased connectivity that comes from these open environments. Ideas flow from mind to mind, and to be refined and modified without complex business development deals or patent lawyers. The incentives for innovation are lower, but so are the barriers.”

### **III. Foreign Ownership of Firms in the Copyright Industries**

The Internet has enabled the development of new approaches for the creation and distribution of content that do not rely on the economic incentive provided by copyright. Nonetheless, copyright remains important for the business models of certain sectors, particularly the entertainment industry. In their advocacy for stronger copyright protection, the associations representing the large media companies make two assertions: 1) Americans are global leaders in the production of creative and innovative services and products; and 2) many of these services and products are dependent on copyright protection.

There is a growing literature questioning the second assertion – the dependency of creative activity on strong copyright protection. The previous two sections of this statement addressed aspects of this issue. By contrast, the first

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<sup>16</sup> Of course, as librarians, we stress that like any encyclopedia, Wikipedia should be the starting point of a research project, and not its totality.

assertion – American global leadership in the production of creative and innovative services and products – often goes unchallenged.

Assessing the U.S. global standing in copyright industries is important because it helps to determine the optimal level of domestic copyright protection, as well as what copyright standards the U.S. should be urging upon its trading partners. For decades, U.S. domestic and foreign copyright policy has been predicated on the assumption that U.S. firms dominated both domestic and foreign markets for copyrighted products.<sup>17</sup> Domination of foreign markets suggested that an increase in the level of copyright protection internationally would lead to increased exports, which would in turn lead to more jobs in the U.S. and more profits for U.S. firms. Likewise, domination of domestic markets meant that the higher prices to U.S. consumers resulting from the decreased competition caused by strong IP protection would be offset by U.S. job growth.

A recent study revealed that for many copyright industries, however, this assumption of U.S. dominance is no longer true.<sup>18</sup> This suggests that, at times, copyright policies adopted by Congress and the Executive Branch may have benefitted foreign corporations at the expense of U.S. consumers. While the U.S. employees and contractors of a foreign firm may receive some income from the firm, it is safe to assume that much of the value generated by these employees and contractors will be captured by the firm and repatriated to its domicile.

The study found that:

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<sup>17</sup> See, e.g., Michael Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* (1998).

<sup>18</sup> Jonathan Band & Jonathan Gerafi, *Foreign Ownership of Firms in IP-Intensive Industries*, InfoJustice (Mar. 5, 2013), <http://infojustice.org/archives/28840>.

- Four of the “Big Six” publishers, the largest English language trade publishers, are foreign-owned. More than 80 percent of the global revenue of the Big Six is generated by these foreign-owned companies. These foreign-owned companies published more than two thirds of the trade books in the U.S.<sup>19</sup>
- Four of the five largest STM (science, technical and medical)/Professional publishers are foreign-owned. More than 90 percent of the revenue of the five largest STM/Professional publishers was generated by foreign-owned firms.
- Only seven of the world’s 50 largest publishers of all categories are U.S.-owned.
- The book publishing industry in Europe has approximately twice as many employees as in the United States.
- Of the top ten best-selling fiction authors in any language whose work is still in copyright, five are foreign. A British author wrote three of the top five best-selling books in the U.S. in 2012.
- Two of the three major record labels are foreign-owned. These two labels have a market share of 59 percent.
- Thirteen of the twenty best-selling recording artists are foreign.
- Of the 50 most popular motion pictures in the United States in 2012, half were filmed partly or entirely outside of the United States.
- In 2013, the Oscar winners in thirteen of 24 categories were foreign. In 2012, the Oscar winners in eleven of 24 categories were foreign. In 2011, the Oscar winners in eight of 24 categories were foreign.
- Seventy percent of the most recent generation of game consoles were manufactured by Japanese companies. Japanese companies have manufactured 92 percent of all game consoles ever sold.

There is absolutely nothing sinister about foreign ownership of firms in the copyright industries, including foreign ownership of companies originally established in the United States. This is to be expected in a globalized economy with multinational corporations and complex cross-border supply chains.

Moreover, many countries in Western Europe and East Asia are at the same level of technological and economic development as the United States. The critical point is

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<sup>19</sup> The parent corporations of two of the Big Six, Penguin and Random House, recently merged the operations of these subsidiaries. Random House’s parent, German-owned Bertelsmann, owns 53 percent of the joint venture, and Penguin’s parent, U.K.-based Pearson, owns 47 percent. The joint venture, named Penguin Random House, controls 25 percent of the U.S. trade market. Thus, the Big Six is now the Big Five.

that in such a globalized economy, U.S. policymakers should no longer assume without reflection that the beneficiaries of protectionist copyright policies are U.S. firms and, by extension, U.S. workers and shareholders.

#### **IV. Conclusion**

These hearings concerning the contributions of the copyright and technology industries reflect a statement by the Supreme Court in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* that copyright law maintains a “balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement.”<sup>20</sup> The Court added that “the more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off.”<sup>21</sup> The Supreme Court is correct that the copyright law balances the support of creative pursuits and the promotion of technological innovation. But copyright balances far more than art and technology. As the Court explained in *Sony Corp. of America v. Universal City Studios, Inc.*, copyright law “involves a difficult balance between the interests of authors ... in the control and exploitation of their writings ... on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other.”<sup>22</sup> Copyright thus balances the interests of authors and society as a whole.

Society’s interest in the free flow of ideas, however, is not simply a matter of encouraging consumer access to information. Rather, as the Fifth Circuit recognized, in

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<sup>20</sup> 545 U.S. 913, 928 (2005).

<sup>21</sup> *Id.*

<sup>22</sup> 464 U.S. 417, 429 (1984). *See also* Golan v. Holder, 132 S. Ct. 873, 900 (2012) (Breyer, J., dissenting).

the Copyright Act “Congress balanced the competing concerns of providing incentive to authors to create and of fostering competition in such creativity.”<sup>23</sup> In other words, copyright law also balances the interests of existing authors with the interests of future authors. This is accomplished by essential features such as copyright term, the idea/expression dichotomy, and fair use.

As Congress proceeds with this examination of copyright reform, it must bear in mind that it needs to balance not only the interests of the copyright industry and the technology industry, but also the interests of authors and the public as well as established authors and new authors.

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<sup>23</sup> *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1463 (5th Cir. 1990). *See also Computer Assocs. Int’l, Inc., v. Altai, Inc.*, 982 F.2d 693, 696 (2d Cir. 1992)(“[T]he copyright law seeks to establish a delicate equilibrium. On the one hand, it affords protection to authors as an incentive to create, and, on the other, it must appropriately limit the extent of that protection so as to avoid the effects of monopolistic stagnation.”)